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Zoning Bulletin

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Uses—Schools and Education—Private College Seeks Application of Dover Amendment, Exempting it from Local Zoning Regulations

Town rejects college's petition, finding

Contributors

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educational purpose of proposed development is secondary

Citation: *Regis College v. Town of Weston, 462 Mass. 280, 2012 WL 1815663 (2012)*

MASSACHUSETTS (05/22/2012)—This case addressed the issue of whether a private college's proposed development of residential and educational facilities for older adults qualified for protection from local zoning laws under the state's Dover Amendment.

The Background/Facts: Regis College ("Regis") is a private college located in the town of Weston, Massachusetts (the "Town"). In 2005, Regis proposed a development called "Regis East." Regis East was to be across the street from Regis' main campus, on a site of approximately 60 acres. Regis East was to be comprised of eight buildings with a total 766,600 square feet, 60% of which were to be residential units. Residents at Regis East were to: be an average of 75 years of age at the time of their arrival; be required to pay an entrance fee of between $700,000 and $1 million; and, while at Regis East, live in 1,300-square-foot apartments and be required to enroll in a minimum of two courses per semester.

In proposing the Regis East development, Regis petitioned the Town's zoning board of appeals (the "ZBA") for relief from certain of the Town's municipal zoning regulations that would otherwise preclude construction of the Regis East development. Regis asked the ZBA to find that Regis was exempt from these zoning regulations under the Dover Amendment (G.L. c. 40A, § 3, second par.).

The Dover Amendment is a state law that, among other things, exempts from certain local zoning laws land or structures that are to be used by nonprofit educational institutions for "educational purposes."

The ZBA denied Regis' petition for exemption.

Regis appealed to land court. Finding there were no material issues of fact in dispute, the land court judge ultimately granted summary judgment, on the law alone, to the Town. The judge concluded that Regis' proposed use of Regis East did not fall within the protection of the Dover Amendment because Regis East's educational purpose "seem[ed] subordinate to [Regis'] desire to provide elderly housing and/or a source of revenue."

Regis appealed.

DECISION: Vacated and matter remanded.

The Supreme Judicial Court of Massachusetts held that the Regis East project had an educational purpose, but that a question of fact remained (for the Land Court to decide) as to whether its educational purpose was primary and dominated over other purposes—so as to qualify it for exemptions from local zoning regulations under the Dover Amendment.

The court first determined that the Dover Amendment protects "only those uses serving primarily educational purposes." The court emphasized that the word "education" is a "broad and comprehensive term," and that the Dover Amendment protections are not limited to "protection of traditional or conventional educational regimes." Thus, "[a] proposed use of land or structures may have an educational purpose notwithstanding that it serves nontraditional communities of learners in a manner tailored to their individual needs and capabilities." Accordingly, Regis East's proposed promotion of the "cognitive and physical well being of elderly persons" through academic and physical instruction could be an educational purpose under the Dover Amendment, concluded the court.

Still, said the court, to be eligible for Dover Amendment protections, a landowner must demonstrate that its use of land will have as its "primary or dominant purpose" a goal that can reasonably be described as "educationally significant." Thus here, the court said that Regis must show not only that Regis East will serve educational purposes, but that such purposes are "primary or dominant"—that the educational purposes "predominate over Regis East's residential and recreational components." The court explained that in order for Regis East to qualify for Dover Amendment protection, Regis had to establish that the residential and recreational aspects of Regis East would not constitute its primary purpose but instead would support the project's dominant educational purpose of providing academic and health-related instruction to older adults.

Addressing the summary judgment motion brought by the Town (which asked the court to find there were no material issues of fact and to decide the matter in its favor on the law alone), the court determined that Regis had shown that the record contained evidence sufficient to create a material dispute of fact as to whether Regis East had as its dominant purpose a goal that

"reasonably could be described as educationally significant"—thus precluding summary judgment. The court remanded the matter back to the Land Court to determine the answer to that issue.

See also: *Whitinsville Retirement Soc., Inc. v. Town of Northbridge, 394 Mass. 757, 477 N.E.2d 407 (1985).*

See also: *Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg, 380 Mass. 869, 406 N.E.2d 1006 (1980).*

Case Note:

Regis challenged the "dominant purpose" requirement, noting those words were not in the Dover Amendment's statutory text. The court rejected that argument and held that the primary purpose requirement "helps ensure that a party invoking the Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute."

Due Process/Revocation of Permits—City Issues Business Owner Permits, Then Revokes Them Two Months Later

Business owner claims deprivation of constitutional due process

Citation: *Bowlby v. City of Aberdeen, Miss., 2012 WL 1662936 (5th Cir. 2012)*

The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

FIFTH CIRCUIT (MISSISSIPPI) (05/14/12)—This case addressed the issue of whether the revocation of permits to a business owner, without notifying the business owner prior to the revocation, violated her constitutional right to procedural due process. The case also addressed whether an individual claiming a due process violation must first exhaust all administrative remedies in order for any deprivation of property to be "final" and the claims to be ripe for adjudication.

The Background/Facts: Debra Bowlby ("Bowlby") sought to operate a "Sno Cone" hut at an intersection in the city of Aberdeen, Mississippi (the "City"). On July 15, 2009, Bowlby appeared before the City's Planning and Zoning Board (the "Board"), seeking permits for the "Sno Cone" hut at the specific intersection. The Board granted Bowlby the requested permits.

