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# STATE LAW UPDATE ACCESSORY DWELLING UNITS DRAFT

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*Prepared November 7, 2016*

This summary is intended to provide a broad overview of AB 2406, AB 2299 and AB 1069. This memo is not intended to explain all of the complexity of the bills, nor is it legal advice. Jurisdictions should consult appropriate legal counsel before taking any action.

THIS MEMO IS DRAFT AND WILL BE REFINED.

## Table of Contents

<b>1. AB 2299 and AB 1069 – Accessory Dwelling Units .....</b>	<b>2</b>
a. Standards Generally .....	2
b. Accessory Dwelling Units in Additions or New Accessory Structures .....	2
c. Accessory Dwelling Units Located in Existing Structures .....	3
d. Frequently Asked Questions .....	4
e. Checklist .....	6
f. Additional Resources .....	7
<b>2. AB 2406 - Junior Accessory Dwelling Units .....</b>	<b>8</b>

## AB 2299 and AB 1069 – Accessory Dwelling Units

Generally, these bills modify a jurisdiction's ability to regulate Accessory Dwelling Units (ADUs) — the new term for Second Units. **The new laws require all local agencies to adopt a new ADU ordinance by January 1, 2017 and to send their new ordinance to HCD within 60 days. If a jurisdiction does not adopt a new ordinance that complies with State law, the jurisdiction's existing law is null and void on January 1, 2017.** In this event, or if a jurisdiction has never adopted a second unit ordinance, ADUs can only be evaluated based on the State standards. Adopting the ADU ordinance is exempt from CEQA.

Below is a summary of key new rules:

### Standards Generally

- **Approval Process**  
Jurisdictions must approve or deny second units through a ministerial process within 120 days of receiving an ADU application. They may not impose requirements beyond those specified in State law. Ministerial approval of ADU applications is exempt from CEQA.
- **Density**  
ADUs do not count against the maximum density of sites.
- **Occupancy Regulations**  
Jurisdictions may require one of the units to be owner occupied and may prohibit short-term rentals (less than 30 days). No other occupancy rules are permitted.
- **Other Regulations**  
Jurisdictions may not require ADUs to provide fire sprinklers if they are not also required for the primary residence.

### Accessory Dwelling Units in Additions or New Accessory Structures

- **Zoning Regulations**
  - Jurisdictions are still allowed to designate some zones for ADUs, and not permit them in other zones.
  - Jurisdictions may regulate height, setback, landscaping, lot coverage, architectural review, maximum size of a unit, and impacts on historic properties.
- **Size Limits**
  - There is some debate about how to interpret the size provisions in the law. The most conservative interpretation is that jurisdictions should allow detached ADUs to be at least 1,200 sf and should allow attached ADUs to be at least 1,200 new square feet or 50% of the main dwelling, whichever is less. (Most likely, jurisdictions may allow larger units as well because local regulations are allowed to be less restrictive). Some jurisdictions have interpreted the law to allow cities to further limit maximum sizes. HCD may offer guidance when they release their interpretation.

- **Parking Requirements**

- ADUs within half a mile of transit, built within an existing structure, located in an historic district, or meeting other criteria defined in the statute do not need to provide parking.
- For other ADUs, at most one parking spot can be required per bedroom or unit. The parking space may be tandem or located in a setback, unless the jurisdiction makes specific findings (e.g. tandem parking or parking in a setback is not allowed anywhere in the jurisdiction; topographical constraints prevent tandem parking, etc.).
- Generally, if a garage is demolished to build a second unit and the jurisdiction requires the homeowner to replace the parking space(s), the homeowner can choose to provide the parking in any configuration (e.g. uncovered, tandem, mechanical lifts, etc.).

- **Fees**

Jurisdictions may require new or separate utility connections for new ADUs, but the fees for the ADU must be proportional to the expected additional water used or sewage generated.

## **Accessory Dwelling Units Located in Existing Structures**

- **Approval Requirements**

Applications must be approved if the ADU is:

- Located in a single family zone,
- Built in an existing legal structure (the main house or an accessory building),
- Provides direct outside access, and
- Has sufficient setbacks for fire safety.

In addition, these ADUs cannot be required to install new or separate utility connections.

Jurisdictions may not charge connection fees or capacity charges for ADUs in existing structures. (Note that the statute's definition of "local agencies" does not include water or sewer districts.)

No additional parking may be required for these ADUs.

*Note: Thank you to Goldfarb & Lipman LLP attorneys for their assistance.*

## Frequently Asked Questions

**Q** – Can jurisdictions limit the number of ADUs to one per property?

**A** – Yes

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**Q** – Are jurisdictions obligated to approve garage conversions?

