



## COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA  
95014-3255 TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333  
CUPERTINO.ORG

### CITY COUNCIL STAFF REPORT

Meeting: December 7, 2021

#### **Subject**

Consider an Interim Ordinance to implement new state legislation (Senate Bill 9), that provides for ministerial approval of up to two units and/or a lot split in a residential single-family zone (Application No.: MCA-2021-005; Applicant: City of Cupertino; Location: Citywide in all residential single family zones)

#### **Recommended Action**

Conduct the first and only reading of Ordinance No. 21-2235: "An Ordinance of the City Council of the City of Cupertino adding or Amending Cupertino Municipal Code Sections 18.20.170, 19.08.030, 19.12.030, 19.28.040, 19.28.110, 19.40.050, 19.40.060, 19.40.090, and 19.112.060 to adopt standards for ministerial approval of duplexes and lot splits in single-family residence districts".

#### **Discussion**

##### ***Background***

Senate Bill (SB) 9 uses a two-pronged approach to encourage increased housing density in single family residential zones throughout the State. First, the statute requires ministerial approval of up to two units, in one structure or two separate structures, in single-family residential zones, subject to certain conditions. Second, the statute requires ministerial approval of lot splits in single family residential districts, subject to similar conditions, with no public hearing. If the conditions are met for both of these approvals, the approvals can result in four units on what was formally one single family residential lot. The requirements for approval are discussed in detail below.

SB 9 requires ministerial approval of up to two residential units on any property that is zoned single-family residential, if the project:

1. Meets certain requirements for streamlining in SB 35;<sup>1</sup>

---

<sup>1</sup> The applicable SB 35 streamlining requirements exclude any parcel located within:  
(A) [Not applicable to SB 9 projects.]

2. Does not result in the demolition of BMR or rent controlled units;
3. Is not on a property occupied by tenants in the past three years;
4. Is not on a property that has been withdrawn from the rental market under the Ellis Act for the past 15 years; and
5. Is not on a property that is located in a historic district or included on the State Historic Resources Inventory, or within a site that is designated or listed as a city or county landmark or historic property or district pursuant to a city or county ordinance.

The local agency may impose objective zoning standards, objective subdivision standards, and objective design review standards “that do not conflict with [SB 9].” However, those standards may not be imposed if they would preclude the development of two units that are at least 800 square feet in floor area.

No setbacks are required for an existing structure or for new construction in the same location and having the same dimensions as an existing structure. Setbacks of up to four feet from the side and rear lot lines may be required for other projects. The local agency may require up to one parking space per unit unless the project is located within one-half mile walking distance of either a high-quality transit corridor or a major transit stop, or there is a car share vehicle located within one block of the parcel.

The local agency may deny a proposed housing development project if the building official makes a written finding, based upon a preponderance of the evidence, that the proposed housing development project (1) would have a specific, adverse impact upon

- 
- (B) Prime farmland or farmland of statewide importance.
  - (C) Wetlands.
  - (D) A very high fire hazard severity zone, subject to certain limitations.
  - (E) A hazardous waste site that is listed pursuant to Section 65962.5, unless the State Department of Public Health, State Water Resources Control Board, or Department of Toxic Substances Control has cleared the site for residential use or residential mixed uses.
  - (F) A delineated earthquake fault zone as determined by the State Geologist, unless the development complies with applicable seismic protection building code standards.
  - (G) A 100-year flood zone special flood hazard area, subject to certain exceptions.
  - (H) A regulatory floodway as determined by the Federal Emergency Management Agency, subject to certain exceptions.
  - (I) Lands identified as part of a conservation or natural resource protection plan.
  - (J) Habitat for species protected under state or federal law.
  - (K) Lands under conservation easement.
- (Gov. Code, § 65913.4(a)(6).)

public health and safety or the physical environment; and (2) there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.

Similar standards apply to lot splits under SB 9. The local agency must ministerially approve a lot split of any parcel in a single-family residential zone if:

1. The lot split creates two new parcels of approximately equal lot area (each at least 40 percent of the lot area of the original parcel);
2. Each new lot is at least 1,200 square feet;
3. Certain requirements for SB 35 streamlining are met;
4. The parcel has not been occupied by tenants in the past three years;
5. The parcel has not been withdrawn from the rental market under the Ellis Act for the past 15 years;
6. The parcel is not located in a historic district or on property included on the State Historic Resources Inventory, or within a site that is designated or listed as a city or county landmark or historic property or district pursuant to a city or county ordinance;
7. The parcel was not created through prior exercise of an urban lot split under SB 9; and
8. Neither the owner of the parcel being subdivided nor any person acting in concert with the owner has previously subdivided an adjacent parcel using an urban lot split as provided for in this section.

