

## **Special Zoning Administrator’s Interpretation Regarding Use Permits for Two-Story Accessory Dwelling Units<sup>1</sup>**

### **Background**

The background regarding this matter is not complicated. An application was submitted to the City to build a detached two-story accessory dwelling unit (ADU) with a maximum height of eighteen (18) feet on property located at 36 East Cairo Drive. The proposed ADU meets all the requirements of Tempe’s ADU ordinance, Tempe Zoning and Development Code (ZDC) Section 3-402, including the height limitation of thirty (30) feet for the zoning district in which it is proposed to be built.

ZDC Section 3-420.A. requires a use permit for certain two-story structures.

Section 3-420.A. reads:

A use permit is required for any single story, single-family residence to add, expand, or rebuild for a second story. This provision is applicable to viewing decks, play structures and detached accessory buildings and structures that have a second story.

“This use permit requirement dates back as far as 1987. The use permit requirement has been applied even when the proposed second story is within the allowable height of the applicable zoning.” See CDC Memorandum, p.1.

In addition, Tempe’s amended ADU ordinance in ZDC Section 3-402.C.6. provides:

Building height. ADUs are subject to the same height regulations that apply to the zoning district with a single-family dwelling on the same lot. Refer to Section 4-202 for the maximum height for the district, Section 3-401 for detached accessory building height, and Section 3-420 - Single-family residential second story addition, rebuild.

This provision can be interpreted to mean that the use permit requirement in ZDC Section 4-420 applies to two-story ADUs.

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<sup>1</sup> In preparing this interpretation, the following items have been considered:

The State ADU statute, A.R.S. § 9-661.18.

Applicable sections of the ZDC.

The Community Development Directors (CDC) Memorandum dated Sept. 30, 2025.

Video excerpt from the City Council’s Sept. 18, 2025, meeting regarding agenda item 8A1.

City Council’s Agenda and Agenda Summary for its Sept. 18, 2025, meeting.

“Without issuing any formal interpretation, the Community Development staff advised the applicant that a use permit would be required for the second story ADU. This application proceeded to the City’s Development Review Commission (“DRC”) which approved the second story ADU. However, an appeal of the DRC decision was submitted and the matter was forwarded to the City Council.”<sup>2</sup> See CDC’s Memorandum, p. 2. The ZDC empowers the DRC to grant or deny a use permit with any appeal of the DRC’s decision going to the City Council. See ZDC Section 6-101; Table 6-101A. The DRC’s consideration of the application for a use permit decision required a public hearing. See ZDC Section 6-308.C. The City Council held a public hearing to consider the appeal of the DRC’s decision. See City Council Agenda and Agenda Summary, Item 8A1, for September 18, 2025. At the public hearing on the appeal, the City Council continued the appeal and requested an interpretation of the ZDC to determine whether “the City of Tempe [has the] legal authority to require a Use Permit for a second-story ADU under the new State Law (A.R.S. § 9-461.18).” See City Council Agenda Summary, Item 8A1, for September 18, 2025.

**Issues:** The question raised by the Tempe City Council is whether the requirement for a use permit in Section 3-420.A. of the Tempe Zoning and Development Code for certain two-story “detached accessory buildings and structures” is applicable to “accessory dwelling units” as defined in ZDC Section 3-402 and Arizona Revised Statute (A.R.S.) § 9-461.18?<sup>3</sup>

The Tempe Community Development Director (CDC) requested that a second issue be addressed because it is anticipated that this issue may be a recurring one for the City. The question is “to what extent, if any, can the City require a use permit process for second story ADU applications in general?” See CDC’s Memorandum, p. 3.

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<sup>2</sup> The appeal was filed by Dawn Sinclair, a resident living some ½ mile from the Harvey property. She and the other residents who spoke at the City Council hearing argued that the proposed two-story ADU was not compatible with the neighborhoods of New Vista and Greater Broadmore.

<sup>3</sup> This interpretation of the ZDC is done pursuant to Section 1-303.B.1. of the ZDC. The interpretation was delegated to this author serving as “Special Zoning Administrator” to avoid any possible conflict of interest. Judge Donahoe’s biography is provided with this interpretation; a complete resumé will be provided upon request.