**A** – Yes, if they meet the conditions described in the law (e.g. in a single family zone, have direct outside access, etc.)

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**Q** – What is the distinction between a Junior ADU and a regular ADU? Are there advantages to jADUs?

**A** – Junior ADUs can have a shared bath and smaller kitchen, which could better meet the needs of some homeowners. Communities can choose whether or not to allow jADUs.

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**Q** – Can jurisdictions limit the size of ADUs to smaller than 1,200 sf? Can they permit larger ones?

**A** –The most conservative answer is that jurisdictions should permit homeowners to build detached ADUs up to 1,200 sf. Attached ADUs can be limited to the smaller of 50% of the existing living area or 1,200 sf. Some jurisdictions may want to allow larger ADUs and because the statute allows communities to adopt an ordinance that is less restrictive than state law, this is likely permissible.

There is language in the law that some jurisdictions interpret to mean they can further limit the size of ADUs, for example by only allowing smaller units. HCD will likely have guidance on this point when they release their analysis.

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**Q** – What is meant by "demolish," when the law says if a garage is demolished, the parking can be permitted in various configurations. Does a garage that is converted to an ADU count as demolished?

**A** – The conservative interpretation is that a conversion counts as a demolition, but jurisdictions should make their own decisions on this issue in consultation with their legal counsel.

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**Q** – What are the default state standards that are imposed if jurisdictions do not adopt their own ordinance?

**A** – If a jurisdiction does not adopt an ordinance that meets the requirements of the statute, only the standards established in the statute may be applied to ADU applications. No other local ordinance, policy, or regulation may be the basis for denial of an ADU application.

This likely means that ADUs would be allowed in all residential zones where there is an existing single family home. It is also possible that planning rules such as floor area ratio or lot coverage restrictions would not apply. (Building codes would still apply.)

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**Q** – Are there now three categories of ADUs, attached, detached and “converted”?

**A** – The State law does not specify if or how jurisdictions categorize ADUs. Some cities may want to use two categories, newly constructed and “converted” ADUs. The statute treats ADUs that are additions or new detached structures almost identically, while setting up very different rules for “converted” ADUs located within existing structures in single family zones. It is up to the jurisdiction to decide if they want to use categories in their local ordinances, and if so, how many categories. Jurisdictions are allowed to have one, two, three or more categories if they prefer. In any case, jurisdictions need to ensure they follow all the new rules regardless of how they categorize the units.

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**Q** – Do the setbacks and other zoning requirements have to be in the same section of code as the ADU ordinance?

**A** – They can be elsewhere, but they must be referenced in the ADU ordinance. It is important to include an explicit incorporation by reference, for example, “An ADU must comply with all provisions of the underlying zoning district, except as modified in this chapter.”

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**Q** – Does a building permit need to be issued within 120 days of receipt of an application? What is meant by approve?

**A** – The law is not clear on this point. One interpretation would be that approval means planning approval, but not building approval. Cities may want to simply reference that ADUs will be approved consistent with the timing in Chapter 65852.2, to provide maximum flexibility.

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**Q** – Can jurisdictions require (or not require) a front setback for second units newly constructed on top of garages?

**A** – Cities are not prohibited from enforcing front setbacks for second units on garages, nor are they explicitly required to have a setback. However, in all single family zones, if an existing second floor over a garage is proposed to be converted to an ADU an additional setback cannot be required.

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**Q** – Will ADUs be subject to creek setback rules?

**A** – Newly constructed ADUs could be subject to those rules. Converting existing space to an ADU would not, assuming the existing building was constructed legally.

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**Q** – Does this legislation apply to illegal buildings?

**A** – A jurisdiction could reasonably argue that the law does not apply to illegal structures, but it is not explicit.

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## Checklist and Next Steps

There are many ways jurisdictions can amend their ordinance to be compliant with State law. Because one of the biggest changes in the new State law relate to rules for ADUs that are built entirely within an existing structure, jurisdictions should consider adding a new subsection solely to deal with these types of ADUs. If this is done, there will likely be fewer edits needed in the ordinance overall.

The following is a checklist to help jurisdictions review their current ordinances. It does not summarize all of the legal requirements and rules regarding ADUs. Cities should not rely on this checklist alone to ensure their ordinance is compliant with State law, and should have their proposed ordinances reviewed by legal counsel.