The lots created must be limited to residential use.

The lot split must comply with applicable objective requirements of the Subdivision Map Act, and the local agency may impose objective zoning subdivision and applicable design review standards subject to the limitations described above, but cannot require dedication of land or off-site improvements such as sidewalk, curb, and gutter improvements as a condition of approval of the subdivision. A lot split may also be denied based on the specific findings of adverse impacts previously discussed.

The approval of a lot split and the subsequent approval of two duplexes on the resulting parcels may result in the construction of up to four units. However, under SB 9, a local agency is not required to permit the construction of an accessory dwelling unit or a junior accessory dwelling unit on the resulting parcels where a duplex has also been approved for construction.

The local agency must require an applicant for an urban lot split (except a community land trust) to sign an affidavit stating that the applicant intends to occupy one of the housing units as their principal residence for a minimum of three years from the date of the approval of the urban lot split.

Finally, a local agency may not require the correction of existing, nonconforming zoning conditions as a condition of approving a lot split.

## *Analysis*

### **A. Development of Objective Standards and Regulations**

While SB 9 precludes discretionary review of qualifying projects on single family zoned property, the statute expressly authorizes the City to impose objective standards to the extent they do not reduce the development allowed under SB 9. Staff recommends adopting objective standards for ministerial approval of up to two dwelling units on a parcel and approval of lots splits pursuant to SB 9 as a matter of urgency since the state law goes into effect on January 1, 2022. The intent of the proposed Ordinance is to allow the City to accommodate additional units that must be approved under SB 9 within development footprint allowed by existing zoning, except in cases where SB 9 requires a moderately larger development footprint. In addition, the proposed Ordinance includes objective zoning, design, and subdivision standards that will allow staff to impose conditions to address neighborhood and community concerns (e.g., privacy) that would otherwise be addressed through a discretionary permitting process.

A summary of significant provisions of the proposed Ordinance is provided below.

#### **1. Ministerial approval of up to two units (including a duplex)**

SB 9 allows the City to impose objective standards on qualifying housing development projects so long as they do not conflict with the requirements of the statute, including minimum unit size and maximum rear and side setback requirements.

- a. *Unit Size and Floor Area Ratio:* Since SB 9 allows two units of up to 800 square feet, the Interim Ordinance allows a minimum of 800 square foot units. However, if the applicant proposes a project that would meet all the other standards required pursuant to the Ordinance, the project would be allowed a Floor Area Ratio equal to current discretionary approval standards. Currently, the Floor Area Ratio in the R-1 zoning district is 45% while in the RHS zoning district the Floor Area Ratio is based on the average slope of the lot, up to a maximum of 6,500 square feet. Should the other adopted standards conflict with the projects ability to construct 800 square foot units, the project would be allowed to at least construct the state mandated 800 square foot units. The larger unit in a duplex development may be up to 200 square feet larger than the smaller unit.
- b. *Setbacks:* Current setbacks are required for the front yard setback. Pursuant to SB 9, the City can require a maximum setback of four feet on the side and rear.

If a four foot setback for the rear and sides is proposed, windows on the second floor must be opaque, unopenable or above a 5 foot sill height. However, as an incentive, if an increased setback is proposed, standard windows may be proposed with incorporation of privacy protection, similar to the City's existing standards for second story windows. Objective standards for landscaping and privacy protection are included.

- c. *Second Story balconies/decks*: The City can regulate second story balconies and has the following options:
  - i. Disallow balconies altogether on projects proposed pursuant to SB 9.
  - ii. Limit balconies to properties that meet certain criteria (wider than 50 feet and not adjacent to property with a building pad five feet or lower than theirs) with an increased setback from abutting property lines.
  - iii. Limit balconies to the front facing or street facing facades.