Two months later, the Board again discussed the location of Bowlby's business, and decided to revoke the permits it had given her to operate the Sno Cone hut at that location. The Board made this decision based on, among other things: its determination that the location posed a safety concern because the busy intersection was not safe for children; the location was zoned and intended for larger businesses; and that the overall look of the business was offensive and not appropriate for the eastern entrance to the City. Bowlby was not invited to this meeting, nor informed that the Board was reviewing the issue. The next day, Bowlby was notified that she immediately had to close her business because the Board had determined that it did not conform to the laws and regulations of the City.

The City's Zoning Ordinance required all appeals of Board decisions be made to the mayor and Board of Aldermen, and then to the courts. However, Bowlby instead brought suit against the City and the Board (hereinafter, collectively, the "City") in the United States District Court for the Northern District of Mississippi. Among other things, she claimed that her business was closed without notice or hearing, in violation of the United States Constitution's 14th Amendment Due Process Clause.

The City asked the court to dismiss the action. The court granted the motion to dismiss. Among other things, the court held that the Board had not violated Bowlby's due process rights because there had not yet been a final deprivation by the state since she had not administratively appealed the decision to revoke permission to operate her business.

Bowlby appealed the court's decision. On appeal, she argued that she had a property interest in being allowed to operate her business, and that the Board's revocation of her business permits without prior notice or hearing violated her 14th Amendment right to procedural due process. She also argued that her claim was actionable as soon as a predeprivation hearing was denied, and that she was not required to exhaust administrative remedies in order to bring a claim under 42 U.S.C.A. § 1983.

DECISION: Reversed, and matter remanded.

The United States Court of Appeals, Ninth Circuit, held that Bowlby had a property interest in the permits that were issued to her by the Board and that she was deprived of due process when the Board revoked the permits.

The court explained that "[p]rivileges, licenses, certificates, and franchises . . . qualify as property interests for purposes of procedural due process . . . because, once issued, a license or permit 'may become essential in the pursuit of a livelihood.' " Here, the Board had issued permits to Bowlby, allowing her to operate a business "in the pursuit of a livelihood." Thus, concluded the court, Bowlby had a property interest in the permits. Moreover, because the Board had issued the permits for a specific location, by extension, she had a property interest in operating at the location it identified, said the court.

Because Bowlby's permit related to her livelihood and was thus a property interest, it could not be taken away by the state without due process, said the court. This meant that prior to the revocation of her permits, she was due an opportunity to be "heard at a meaningful time and in a meaningful manner."

The court explained that in determining whether Bowlby was provided adequate due process prior to the revocation of her permits, it must weigh three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying those factors, here, the court found that: (1) the private interest affected by the Board's action was Bowlby's ability to operate her business; (2) the Board's failure to provide any process prior to revoking Bowlby's permits increased the risk of an erroneous deprivation, and meant that any procedural safeguards would be highly valuable; and (3) while the City may have had a strong interest in properly regulating businesses, providing some sort of predeprivation procedure to Bowlby would be not have been overly burdensome. The court concluded that while the balancing test "permits varied types of hearings, from informal to more formal evidentiary hearings, . . . [i]n a

situation such as Bowlby's, however, due process demands more than no hearing at all."

The district court had held that Bowlby "has not yet been denied such process" because her "pre-deprivation hearings are the appeal to the Mayor and Board of Alderman and if necessary, to the circuit court that serves as an appellate court for the decision." Since her "property interest has not been effectively destroyed, as the Mayor and Board of Alderman could theoretically disagree with the Zoning Commission's decision tomorrow," a "[d]eprivation by the state has not yet occurred," concluded the district court. The Fifth Circuit disagreed. It held that the due process injury—the taking without sufficient process—was complete at the time the process was denied (i.e., when the Board revoked Bowlby's permits without allowing her a hearing). In addition, noted the court, exhaustion of state remedies is not required before a plaintiff can bring suit under § 1983 for denial of due process. Consequently, concluded the court, Bowlby was not required to go through the appeal process set out in the City Zoning Ordinance in order to state a cognizable procedural due process claim. Because Bowlby was due predeprivation process, she suffered a due process injury when the City revoked her business permits, notwithstanding the fact that they may have been reinstated at some later date had she appealed the Board's decision, said the court.

The Fifth Circuit reversed the district court's dismissal of Bowlby's procedural due process claim.

See also: *Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).*

See also: *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).*

Case Note:

In its holding, the court noted that even due process violations with de minimis damages are actionable.

Case Note:

Bowlby had also brought a claim for an equal protection violation. The court found that she failed to properly state the claim because: she

failed to allege that the City's treatment of her was the result of intentional discrimination; or that she was similarly situated to other business owners to whom she broadly referred.

Uses-Mining—Township Zoning Ordinance Allows "Oil and Gas Production" as Permitted Principal Use

However, Township contends that natural gas compression station adjacent to wellhead is not a permitted use

Citation: *In re Township of Bradford, Tp. Zoning Hearing Board, 2012 WL 1622495 (Pa. Commw. Ct. 2012)*

PENNSYLVANIA (05/09/12)—This case addressed the issue of whether a compression station adjacent to a natural gas wellhead was a "permitted use" under a municipal zoning ordinance that allows "oil and gas production" as a permitted use.

The Background/Facts: New Century Pipeline ("New Century") operated a gas pumping operation in a "Forest/Slope Residence District" (the "Forest District") in Bradford Township, Pennsylvania (the "Township"). Adjacent to New Century's pump was a small compressor and stripper station, which purified the natural gas before placing it in a pipeline for movement from the site.

In August 2009, the Township's Zoning Officer (the "ZO") issued an enforcement notice to New Century. The notice charged New Century with a violation of the Township's Zoning Ordinance. Specifically, the ZO contended that the compressor station was not a permitted use in the Forest District.

