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Emergency moratorium on accessory structure setback exemptions adopted

By Sora O'Doherty



Photo Sora O'Doherty

are governed by a different section of the municipal code.

At a special meeting on July 31, all five members of the Orinda City Council voted to pass an urgency ordinance imposing a 45-day moratorium on exceptions to setback requirements for accessory structures pending a study of zoning regulations needed to alleviate a current and actual threat to the public health, safety and welfare. The emergency action was prompted by public outcry over two accessory structures under construction at 71 Meadow View Road, but the action will have no effect on that project because it was authorized under existing law.

Drummond Buckley, director of planning, said that he did not recall a case of similar complaints about an accessory structure in the two years that he has been back working for Orinda. Buckley explained that an accessory structure includes structures that are habitable but are not the same as accessory dwelling units, which

Accessory structures were allowed an exemption from the minimum setback for side and rear property lines without street frontage and could be built as close as 5 feet to the property line. For accessory structures built within the required setback, the law set the maximum height at 15 feet of any portion within the setback, the maximum size at 400 square feet, and the total of multiple units at 800 square feet. With the moratorium on building with the setback, the other requirements were also removed as they were only applicable to structures within the setback.

Accessory dwelling units, garages, and additions to existing accessory structures to provide new accessory dwelling units must conform to the setback requirement applicable to their zone. According to Buckley, to be an ADU, the structure needs to be an "independent living facility" which means it has all of the following: A kitchen, a bathroom, a place to sleep, and direct access to the exterior. To be considered a kitchen, there needs to be a sink, counter and either a 220 volt connection or gas hookup.

The neighbors of 71 Meadow View Road are extremely upset that the owner has gradually progressed his project from an office and a workout room to the current two 400-square foot units that loom over the border fence and have windows looking directly into the bedrooms next door. The owner, the neighbors say, has announced his intention to offer the units as Airbnb, although they say that Buckley has told them that only one unit can be so employed.

The owner of 71 Meadow View Road, Gurdip Birdee, contacted after the meeting, said that both his side and rear neighbors have already taken full advantage of the 5-foot setback. "The fascia board of Mr. Pedder's house at 73 Meadow View Road is only 5 feet from the fence line. The garage wall of Mr. Anjedani's house at 69 Meadow View Road is at the property line," adding that 69 Meadow View was given an easement by the previous owner of Birdee's property to make it easier to enter and exit the garage.

"Had these neighbors not been allowed to build up to the common property line," he said, "they would have had more space." Birdee argues that his neighbors are trying to preserve space between the properties at his expense. "Having already maximized their building footprints, these same people now want to make it more difficult for other Orinda homeowners to also maximize improvements to their properties," he concluded.

A number of members of the public appeared at the special meeting, but Gary Johnson was the main speaker. "This should never have happened," he said. "I've lived for 20 years across the street from this project," he added. Johnson described the project: "It looms 15 feet above the fence five feet from the property line." The neighbor's bedrooms, he said, get no light. "If my neighbors did that, I'd move," he declared, and said that he hoped that the council would approve the urgency ordinance.

Johnson described Buckley as "very responsive," and Buckley was at pains to explain that he had had no ability to refuse the application, as it met all the requirements of existing law. This, he said, made it a ministerial decision, and not one about which he had any discretion. Kendra Marcus asked for an explanation of a "ministerial decision." This was provided by city attorney Richard Taylor. Some parts of the municipal code set forth explicit requirements, and if an application meets those requirements, the city has no discretion to refuse the application. Other parts of the code set forth objective standards, and in those cases

staff have discretion to determine if the application meets the standards.

Mayor Amy Worth, appearing telephonically, said that there had been no intention for accessory structures to be habitable, but Buckley reiterated that they are allowed to be habitable. For example, he said, you can sleep in a pool house. Worth was also concerned about a limit on the number of structures allowed. The mayor was also concerned about accessory structures in the R6 District. The attorney informed her that a moratorium could be imposed, but not at that meeting because it had not been included on the agenda. Buckley and council member Dean Orr pointed out that the number of structures in R6 would effectively be controlled by the limitation on FAR, the floor area ratio to the size of the lot. In the R6 District, the minimum setback from one side property lines continues to also apply to accessory structures. However, owing to the small lot size in the R6 District, accessory structures are less common.

Although the moratorium is for 45 days, the matter will appear again on an August agenda for further discussion.

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