## Applicable Law

The overarching rule of law at the root of this interpretation is that in matters of statewide concern, a municipal ordinance that conflicts with a state statute is pre-empted or displaced by the state statute and, therefore, renders the municipal ordinance unenforceable. See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, ¶¶ 40 and 63 (S.Ct. 2017). It would be hard to argue that the affordable housing crisis and removing barriers to the construction of affordable housing are not issues of statewide concern. This pre-emption principle is recognized in ZDC Section 3-402.A.1. which provides that “[t]o the extent any provision in this section conflicts with A.R.S. § 9-461.18, the state law shall control.” With that principle in mind, the analysis turns to the state statute regarding ADUs and the city ordinance which requires a use permit.

A.R.S. § 9-461.18(A), requires municipalities having a population of more than 75,000, to adopt regulations that allow “on any lot or parcel where a single-family dwelling is allowed \* \* \* at least one attached and one detached accessory dwelling unit as a **permitted use**.” Paragraph H of A.R.S. § 9-461.18 defines “permitted use” as:

[T]he ability for a development to be approved **without** requiring a public hearing, variance, conditional use permit, special permit or special exception, other than a discretionary zoning action to determination [sic] that a site plan conforms with applicable zoning regulations. (Emphasis added.)

In response to that directive from the Arizona State Legislature, “Tempe amended existing provisions in ZDC § 3-402 that already had some provisions for ADU’s. (Tempe Ordinance No. O2024.51). The new ADU provisions in Ordinance No. O2024.51 were intended to make Tempe’s ADU provisions consistent with” with A.R.S. § 9-461.18. See CDC’s Memorandum, p.2.

## Discussion

For the reasons set forth below, I am of the opinion that the use permit requirement set forth in Section 3-420 and made applicable to ADUs by ZDC Section 3-402.A.1. cannot lawfully be applied to either a detached or attached two-story ADU.

Section 3-420 applies in two situations: (1) the addition, expansion or rebuilding of a second story on an existing single-family residence, and (2) when “viewing decks,

play structures and detached accessory buildings and structures” two stories in height are built. Obviously, situation one does not apply to a detached ADU because the ADU is not being added to, expanded or rebuilt on an existing single-family residence, but is new construction of a detached structure. However, this provision would encompass an ADU that is being attached to an existing single-family residence because the ADU would be considered an addition or expansion of the residence.

Regarding situation two, the only phrase in Section 3-420 that could possibly be interpreted to include an ADU is “detached accessory buildings and structures.” The definitions of those terms (“accessory building” and “accessory structures”) in Chapter 7 of the ZDC do not mention ADUs. However, Section 3-401.B. states that:

Accessory buildings shall not be used as a dwelling, except where permitted as guest quarters or as accessory dwelling units.

That provision can reasonably be read to mean that guest quarters and ADUs are the only dwelling units encompassed within the broad definition of “accessory buildings”. But even if ADUs fall within the scope of ZDC Section 3-420 by virtue of the above provision in Section 3-401.B. or the “building height” provision in ZDC Section 3-402.C.6., the use permit requirement contained in Section 3-420 for both an attached and detached two-story ADU violates A.R.S. § 9-461.18 and is, therefore, unenforceable as explained below.

When A.R.S. § 9-461.18 is read in its entirety, the unmistakable conclusion is that the legislature intended to facilitate the construction of ADUs by removing almost all city-imposed restrictions or barriers that normally apply to gaining approval for the construction of a single-family residence and making the construction of an ADU that complies with the requirements of the state law, a matter of right.

To achieve that intent, the legislature removed almost all discretion that might be used by a municipality to deny construction of ADUs. As noted by Mayor Woods during the City Council’s public hearing, “The legislature left the City with few tools to regulate ADUs.” A.R.S. § 9-461.18.H. expressly provides that an ADU is a “permitted use,” and as such, obtaining a “conditional use permit, special permit or special exception” cannot be a requirement for construction of an ADU. Importantly, A.R.S. § 9-461.18 does not

limit the statute's provisions to one-story ADUs nor are the provisions different for attached and detached ADUs.

The City's use permit process presents multiple conflicts with the State's ADU statute starting with the definition of "use permit". The ZDC defines "use permit" in Section 7-122 as:

*Use permit* means a permit granted to a property owner or lessee to conduct a use not otherwise permitted; or the use of alternative development standards following a compatibility review.<sup>4</sup>

This definition when applied to any two-story ADU conflicts with A.R.S. § 9-461.18.H. either by making a two-story ADU not a permitted use or by imposing special exception requirements, such as the compatibility review and parking requirement. (See discussion below regarding ZDC Section 4-420.C.) The only discretionary action allowed by the State statute is a review for site plan conformity "with applicable zoning standards." The granting of a use permit is exactly the type of discretionary (subjective) requirement that the legislature intended to eliminate from the approval process.

