CALIFORNIANS FOR HOMEOWNERSHIP

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December 17, 2020

Robert N. Kwong, Esq.
District Legal Counsel, Ojai Valley Sanitary District
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RE: Unlawful connection fees for accessory dwelling units

Dear Mr. Kwong:

Californians for Homeownership is a 501(c)(3) non-profit organization devoted to using impact litigation to address California's housing crisis. I am writing as part of our work monitoring local agency compliance with California's laws regarding accessory dwelling units (ADUs).

We recently became aware that the District is charging unlawful connection fees in connection with the development of ADUs. Specifically, the District is charging ADUs (other than interior conversions) the ordinary connection fees that it would charge for a new residential use. Instead, "[a]n accessory dwelling unit shall not be considered by a local agency, special district, or water corporation to be a new residential use for purposes of calculating connection fees or capacity charges," and these ADUs much be charged (at most) a fee "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." Gov. Code § 65852.2(f).

If the District does not immediately discontinue this practice, we intend to sue the District on behalf of the important public interest in the creation of new housing in the region. We have public interest standing to sue the District in a writ action. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011). For the same reason, if we sue the District, we expect to be able to recover our attorneys' fees under Code of Civil Procedure Section 1021.5.

The District's obligations under state ADU law are explained in detail in the November 23, 2020 letter (attached here) from Shannan West, Land Use & Planning Unit Chief at the state Department of Housing and Community Development (HCD). HCD has authority to interpret and enforce the state ADU laws. Gov. Code §§ 65852.2(h), (i). If we are forced to litigate against the District, the District will be stuck explaining to a court why it should ignore the plain language of state law, as well as HCD's interpretation.

I am aware of your prior statements about the conflict between state ADU law and California's constitutional and statutory rules for fair apportionment of utility costs. Your remarks vastly overcomplicated the issue. The Legislature has simply added the development of an ADU, without paying traditional residential connection fees, to the bundle of rights possessed by every

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homeowner in the state. Because every homeowner is equally entitled to develop such an ADU without paying capacity charges, there is no unfairness. The fact that some homeowners choose not to avail themselves of this right does not make it unfair for those homeowners to pay the same capacity charge as those who choose to do so.

Nor is the District required to achieve perfect fairness in its fee structure. The District does not, for example, conduct a detailed analysis to determine the exact expected occupancy level of a home to determine the fair fee it can charge; it simply charges a flat fee for each new residential use. It is no more unfair to exempt ADUs from paying new fees than it is to charge the same fee for a home that will be occupied by two residents as a home that will be occupied by six. Under state law, an ADU is simply not a new residence; it is an accessory use that expands the occupancy of a residence through an attached or detached structure.

If the District's capacity charges are insufficient to account for the fact that homeowners can now build ADUs alongside their primary dwellings, the District should adjust the capacity charges for each new primary residential connection, not attempt to charge for primary connections a second time in violation of state law. And, of course, the District remains free to charge monthly or annual usage fees to account for the cost of an ADU's actual use of the District's system.

At the December 17, 2018 meeting of the District's Board of Directors, you told the Board that "most sanitation districts in the State are not changing their regulations in response to the new State ADU laws; they are waiting for a court action to occur to reconcile the conflict between these and other State laws." That is not remotely true. We have discussed these laws with around 150 local agencies over the last year, and never—not once—has any other agency expressed concerns about the legal conflict you described in that meeting. The District is way out on a limb.

Time is of the essence. The public record reflects that the District has known about these laws for years, and has been under investigation by HCD for months, but is continuing to charge unlawful fees today. Homeowners in the District have waited far too long for the District to come into compliance with state ADU law, and the District has taken advantage of their limited legal and financial resources to overcharge them. We demand that you respond to this letter by December 21, 2020 confirming that the District will discontinue applying any capacity charge to any ADU until it has developed a method for charging a legally permissible fee and confirmed the validity of that method with HCD.

If we do not hear from you, we will begin preparing for litigation. If you have any questions or concerns, please do not hesitate to give me a call at (213) 739-8206.

Sincerely,

Matthew Gelfand

cc: Jeff Palmer, General Manager (by email to jeff.palmer@ojaisan.org)
Alison Young, Administrative Officer (by email to alison.young@ojaisan.org)
Richard Nack, Operations Manager (by email to rick.nack@ojaisan.org)

ATTACHMENT

STATE OF CALIFORNIA - BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY GAVIN NEWSOM, *Governor*
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November 23, 2020

Jeff Palmer
General Manager
Ojai Valley Sanitary District
1072 Tico Road
Ojai, CA 93023

Dear Jeff Palmer:

RE: Ojai Valley Sanitary District's Accessory Dwelling Unit (ADU) Fees and Charges – Letter of Technical Assistance

The purpose of this letter is to provide technical assistance to the Ojai Valley Sanitary District (OVSD or District) regarding the development of legally permissible connection fees and capacity charges as applied to accessory dwelling units (ADUs) under the State ADU Law (Gov. Code, §§ 65852.2, 65852.22.) during the current housing crisis. The California Department of Housing and Community Development (HCD) appreciates that the changes in the law are complicated and have been evolving quickly in recent years. HCD hopes that the following technical assistance is useful to the District and assists OVSD in expeditiously bringing its practices and regulations into compliance with state law.