The relevant provision of the Zoning Ordinance permitted as a principal use: "oil and gas production, including equipment nec-

essary to drilling or pumping operations." In addition to permitting that principal use, the Zoning Ordinance permitted uses accessory thereto. An "accessory use" was defined as one "customarily incidental and subordinate to the principal use . . . located on [the] same lot" with the principal use.

The ZO asserted that that New Century's compressor station was not equipment "necessary to drilling or pumping operations" and was not incidental to a gas pumping operation. Rather, the ZO and the Township contended that the compressor station was processing gas, and that, pursuant to the Zoning Ordinance, "oil and gas refining, processing, storage and transmission" could only be done in the Township's General Manufacturing District.

New Century appealed to the Township's Hearing Board (the "Board"). New Century maintained that without the compressor station, it could not move its gas from the wellhead. Accordingly, it argued the compressor station was equipment necessary to gas production or, alternatively, a permitted accessory use.

After a hearing, the Board held that New Century's compressor station violated the Zoning Ordinance because, among other things: it was processing gas, an activity that could only take place in the Manufacturing District. The Board ordered New Century to remove the compressor station.

New Century appealed. The trial court affirmed the Board's decision.

New Century again appealed.

DECISION: Reversed.

The Commonwealth Court of Pennsylvania held that the compressor station was equipment necessary to gas production and, thus, permitted under the Zoning Ordinance.

Noting that where there is doubt as to the intended meaning of language in an ordinance, it must be construed in favor of the property owner and against any implied extension of the restriction, the court said that: "To the extent a doubt exists that the Zoning Ordinance prohibits the use of a compressor station in the Forest District, [the Zoning Ordinance] must be construed in New Century's favor." The court found that "the evidence [was] uncontroverted that without the compressor station, New Century's gas at the wellhead [was] useless, except, perhaps, for flaring and roasting marshmallows." New Century had also presented evidence showing that the Pennsylvania Department of Environ-

mental Protection considered the compressor station to be a production tool and, for that reason, required New Century to obtain a permit. The United States Environmental Protection Agency defines facilities in the oil and natural gas production source category to include "a compressor station that transports natural gas to a natural gas processing plant, and natural gas processing plants." Accordingly, the court held that "operation of the compressor station [was] 'gas production,' as that term was used in [the Zoning Ordinance], and, as such, [was] a permitted use." Any other interpretation, said the court, would make "gas production, including equipment necessary to drilling or pumping operations," impermissible, which would contradict the Zoning Ordinance's express authorization of gas production in the Forest District.

Zoning News from Around the Nation

CALIFORNIA

The California Supreme Court recently agreed to hear a case about whether cities can use their zoning codes to prohibit medical marijuana dispensaries. The case involves the city of Lake Forest and the Evergreen Holistic Collective.

Source: *Lake Forest Patch;* http://lakeforest-ca.patch.com

MASSACHUSETTS

Massachusetts' House of Representatives is considering an economic development bill. Proponents of the bill, An Act Relative to Infrastructure Investment, Enhanced Competitiveness and Economic Growth in the Commonwealth (H 4093), reportedly say it "takes a sweeping approach toward boosting startups, research and manufacturing in the state." Reportedly, some express concern that provisions of the bill could "hamper local control over zoning"; one provision "specifically rules out oversight on local authorities that are established to oversee development districts and have the power to borrow money based on the promise of new property tax revenues," and another "prohibits municipalities from passing any ordinance or bylaw that interferes with interstate or intrastate commerce."

Source: *Boston Herald; www.bostonherald.com*

PENNSYLVANIA

On May 10, 2012, Pennsylvania's Public Utility Commission "approved final guidelines for most of the new Marcellus Shale drilling law, though rules regarding the zoning provisions being challenged in the state court system were put on hold." Reportedly, the "zoning-related rules likely will not be finalized until the pending lawsuit seeking overturn [of] that section of the law is decided."

Source: *Pittsburgh-Post Gazette; http://shale.sites.post-gazette.com*

RHODE ISLAND

Rhode Island's General Assembly is considering a bill, H7866, which would amend the state's building code. Among other things, "[p]rovisions in the bill would significantly shrink the acceptable 'buildable lot size' from 80,000 square feet to 40,000 square feet, eliminate the assessment of slope when calculating buildable area and add a definition of . . . 'conservation development' to the code." "Opponents say the bill would hamstring local zoning officials and open up hundreds of thousands of acres in rural Rhode Island to development" by increasing density in rural areas. Proponents say the bill "simply clarifies the building code for building officials."

Source: *eco RI news; www.ecori.org*

ZONING PRACTICE JULY 2012

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PRACTICE ACCESSORY HOUSING

Zoning for Accessory Housing

By Tom Daniels

Compact, walkable, and well-designed development is a primary goal of smart growth, and accessory housing can provide affordable housing opportunities that promote smart growth without sacrificing appearance.

Accessory housing may either be a detached dwelling unit with full services—bath, sleeping quarters, and kitchen—or an autonomous apartment attached to a house.

Accessory apartments are often known as "granny flats" or "in-law suites" because of the common practice of keeping an elderly parent as part of the household but in a largely independent living situation. An apartment may be inconspicuously built over an attached or detached garage or added on to the back of a house.

Whether attached or detached, accessory housing can increase residential densities and encourage walkability. However, many older zoning ordinances present major obstacles to the creation of accessory dwelling units (ADUs).