*(Note that these regulations would not be applicable to all R-1 properties but only those that wish to pursue a project pursuant to SB 9. Alternate language has been provided in the proposed Interim Ordinance for each option for Council's consideration.)*

- d. *Parking*: SB 9 does not allow the City to require more than one parking space per unit. The proposed Ordinance requires that the parking space be in an enclosed garage of a size that accommodates a one car parking space as required by the City's current parking ordinance. Also, if the applicant were to propose any additional parking spaces, they must meet the City's requirements related to parking stall size and configuration. In addition, to ensure that the City continues to forward its mobility goals of the General Plan, driveway curb cuts are limited in size per the City's existing Public Works standards.
- e. *Basements*: SB 9 was adopted by the State to encourage the development of affordable units. The construction of basements, including the removal and off-haul of large amounts of soil to accommodate a basement, can add significantly to the cost of these units. As a result, it is proposed that basements be allowed only on lots greater than 5,000 square feet and be counted toward the Floor Area Ratio. The Ordinance includes setbacks for basements, lightwell railings and additionally similar to existing standards related to basements, regulations are proposed to ensure that lightwells are the smallest required pursuant to the Building Code. These regulations are proposed in a bid to lower the cost of construction and associated environmental impacts.
- f. *Design Standards*: Standards have been incorporated into the R1 and RHS zoning districts. In the R1 zoning district, these are to ensure that entry features as a result of duplex developments, do not overwhelm the development, while

advancing the General Plan goals of ensuring porches and stoops are located close to the right of way. Additionally, several existing design standards are incorporated into the proposed Ordinance (e.g., no more than 50% of the front face shall be occupied by the garage and the garage shall be setback a minimum of two feet from the face of living space). No more than two garage spaces may be visible from the right of way. Additional spaces must be proposed in tandem or at the rear of the property. Other design standards are proposed to ensure that blank facades are not proposed by requiring minimum architectural features or interest on facades facing the street. Among other design features, window trim is required around windows or as an alternative, windows are required to be setback to allow shading and interest to the building. A shadow study must be provided to ensure that no more than 10% of existing solar panels are blocked as a result of any proposed development. Finally, exposed or uncovered staircases to the second floor are disallowed to preserve privacy.

It should be noted that the proposed Interim Ordinance has also attempted to ensure that existing regulations in specific zoning areas – such as R1-a or R1-i – are incorporated in ministerial developments. The R1-a zoning regulations were crafted with significant input from the residents of this zoning district to retain a rural feel by incorporating traditional design features into development such as requiring porch features, increased setbacks, and traditional design features. The R1-i zoning district is a single-story overlay zoning district. An example is to include a requirement where “[t]he second floor shall not cantilever over the first floor in the R1-a zoning district.”

- g. *Private Open Space*: Each unit would be required to have a minimum of 15% of the unit’s floor area as private open space on the ground floor with no dimension less than 10 feet.
- h. *Refuse, Outdoor Lighting, and Other*: Space must be provided for all refuse and recycling containers on the site. All outdoor lighting and fencing must comply with the City’s existing standards. Yard encroachments continue to be allowed for architectural features that do not incorporate useable floor area – these include bay windows, chimneys etc.
- i. *Definitions*: Definitions have been added for “Bay Window” (required to determine floor area), “Gable End” (required for design standards), “Pie-shaped lots” (required for subdivision and access standards) and “Substantially Enclosed” (required to determine floor area). The definition of “Bay Window” and “Substantially Enclosed” is in keeping with the way these terms would be interpreted for discretionary projects even though they are not

currently defined in the Municipal Code. The definition for “Duplex” has been refined to include attached and detached units on a lot.

- j. *Regulations in the RHS Zoning District:* There are several large lots on steep slopes in the RHS zoning district which are the subject of SB 9 projects. In order to ensure that the impacts from development in the hills are minimized, existing limitations on grading and size of units are proposed to be retained.

Consistent with the General Plan policies and currently permitted densities, development in the hillsides would be allowed only if driveways are shared (*to minimize grading*) and new building pads are either located close to existing building pads or flat areas close to existing driveway locations (*to encourage clustering of development*). The existing Hillside Ordinance already implements much of the intent of the General Plan related to massing, following contours, disallowing much development on a ridgeline. The objective requirements of the Hillside Ordinance would continue to apply to SB 9 projects. Some minor clarifications have been made to existing language to clarify the language in Subsection 19.40.060(E) and 19.40.060(I). Additionally, objective standards have been added related to the following:

- Disallowing garages from being the predominant feature on units pursuant to SB 9.
- Entry feature regulations
- Screening structures from prominent intersections (listed in the Ordinance). Views of the hills from these intersections have historically been used to evaluate the visibility of hillside homes when Hillside Exceptions have been sought.
- Requiring privacy protection for second story windows and requiring windows to be opaque, unopenable, with fixed louvers or a minimum sill height of 5’1” unless setback a certain distance.