In addition, certain criteria to be considered in deciding whether to grant a use permit conflict with A.R.S. § 9-461.18. ZDC Section 4-420.C. sets forth the following "[a]dditional criteria for determining approval of a use permit:"

1. The proposed second story is designed to be compatible with the architecture of the residence and compatible with the surrounding neighborhood;
2. There are design considerations for privacy to adjacent properties and protection of existing solar appurtenances on adjacent lots; and
3. There is sufficient parking on site or on the street frontage to accommodate guests. Addition shall be required to meet current single family parking standards pursuant to Section 4-603, parking ratios.

A.R.S. § 9-461.18.B.3. provides, in relevant part, that "a municipality may not ... [r]equire that a lot or parcel have additional parking to accommodate an accessory dwelling unit" while subparagraph 4 of that section prevents a municipality from requiring "that an accessory dwelling unit match the exterior design, roof pitch or finishing materials of the single-family dwelling that is located on the same lot as the

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<sup>4</sup> "Compatibility review" is not a defined term, although "compatibility with other uses" is one of the criteria for approval of a use permit. See ZDC Sections 4-420.C and 6-308.

accessory dwelling unit.” The criteria set forth in ZDC Section 4-420.C., subparagraphs 1 and 3, are in direct conflict with those provisions of § 9-461.18.

The State statute expressly prohibits a municipality from imposing any condition for the construction of an ADU that requires a public hearing. As noted above, the initial consideration of a use permit by the DRC requires a public hearing, and if there is an appeal, a second public hearing will take place in front of the City Council. This applicant’s journey through the use permit and appellate processes was exactly what the state legislature intended to eliminate by adopting A.R.S. § 9-461.18.

At the City Council hearing, the Appellant acknowledged that the City may not “set restrictions for accessory dwelling units that are more restrictive than those for single-family dwellings within the same zoning area with regard to height,” see A.R.S. § 9-461.18.B.5., but argued that requiring a use permit for a two-story ADU is the same requirement for two-story single-family dwelling units and, therefore, not more restrictive. The problem with that argument is that when construing a statute, the primary goal is to find and give effect to the legislative intent while harmonizing all the provisions of the statute in such a way as not to nullify any provision because of the interpretation given to another provision. See *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles, Inc.*, 235 Ariz. 141, 329 P.3d 1043 (S.Ct. 2014); *Planned Parenthood of Ariz., Inc.*, 86 Arizona Cases Digest 33, 524 P.3d 262, ¶ 11 (App. 2022); *Gries v. Plaza Rio Mgmt. Corp.*, 236 Ariz. 8, 335 P.2d 530, ¶ 20 (App. 2014). Thus, to accept Appellant’s argument would negate the legislative intent of simplifying the ADU approval process and nullify the limitations in A.R.S. § 9-461.18.H.5. concerning the authority of a municipality to require a public hearing, conditional use permit, or a special exception for ADUs. A reasonable and harmonious interpretation of the phrase in A.R.S. § 9-461.18.B.5. relied upon by Appellant, is simply that a city may not set a height limit for an ADU that is less than the height limit for a single-family residence. In other words, if the height limit for a particular zoning district is thirty feet, then ADUs must be allowed that same height limit. This provision does not authorize a municipality to require a use permit for a two-story ADU.

Requiring an applicant for construction of any two-story ADU to obtain a use permit, which requires a public hearing along with the possibility of a second public

hearing if there is an appeal, conflicts with the express language of A.R.S. § 9-461.18. It also conflicts with the legislative intent to make the approval process for the construction of all ADUs as simple as possible by severely limiting the discretionary (subjective) requirements, such as a “compatibility review,” for approval that a municipality might try to impose to thwart construction of ADUs. It is my opinion that the legislature intended to eliminate from consideration in the ADU approval process the type of NIMBY arguments that were made at the City Council hearing.

**Conclusion**

It is my opinion that the City of Tempe does not have the legal authority to require a use permit pursuant to ZDC Section 3-420 for any two-story ADU because the use permit requirement, the attendant required public hearing, and at least two of the criteria that could be used to deny a use permit, conflict with A.R.S. § 9-461.18. Therefore, the answer to both questions referred to the Special Zoning Administrator is the same: The use permit requirement when applied to any two-story ADU conflicts with the express language and legislative intent of A.R.S. § 9-461.18 and is, therefore, unlawful.

Dated this 3<sup>rd</sup> day of October, 2025

By   
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Gary E. Donahoe  
Special Zoning Administrator