Accessory housing is one response to major changes in demographics and the real estate market. First, the number of single-person households is growing, especially among young adults who are marrying later and don't need large homes. Second, many people are living longer and want to age in place with family members nearby, rather than join their fellow senior citizens in an assisted-living complex. Third, many empty nesters are downsizing, and an apartment makes good sense. Fourth, the popularity of off-campus living among college students means a steady demand for apartments, especially within walking distance of school. Finally, people who work in a high-end community often cannot afford to live there as well. ADUs can provide affordable workforce housing for local workers.

Efforts to retrofit suburbs and encourage infill in cities have often focused on large projects such as redeveloping dead malls and multistory mixed use commercial and residential buildings. But financing for these projects is less available since the 2007 downturn in the real estate market. While these large projects are certainly needed to promote mixed uses and walkability, the residential market has lately favored renters over buyers. Still, proposals for multifamily rentals often spark a backlash, especially in newer suburbs. One less conspicuous way to provide more rental units is through an accessory housing ordinance in single-family residential districts.

ADVANTAGES OF ACCESSORY HOUSING

1. A way to create mixed income neighborhoods without reducing property values (a traditional use of zoning).
2. A way to increase density in urban and suburban areas without multifamily development. Little burden on community services compared to property taxes generated.
3. A way to provide housing for the elderly, especially for an older family member. This enables senior citizens to "age in place."
4. Workforce and student housing.

Interest in accessory housing has existed for decades. In 1985 author Martin Gellen estimated that there were 10 to 18 million houses with sufficient space to add an accessory dwelling unit, and if just 15 percent of these units were actually built, at least 150,000 units could be added to the nation's housing stock. In much of the 1980s and 1990s cities and inner suburbs grew more slowly or lost population compared to most suburbs and exurban areas, where builders could offer large houses on large lots. In the 2000s, this big-house strategy contributed to the housing meltdown in two ways. First, many people paid more than they could afford for these large houses, and second, home builders created an oversupply of houses, which exacerbated the downturn in home prices and left many recent buyers "underwater"—owing more on their mortgage than their house was worth. Although housing prices seem to be stabilizing after five years of declines, rental opportunities remain attractive.

Several studies have shown that accessory apartment units rent for below-market rates, in part because the accessory apartments are less expensive to build onto existing houses or garages. Pedestrian access to commercial uses and transit are important, especially for older people who may no longer drive and for young adults who cannot afford a car or may not want to own a car. Thus, accessory units tend to be more pedestrian- and transit-friendly within cities and inner suburbs, rather than in newer suburbs where residential and commercial areas are typically separated and a car is needed for transportation.

Two potential longer term threats to accessory housing are gentrification and rising property taxes. Gentrification can lead to reductions in accessory housing supply when wealthier residents moving into a neighborhood "mothball" or remove accessory units. Also, as property values rise, the rents on the ADUs can rise beyond the affordability of low- to moderate-income residents. It is also important to keep in mind that the construc-

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About the Author
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tion of an ADU, whether detached or an attached apartment, will result in higher property taxes for the property owner.

CREATING AN ACCESSORY HOUSING ORDINANCE

Zoning is not known as a tool that local governments use to respond quickly to demographic trends or changes in the real estate market. The main purpose of zoning remains the separation of conflicting uses, which is closely tied to the protection of property values. But there is a sequence of steps that a local government can take to create a legally and politically sound accessory housing ordinance.

First, planners and elected officials should make sure that the community generally supports ADUs. Then they can add an affordable housing goal to the comprehensive plan (if such a goal does not already exist). Next, planners and elected officials can include a policy objective to promote ADUs in the housing section of the comprehensive plan and amend the future land-use map to indicate where ADUs are allowed. Planners should have a sense of the maximum build-out potential for accessory dwelling units, and accessory units should only be allowed in areas with adequate central sewer and water service. This first step shows that the elected officials and planners support accessory housing.

Second, make sure than the accessory housing provisions of the zoning ordinance are consistent with the local comprehensive plan. The affordable housing goal and accessory dwelling objective give direction to the zoning ordinance and establish a legal basis for the accessory dwelling provisions within the zoning ordinance. The location of where ADUs are allowed on the zoning map should coincide with locations identified as appropriate on the future land-use map. The overall consistency of the zoning ordinance and zoning map with the affordable housing goal, the accessory housing objective, and the future land-use map of the comprehensive plan will make the accessory housing ordinance more likely to withstand legal challenges.

An important decision is whether to allow accessory dwellings by right or through a special exception. A conditional use permit makes little sense because accessory housing generally does not affect the entire community but rather certain neighborhoods. The advantage of the special exception approach is that the zoning ordinance can impose certain limits on the number of occupants of the accessory housing. The special exception process involves a review of the ADU that the home owner is proposing, a fee, and approval from the Zoning Board of Adjustment.

> The location of where ADUs are allowed on the zoning map should coincide with locations identified as appropriate on the future land-use map.

Third, the addition of the accessory housing provisions in the zoning ordinance helps to avoid rezoning and variance battles, which can be expensive and engender bad feelings with neighbors. In drafting the ADU ordinance, planners should meet with residential property owners and neighborhood associations and negotiate design standards, parking, and rules for ADUs, such as "no more than two people may reside in an accessory unit." This community outreach serves to head off political opposition to the accessory housing ordinance and to incorporate as much as possible the comments of the people who will live near and next to the ADUs. The ADU ordinance emphasizes revising single-family zoning districts to allow accessory dwellings. ADUs, both detached units and attached apartments, must be defined in the ordinance.