Most of the mandates contained in State ADU Law apply to local agencies (cities, counties, or cities and counties) rather than districts (Gov. Code, § 65852.2, subd. (j)(5).) There are key provisions of State ADU Law that apply to districts, however. These sections delineate the permissible connection fees or capacity charges for a new ADU. State ADU Law places significant limits on two kinds of fees: (1) impact fees and (2) connection fees and capacity charges. OVSD's regulations and practices appear to exceed the limitations on the latter. These fees are prohibited in some cases and limited in others.

ADUs for which no separate "connection" may be required and no connection fee or capacity charge may be imposed

ADUs constructed entirely within an existing single family home or other accessory structure that satisfies the requirements of Government Code section 65852.2, subdivision (e), are exempt from any requirement to install a new or separate sewer connection; they are also exempt from connection fee or capacity charge (Gov.

Code, § 65852.2, subds. (e)(1)(A) and (f)(4). See also HCD's ADU Handbook[1] September 2020, at pp. 13-14.) OVSD's regulations appear to acknowledge these mandates under state law (District Code of Regulations, Chapter 3, s. 301.4.).

ADUs for which a "connection" or "capacity" fee may be charged

ADUs that are not described in Government Code section 65852.2, subdivision (e), may be subject to a new utility connection directly between the ADU and the utility. If such a connection is mandated, then a fee or charges may be imposed but shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed. (Gov. Code, § 65852.2, subd. (f)(5) and Gov. Code, § 66013.) State ADU Law places two important restrictions on the imposition of such fees or charges:

(1) State ADU Law expressly prohibits local agencies, special districts, and water corporations from considering ADUs as a new residential use for the purposes of calculating connection fees or capacity charges for utilities, including water and sewer services. (Gov. Code, § 65852.2, subd. (f).)

(2) State ADU Law prescribes in detail the method by which the fees may be calculated and assessed. Such fees may be assessed only proportionate to the burden of the ADU based upon its *"square feet or the number of its drainage fixture unit (DFU) values."* (Gov. Code, § 65852.2, subd. (f)(5).)

The effect of these two provisions is that the District may not treat an ADU the same as it would a single-family home and charge the same fee. In this context, "proportionate" is to be determined in comparison to a similar fee for a single-family dwelling (Gov. Code, § 65852.2, subd. (f)(5); HCD's Accessory Dwelling Unit Handbook September 2020, at pp. 13-14.). Thus, for example, using a square-foot approach, a capacity fee for a 1,000 square foot ADU would be expected to be about half of the capacity fee for a 2,000 square foot single family home. Likewise, using a drainage-fixture approach, an ADU with 10 drainage fixtures would be charged about one-third of the capacity fee of a single-family home with 30 drainage fixtures. (See HCD's ADU Handbook September 2020, at pp. 13-14.)

The District's regulations do not comply with these requirements and thus appear to be impermissible. While the District's regulations apply a drainage-fixture approach for commercial uses, they treat all residential uses equally. (Compare, for instance, District Code of Regulations, Chapter 3, s. 301.12.1 with s. 301.12.2.) This is true for Treatment Plant Capacity Charges (s. 301.11.1), for Truck Sewer Capacity Charges (s. 301.12.1), and Local Sewer Capacity Charges (s. 301.13.1). There is no suggestion in the regulations that fees or charges are based on the proportionate burden based on either square feet or drainage feature units for

[1] HCD's ADU Handbook can be referenced here: https://www.hcd.ca.gov/policy-research/docs/adu-ta-handbook-final.pdf.

ADUs. Rather, single family homes and ADUs are treated interchangeably. This appears to be borne out in the District's practices; as HCD understands it, the District charges a combined connection fee of roughly $16,000 for all residential uses, including ADUs, regardless of their size or their proportionate burden on the district using the methodology prescribed by law. The District's regulations and current fee structure is not legally sound, subjects the District to significant legal risk, is serving as a significant impediment to housing in this current housing crisis, and must be modified to conform to statute.

We appreciate the District's efforts to comply with State ADU Law and welcome the opportunity to assist the District in fully and expeditiously complying with State ADU Law. Please feel free to contact Greg Nickless, of our staff, at (916) 274-6244 or greg.nickless@hcd.ca.gov.

Sincerely,

Shannan West
Land Use & Planning Unit Chief

cc: Robert N. Kwong
Arnold LaRochelle Mathews
VanConas & Zirbell LLP

David Pai
Department of Justice
Office of the Attorney General