Does the ordinance:

- Provide for ministerial approval or denial of ADU permits in 120 days;
- Make clear that approval or denial is exempt from CEQA;
- Limit regulation to approved categories (e.g. height, setback, landscaping, lot coverage, non-discretionary architectural review, maximum size of a unit, and impacts on historic properties);
- Not regulate number of occupants or who may live there (however, jurisdictions may require owner occupancy and limit short term rentals);
- Appropriately regulate ADUs size (see discussion above);
- Exempt second units from density rules (e.g. if the zoning says the lot can have one house, then one house and one second unit are permitted);
- Incorporate zoning requirements and other development standards into the ordinance explicitly or by reference;
- Have the following parking rules
  - Have no additional parking requirements for ADUs in certain locations (Within a ½ mile of transit, in existing structures, in historic districts, within one block of car share locations, in areas with residential parking permit rules that do not allow second units to get a permit)
  - For other ADUs, only require one parking spot per bedroom or unit. The spot may be a tandem spot or in a setback, unless the jurisdiction makes specific findings. (E.g. tandem parking or parking in a setback is not allowed anywhere in the city; topographical constraints prevent tandem parking, etc.).
  - Allow provisions regarding replacement of parking spots lost when garages are demolished for ADUs (Generally, if a garage is demolished to build an ADU and the jurisdiction requires the home owner to replace the parking spot, the homeowner can choose to provide the parking in any configuration (e.g. uncovered, tandem, mechanical lifts).)
- Have the following rules regarding sewer and water fees (if the jurisdiction controls these fees)
  - No new connection required for ADUs in existing structures in single family zones, and no related connection fee or capacity charge.
  - Charge fee proportional to the expected additional usage of water or sewer for ADUs not in existing structures.
- Adjust the rules regarding ADUs that meet certain criteria and are in existing structures (the main house or an accessory buildings). These ADUs must be approved ministerially and jurisdictions may not require additional parking or water connection fees. Relevant criteria include:

1. Located in a single family zone
  2. Provides direct outside access
  3. Has sufficient setbacks for fire safety
- Have appropriate setbacks for newly constructed ADUs over garages, no more than five feet from the side and rear lot lines;
  - Refer to the units as Accessory Dwelling Units, not Second Units (or define "second units" as "accessory dwelling units");
  - Consider allowing Junior ADUs (optional)
  - Be sure to provide the Department of Housing and Community Development a copy of the ordinance within 60 days of adoption.*

## Additional Resources

- Chaptered Law - <http://21elements.com/Download-document/833-Chaptered-Changes-in-Accessory-Unit-Provisions.html>
- Goldfarb and Lipman Presentation - [http://21elements.com/Download-document/832-Goldfarb\\_slides\\_ADU.html](http://21elements.com/Download-document/832-Goldfarb_slides_ADU.html) (contact [abrams@bdplanning.com](mailto:abrams@bdplanning.com) for audio)
- Goldfarb and Lipman Law Alert - <http://21elements.com/Download-document/834-Law-Alert-9-30-16-New-State-Laws-Clear-Path-for-Second-Units-Local-Ordinances-Must-Be-Updated-by-January-2017.html>
- More resources at <http://21elements.com/Resources/second-units.html>

## AB 2406 - Junior Accessory Dwelling Units (Junior Second Units)

This bill creates a new category of ADU, called a Junior Accessory Dwelling Units. Junior ADUs (jADUs) are small units created out of existing space in a single family house. Jurisdictions are not required to allow jADUs, but if they choose to, the bill sets rules on how to regulate them. The key difference between ADUS and jADUs is that a bathroom can be shared with the main house and the kitchen must be limited. Key points of the legislation are summarized below:

- **Size and Creation** – These units may be up to 500 sf and must be created from space that was formerly part of the single family home.
- **Guidelines** - Junior ADUs must:
  - Have one of the units owner occupied by the owner (the main house or the junior ADU)
  - Have a deed restriction that prevents the sale of Junior ADUs and limits their size as specified in the bill.
  - Be created by including an existing bedroom (e.g. you cannot wall off a living room)
  - Have a door directly to the main house.
  - Have an efficiency kitchen with a sink and a cooking facility with appliances that can run on standard 120 -volt outlets and 1.5 inch drain line.
- **Additional Requirements**
  - The bathroom can be shared with the main house.
  - No additional parking can be required
  - For life safety regulations and sewer/water, junior ADUs are not a new unit (no sewer/water connection fees)
- **Approval** – Junior ADUs must be reviewed through a ministerial process within 120 days

Please see the 21 Elements [summary of Junior Second Units](#), two PowerPoint presentations from a recent 21 Elements meeting, one from [Lily Pad homes](#) and [Novato](#). There are additional requirements in state law about jADUS. Please see your counsel for advice.