On the other hand, allowing an ADU by-right can speed the review process while maintaining certain performance standards, such as a required tie-in to central sewer and water, limits on size, and number of residents. A site plan review is commonly required whether the zoning to allow accessory dwellings is by-right or by special exception.

Fourth, land development and building design standards are key issues, especially for detached units. Setbacks from property lines are usually stated in the zoning ordinance rather than left up to the variance process. For the sake of good neighbor relations and appearance, a specific setback of

10 or 15 feet is recommended. Maximum lot coverage can be the same standard as for single-family dwellings. Height limits may be no more than 20 feet. The idea is that a single floor with some storage space above is adequate, or that an apartment above a garage should not loom over a neighbor's property. The maximum size is a common issue. A maximum square footage should be spelled out, such as 800 square feet. Design and landscaping requirements for a detached accessory unit should not be dissimilar from the rest of the neighborhood. Graphic illustrations of design and landscaping standards in the ordinance can be particularly helpful. Parking, however, can be a problem. An accessory dwelling unit will most likely rely upon on-street parking. Adding a parking space on the property could be difficult. In addition, the property owner must demonstrate that there is adequate central sewer and water service for the accessory dwelling unit. Typically, no more than one accessory dwelling is allowed with a primary residence, and often, the owner of the primary residence must live on the property, either in the primary residence or in the accessory unit. Also, an ADU must meet the local building code before the local government will issue an occupancy permit.

Finally, it is important to demonstrate that builders are interested in constructing detached ADUs and attached accessory apartments. Local lenders should be made aware that accessory dwellings are permitted and that a construction loan should be forthcoming pending zoning approval.

WHERE HAS ACCESSORY HOUSING WORKED?

Cities appear to have had more success in constructing ADUs than suburbs. And West Coast cities, in particular, have made innovative efforts to encourage accessory units in part to provide affordable housing and to promote compact development.

Portland, Oregon

Portland is often cited as a paragon of smart growth. Portland's zoning code provides standards for ADUs in all of its residential zones and was last updated in 2010. ADUs can be created by right in a detached single-family house, an attached row house, or a manufactured home. The ADU can result from converting existing living area, finishing an existing basement or attic, building a new structure, or making an addition to an existing structure.

The purposes of the accessory dwelling provisions in the Portland zoning ordinance include:

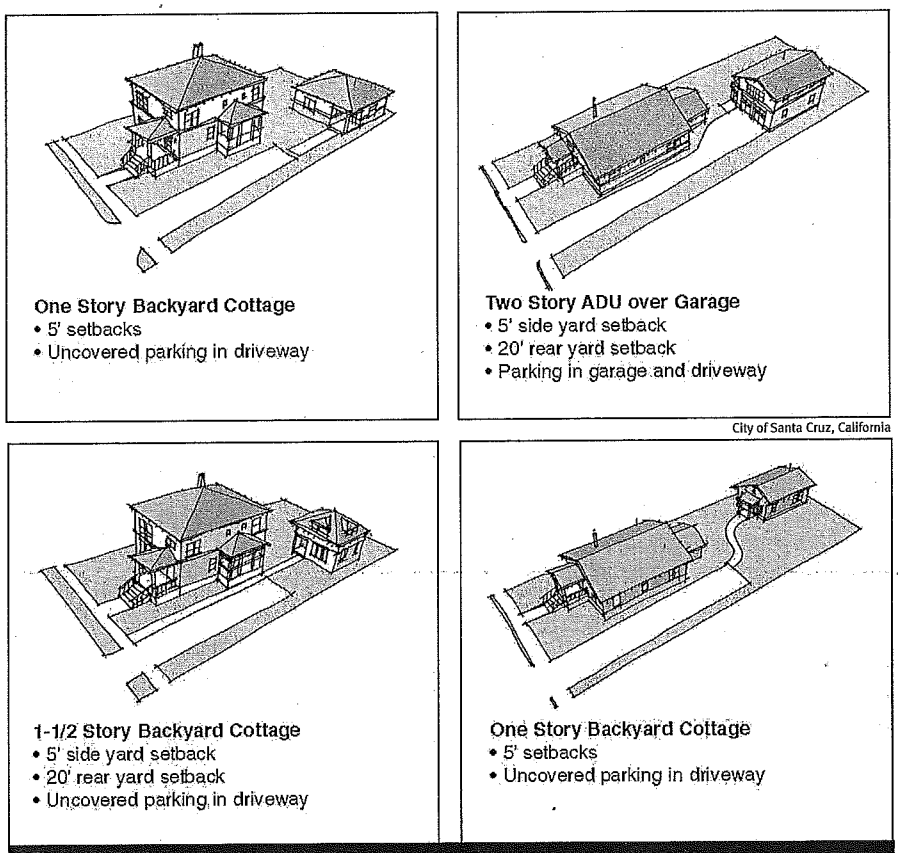
- increasing the housing stock while respecting the appearance and scale of single-dwelling neighborhoods;
- providing a mix of housing that responds to changing family needs and smaller households;
- providing a means for residents—particularly seniors, single parents, and families with grown children—to remain in their homes and neighborhoods and obtain extra income, security, companionship, and services; and
- providing a broader range of accessible and more affordable housing.

The ordinance defines an ADU as a second dwelling unit created on a lot with an existing house, row house, or manufactured home, where the second unit is auxiliary to and smaller than the existing unit.

Portland's ordinance allows a household to inhabit an ADU. The ordinance defines a household rather broadly: "One or more persons related by blood, marriage, legal adoption or guardianship, plus not more than 5 additional persons, who live together in one dwelling unit."

