Date: 5-4-16

Submitted in Housing Committee

Council File No: 16-0348

Item No. 2

16-0348

Public

Dep~~ty~~

~~Comparison of Judge Chalfant's~~ February 25, 2016 decision to the April 29, 2016 Planning Director's Report recommending repeal of the City's existing second unit ordinance

Judge Chalfant's February 25th decision specifically ruled that, subsequent to the Legislature's enactment of AB 1866 in 2002, *the City's adopted second unit ordinance can, and has been, lawfully applied by the City.* The April 29th Director's Report, however, clearly contradicts Judge Chalfant's ruling, erroneously contending that sections 12.24 W 43 and 44 "*violate state law because they include discretionary standards as part of the Conditional Use Permit [process].*" As seen in the excerpts below from both the Superior Court Opinion and the Director's Report, the Report's legal contention is *directly contrary* to the Superior Court's ruling on the central issue in the case: the City Attorney's clearly mistaken legal advice that the City must formally amend the existing local ordinance to delete certain provisions that describe a discretionary CUP process and standards. *The Court forcefully rejected that mistaken legal advice; the Director's Report should not be repeating it now as a supposed ground for repealing the existing second unit ordinance.*

The Report also conjures up a second supposed legal reason the City's existing ordinance "[does] not comply with state law": it asserts that the ordinance "effectively limit[s]" second units "to single family zones without the required findings" that certain specified negative results would result from such development. (pp. A-3, A-9.) In this regard, the Report observes that the City's ordinance allows second units in single family zones, but specifically *identifies only one multi-family zone, RMP, mobile home park, as allowing second units.* According to the Report, RPM zoning covers only a "miniscule" portion of the City's multi-family zoned territory, and thus the ordinance violates the law by precluding and unreasonably restricting second homes from being constructed in the other multi-family zoned areas. (p. A-3, fn 4.)

For good reason, the City never made this utterly fallacious second argument to Judge Chalfant. In fact, *the City's current zoning expressly permits development of second units in nearly all multi-family zones.* A permissible "by right" use under R2 zoning is "a two family dwelling or two single family dwellings." This authorization would allow the construction of either an attached or detached second unit, by right, so long as other zoning rules were satisfied. R3 zoning permits all uses in R2 zones, and R4 zoning permits all uses in R3 zones. The City's second unit ordinance did not need to specifically list all of the multi-family zones as permissible "by right" locations for second units, because those zones themselves already provided for it.

February 25, 2016 Superior Court decision
(per Judge James Chalfant) (excerpts)

In 2002, the legislature enacted AB 1866 [amending Govt. Code section 65852.2] ... to require municipalities with their own adopted second unit standards to administer them on a "ministerial" rather than "discretionary" basis. (p. 7.)

[According to the State HCD], the state agency responsible for advising local governments about the effect of the law, municipalities with existing second unit ordinances compliant with [section 65852.2] should consider [future second unit] applications *ministerially* according to the ordinance's standards, and any provision in conflict with the statute should be considered *null and void.* (p. 7.)

[When AB 1866 was enacted], the City needed to decide whether its ordinance conflicted with [section 65852.2] and, if so, whether parts of it could be severed and implemented as ministerial. *This process was* expressly authorized by the state law, and *[was] performed in the 2003 ZA Memorandum.* (p. 14.)

[In 2003, the City's then-Chief Zoning Administrator, Robert Janovici issued a memorandum] concerning AB 1866's impact on second dwelling units in the City..., stating that ... most of the conditions in LAMC 12.24 W 43 would be used to determine if a second dwelling unit will be permitted "by right" in a single family zone.... [Utilizing a severability analysis to separate that section's ministerial standards from its former discretionary CUP permit process and standards], the 2003 ZA memorandum then listed nine standards required to be met for ministerial approval, all of which are taken from [section 12.24 W 43].... In the period following the 2003 ZA memorandum through May 2010, the City issued 282 permits for second dwelling units amounting to approximately 40 units per year. (pp. 8-9.)

In May 2010, [the new Chief Zoning Administrator, Michael LoGrande] issued [ZA 120] superseding the 2003 ZA Memorandum. ZA 120 stated that a second dwelling unit would thereafter be permitted if it meets...the [state] "default" standards under AB 1866, even if it did not comply with the LAMC's own adopted standards. (p. 9.)

ZA 120 [was] based on a *clearly erroneous legal interpretation* of Govt. Code second 65852.2 and *is invalid.* (p. 15.)

The Court agrees with Petitioner's statutory interpretation.... *The legislative intent of AB 1866 was to enable cities to continue to apply their existing adopted second unit standards on a ministerial basis without formally amending their ordinance to delete CUP discretionary procedures....* (p. 12.)

Did ZA 120 perform [a severability] analysis [regarding] whether the ministerial portions of LAMC section 12.24 W 43 could be implemented separate from its discretionary standards as authorized by ... section 65852.2? The answer is no. The 2003 ZA Memorandum actually purported to perform this process. ZA 120 was issued not to revise [that] analysis, but [was] *based on the City Attorney's mistaken legal advice* that AB 1866 requires a new ordinance [formally enacted to provide for only ministerial administration of second unit applications without discretionary CUP procedures and standards] and the 2003 ZA Memorandum did not qualify as a legislative enactment. (p. 14.)

[Commencing in May 2010], the undisputed evidence is that the City has a policy and practice of disregarding the second unit standards of [section 12.24 W 43] in approving building permits, in favor of the more lenient state standards [set forth] in ZA 120. [For example], since May 2010, 40 percent of the issued 379 permits [since May 2010] have exceeded the City's 640 SF limit, and .... 93 permits ... have permitted the construction of second units in hillside areas contrary to [that section]. (p. 11, fn. 3.)

Planning Director's April 29, 2016 Report
re Proposed Repeal Ordinance (Excerpts)

The Court's [February 25, 2016] Order leaves the City with existing second unit ordinances that *do not comply with state law*.... (p. A-2.)

The City's Existing Second Unit Regulations *Do Not Comply with AB 1866.* The City's existing second dwelling unit regulations *include discretionary standards* as part of the Conditional Use Permit [process]..., *which [does] not comply with state law*.(p.A-3.)

It does not appear feasible or advisable to leave the City's existing second dwelling unit ordinances, LAMC sections 12.24 W 43 and 44 in place (by not repealing them).... While the Court did not prohibit the City from attempting to perform a [new] severability analysis of [those] sections, such an analysis would not leave the City with second dwelling unit standards that comply with state law.... [Those sections] *violate state law because they include discretionary standards as part of the Conditional Use Permit* [process].... (p. A-6.)