The emphasis in Portland's accessory dwelling approval process is on mitigating off-site impacts, for example requiring an erosion-control plan and a stormwater plan if the ADU will add more than 500 square feet of impervious surface. In addition, there is a system development charge (think impact fee) of about $6,000 to $10,000 for sewer and water service, recreation, and streets.

The density requirements are quite favorable for adding accessory dwellings. In the single-dwelling zones, ADUs are not included in the minimum or maximum density calculations for a site. In other words, density is not an issue. In all other residential zones ADUs are included in the minimum density calculations but are not included in the maximum density calculations. This is in an incentive not to create large lots. Keep



These illustrations show a range of detached ADU types. Owners looking to create an ADU rental for supplemental income may elect to construct a detached unit to maximize privacy.

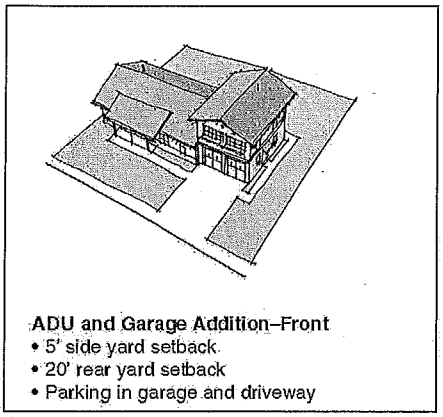
in mind that the general standard for new development inside the greater Portland metropolitan service boundary is 10 to 12 dwelling units per acre. The ADU ordinance is designed to help achieve that density.

For an existing house the ADU can be no more than 75 percent of the total living area of the house or a maximum of 800 square feet, whichever is less. To keep detached accessory dwellings inconspicuous, a unit must be at least 60 feet from the front property line, or the unit must be at least six feet behind the house, row house, or manufactured home. For fire safety, the detached ADU must be at least six feet from the primary dwelling. Portland does not require additional on-site parking for an accessory dwelling. Thus, on-street parking can be used. Design review is required if changes are proposed to the exterior of an existing house.

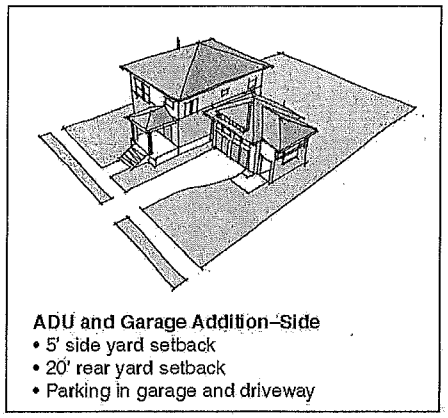
The height limit for a detached accessory dwelling unit is 18 feet. The lot coverage of the detached accessory dwelling unit cannot exceed the lot coverage of the primary dwelling. Together, the two dwellings cannot cover more than 15 percent of the entire lot. As for design, the exterior of the accessory dwelling unit must be the same as or visually match the primary dwelling. For instance, the roof pitch of the accessory dwelling must be same as the pitch for the primary dwelling, and the trim and the windows should match. Unfortunately, though, the ordinance does not contain any graphics for the reader to follow in trying to understand the design standards.

Finally, Portland requires that an applicant for an ADU submit a site plan, architectural plans, and structural plans.

From 2002 through 2011 Portland issued a total of 316 accessory dwelling permits. The downturn in the national economy was also reflected in ADU activity. In 2007, 31 permits were issued; only 19 were issued in 2008 and 22 in 2009. The Portland City Council then enacted a waiver of the system development charges for three years for new accessory dwelling units. The new policy seems to be working. In 2010, the city issued 61 permits; in 2011, 64.

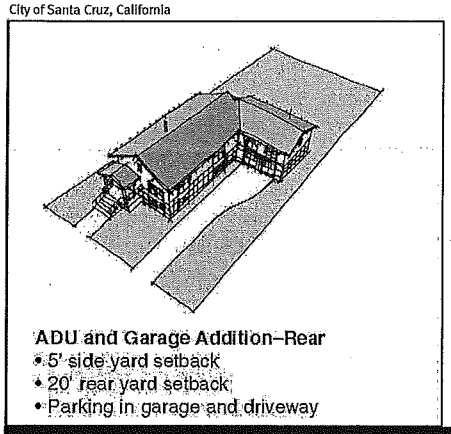


ADU and Garage Addition–Front
- 5' side yard setback
- 20' rear yard setback
- Parking in garage and driveway

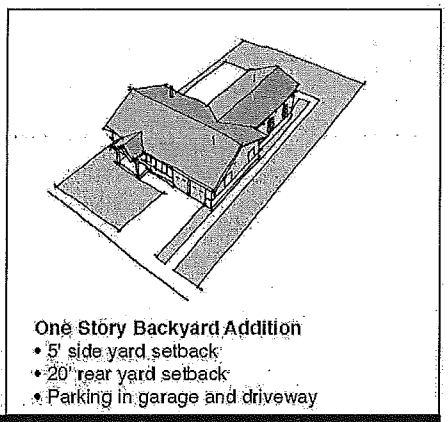


ADU and Garage Addition–Side
- 5' side yard setback
- 20' rear yard setback
- Parking in garage and driveway

City of Santa Cruz, California



ADU and Garage Addition–Rear
- 5' side yard setback
- 20' rear yard setback
- Parking in garage and driveway



One Story Backyard Addition
- 5' side yard setback
- 20' rear yard setback
- Parking in garage and driveway

These illustrations show a range of attached ADU types. Attached ADUs may be preferable for housing extended family members.

Most of the new ADUs have been built on the east side of the city fairly close to downtown. About 40 percent of the ADUs built have been detached cottage units and 60 percent attached apartments, typically above a garage.

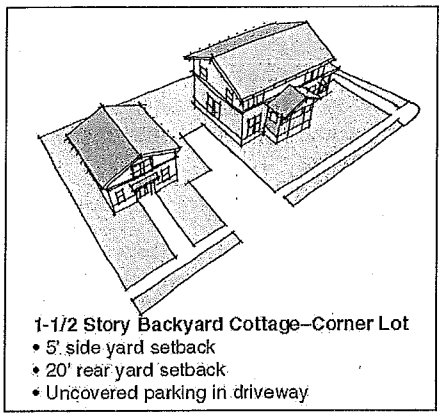
Spokane, Washington

Spokane has taken a unique approach to accessory dwellings by adopting a cottage housing ordinance in 2006. Although this ordinance may not be applied as widely as a typical accessory housing ordinance, it offers a way to increase density and affordability through the construction of small houses. The purpose of the Spokane ordinance is to "support the diversity of housing, increase the variety of housing types for smaller households and provide the opportunity for small, detached single-family dwelling units within existing neighborhoods."

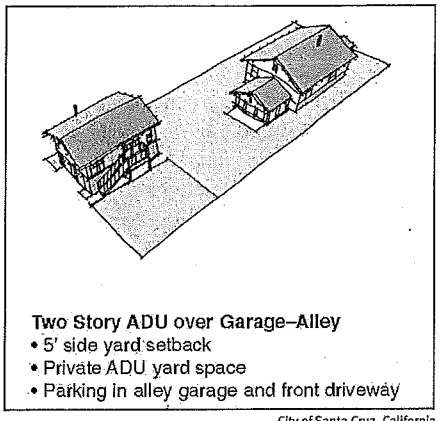
The cottage ordinance applies in the city's single-family residential district and the residential agricultural district. The ordinance requires a minimum of half an acre and a minimum of six units, with a maximum of 12 units, and offers the property owner a 20 percent density bonus. Properties that meet the minimum acreage standard are most often on the edge of a city, and hence the cottage ordinance could be especially helpful as a city with annexation powers adds land within the city limits.

The maximum square footage is 1,000 square feet, excluding any floor area where the floor-to-ceiling height is less than six feet. But half of the cottages can have no more than 650 square feet on the main floor and half can have no more than 1,000 square feet on the main floor. Once a cottage is built, it cannot be expanded.

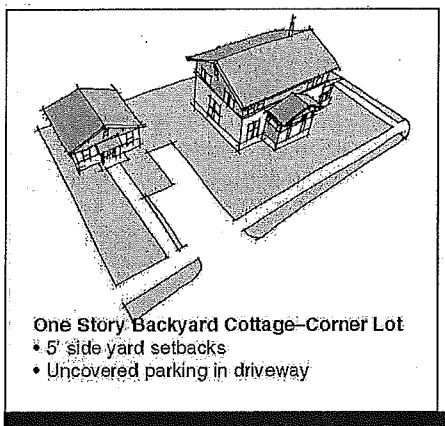
Maximum lot coverage is 40 percent. The height limit is 18 feet, except if the dwelling has a pitched roof. Then the maximum height is 25 feet. All cottages are required to have covered porches, which are oriented toward common open space or to the street. For each cottage there must be at least 250 square feet of common open space and 250 square feet of private open space. The common open space must be landscaped and maintained by a home owners association. Setbacks for all structures from the property lines must average 10 feet but cannot be less than five feet, and not less than 15 feet from a public street. This last standard is similar to the front yard setback required of any detached single-family residence.



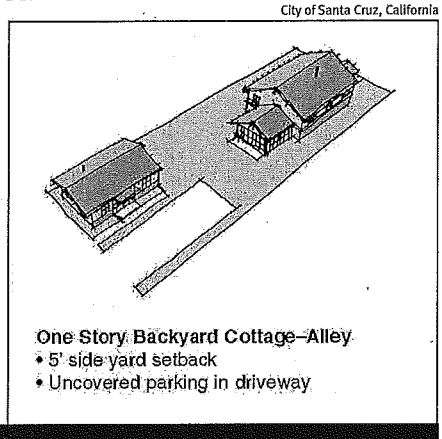
1-1/2 Story Backyard Cottage–Corner Lot
- 5' side yard setback
- 20' rear yard setback
- Uncovered parking in driveway



Two Story ADU over Garage–Alley
- 5' side yard setback
- Private ADU yard space
- Parking in alley garage and front driveway



One Story Backyard Cottage–Corner Lot
- 5' side yard setbacks
- Uncovered parking in driveway



One Story Backyard Cottage–Alley
- 5' side yard setback
- Uncovered parking in driveway

City of Santa Cruz, California

These illustrations show how detached ADUs can be sited on corner lots and lots with access to an alley.

Parking must be clustered in groups of five spaces and set back at least 20 feet from the street. Each cottage must have access to a sidewalk.

The cottage ordinance calls for variety in design. Only one-fifth of the cottages can have the same design, and no two similar designed cottages can be placed next to each other. Each cottage must have at least four elements from a list of 14. These include, for example, varying roof shapes, dormers, bay windows, and variation in building materials and colors.

Spokane has had difficulty in implementing the cottage ordinance. So far only three projects have been proposed. Objections from neighbors have been a major problem. But in 2009, the Washington Court of Appeals issued a ruling upholding the city's approval of a 24-unit cottage development on two acres. The court found that the cottages would have no significant adverse effect on the neighborhood. Another obstacle has been minimum lot size of 4,350 square feet with a minimum lot width of 40 feet and a minimum front lot line of 40 feet. In 2011, an Infill Housing Task Force recommended creating a new compact residential single-family zoning district (RSF-C) in addition to the existing residential single-family district (RSF) in order to promote the cottage ordinance. The RSF-C district would have a minimum lot size of 3,000 square feet, a minimum lot width of 36 feet, and a minimum front lot line of 30 feet.

Santa Cruz, California

Santa Cruz is located about 70 miles south of San Francisco on the Pacific Ocean. It is a college town that has experienced considerable growth from its proximity to Silicon Valley to the northeast. Santa Cruz created its accessory dwelling ordinance in 2003 in response to California law AB 1866 of 2002, which not only sought to promote the creation of accessory dwelling units but made it so that local governments could not prohibit the development of an ADU if it meets development standards. The purpose of the Santa Cruz ADU program is to provide more rental housing, encourage infill development and thus protect green space on the edge of the city, and to promote the use of public transportation. Santa Cruz has one of the least affordable housing markets in the United States. The city estimates that less than seven percent of the city's residents can afford to buy a local median-priced house. On the other hand, Santa Cruz has more than 18,000 single-family lots, which suggests a good opportunity to create affordable rental housing.

Santa Cruz formed the Accessory Dwelling Unit Development Program, which featured changes to the zoning ordinance, a strong public education effort, and financial assistance. The city removed a requirement that a single-family home had to have a covered parking structure (garage or carport), which made space available for

City of Spokane, Washington

Permitting two or more small cottages on a single lot provides an alternative to the standard accessory dwelling model.

an ADU. ADUs are allowed on single-family lots of 5,000 or more feet, and must meet setback, height, and parking requirements. Two-story ADUs that are located within a rear yard setback or any ADU that does not meet applicable zoning standards require a public hearing and an administrative use permit.

Next, the city had architects draft designs of accessory units that met both size (500 square feet) and style requirements that home owners could follow to speed the review and approval process. Then the city drafted an ADU manual describing how home owners could work their way through design, review, and city approval to construction. The city also held five public workshops to explain the ADU process.

In 2003 a total of 35 accessory dwelling units were built in Santa Cruz, up from just eight in 2001. In 2004, the city added a progressive Fee Reduction/Waiver Program for property owners who build an ADU for a household whose income level is at or below 60 or 50 percent of the Area Median Income (AMI). Fees may vary by unit size and other design components. Typical city development fees for a new one-bedroom, 500-square-foot ADU might be about $9,000. For providing rental housing to low-income households at 60 percent of the AMI, a home owner would save about $6,000 in city development fees. For very low-income housing at 50 percent of the AMI, the full $9,000 would be saved.

The Santa Cruz Community Credit Union offered loans of up to $100,000 at 4.5 % interest for Santa Cruz home owners looking to build an affordable ADU. To qualify, home owners had to sign a covenant stating that the ADU would be rented at a price affordable to low- to moderate-income residents.

In 2004 the city received the Policies and Regulations Smart Growth Achievement Award from the U.S. Environmental Protection Agency. Since 2003, Santa Cruz has added more than 170 accessory dwelling units.

CONCLUSION

The accessory housing concept is an old idea, but has seen renewed interest over the past 30 years and especially since the rise in real estate prices in the late 1990s. Local governments have adopted accessory dwelling ordinances to encourage housing for elderly relatives and rental opportunities for young adults, including students. A local government can identify accessory housing as an objective in the comprehensive plan and provide for it in the local zoning ordinance.

Portland and Santa Cruz have created successful accessory dwelling unit programs that seek to streamline the development process yet maintain good design that fits in with the neighborhood. Both cities have offered financial incentives. Portland has temporarily waived the system development charges on new accessory dwelling units, and Santa Cruz has offered low-cost financing.

Eleven cities in Washington, including Spokane, have adopted cottage ordinances. Spokane's experience shows that site design is also important, not just zoning. In effect, a unified development code that combines zoning and land development regulations would help landowners understand what they have to do to create an ADU as well as streamline the approval process. Opposition from neighbors is to be expected, especially if the city does not undertake an educational effort. Even then, accessory units can make neighbors feel encroached upon as well as raise concerns about impacts on property values.

With the U.S. population expected to add more than 100 million people over the next 40 years, accessory housing can play a small, but significant role in offering affordable housing and walkable, compact development that helps to revitalize cities.

RESOURCES BOX

Resources on Accessory Housing
Georgia Department of Community Affairs
"Accessory Housing Units." www.dca.state.ga.us/intra_nonpub/Toolkit/Guides/AcsryHsngUnts.pdf

Portland (Oregon) Bureau of Development Services, City of
"Accessory Dwelling Units (ADUs)."
www.portlandonline.com/bds/index.cfm?c=36676
www.portlandonline.com/bds/index.cfm?&a=53301

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2012. Municipal Code. Section 17C.110.350: Cottage Housing.
www.spokanecity.org/services/documents/smc/?Section=17C.110.350

Santa Cruz (California), City of
"Accessory Dwelling Unit Development Program"
www.cityofsantacruz.com/index.aspx?page=1150
www.huduser.org/rbc/newsletter/vol6iss2more.html

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2009. *William Davis et al. v. City of Spokane and Konstantin Vasilenko*, No. 29204-5-III.
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