- k. *Condominium, Community Apartment or Stock Cooperative Project:* The Council has the option to provide policy direction to staff to disallow further subdivision of parcels (besides the urban lot split discussed below) in the R1 and RHS zoning districts. Language has been provided for Council’s consideration direction to staff in the event an application is made for condominium conversion, or similar types of ownership.
- l. *Frontage Improvements and Dedication:* SB 9 disallows the City to require dedications or frontage improvements with an urban lot split. However, it does not disallow the City from requiring these items when the lot is developed after subdivision. In the interests of furthering the City’s mobility and safety goals,

frontage improvements and dedication will be required at time of development of the lot.

- m. *Process*: A new permit type, Miscellaneous Ministerial Permit, is proposed to process projects pursuant to SB 9. As a result, amendments are proposed in Chapter 19.12, Administration, to ensure that the permit can be processed in compliance with state law. The Ordinance language authorizes the City Council to set a fee by resolution to recoup reasonable costs associated with processing such applications. It is proposed that notice be sent to adjacent neighbors as a courtesy, fourteen days before a decision is made on the project. It should be noted that the ministerial approval process does not involve any appeal process. It is expected that this will be made clear in the notice.

## 2. Ministerial lot split pursuant to SB 9

Presently, typical lot shapes in the City include interior lots (*a rectangular or close to rectangular shaped lot with street frontage on one street*); corner lots (*a lot that fronts two different streets*); cul-de-sac or pie shaped lots (*lots that have a significantly smaller front lot line than its rear lot line or lots with more than four lot lines where the front lot line is smaller than the other lot lines*); and flag lots (*a lot that has a rectangular buildable lot but with access either through another lot or a portion of its lot that is designed solely for access*). Staff recommends that objective standards for SB 9 lot splits should reflect design strategies and General Plan policies, taking into account these different lot shapes. In all cases, lot splits will be subject to SB 9's requirements that the two resulting lots be roughly equal in size (no more than 60% or less than 40% of the original lot size) and that the resulting lots be no less than 1,200 square feet.

- a. *R1 Zoned Lots*: The City's General Plan has a strategy (Strategy LU-27.7.2) regarding allowing "flag lots in cases where they are the sole alternative to integrate subdivisions with the surrounding neighborhood"—meaning that flag lots should be permitted only if there are others in the immediate neighborhood.<sup>2</sup> This policy seeks to create engaging, inviting street frontages by maximizing opportunities for interaction between neighbors and the frontage. Therefore, per the City's General, staff recommends developing objective standards that limit flag lot subdivisions to the extent such limitations are consistent with SB 9. It is anticipated that lots of up to 30 feet in width may be developed consistent with the proposed regulations related to garage façade etc. Subdivision is anticipated as follows:
  - Lots less than 60 feet of street frontage would be required to subdivide in a manner that would require a flag lot.

---

<sup>2</sup> For example, there are no flag lots in the Rancho Rinconada/Blanney neighborhoods.



- Lots with 60 feet or more would be subdivided in a manner that would create two lots with street frontage.
  - Existing flag lots would be subdivided in a manner to retain existing yards (i.e., front yard would remain front yard).
  - Corner lots would be subdivided along the longer street side property line to ensure that the resulting lots are not too narrow.
- b. *Driveways*: The General Plan also has a policy (Policy M-3.5) to “[m]inimize the number and width of driveway openings” in the interest of pedestrian and bicycle safety. Therefore, in lots with street frontage less than 60 feet, shared access over the flag lot access area would be required to minimize the number of conflicts with pedestrian and bicyclists and the number of curb cuts. For lots with a lot width of 35 feet or less, only a single car curb cut would be allowed. For lots wider than 35 feet, a two car curb cut may be proposed provided a minimum of 22 feet is available between any existing or proposed curb cut to retain and allow on-street parking to the maximum extent possible. If 22 feet is unavailable, only a single car curb cut or a shared driveway can be provided.
- c. *RHS Zoned Lots*: Hillside properties zoned for single family residential are also subject to SB 9. Of particular concern on these properties are building sites that are accessible via long driveways and not close to a public street. On these sites, shared common access is required to minimize points of conflict with pedestrians due to the lack of pedestrian amenities in the hillside zoning district and to minimize grading in the hills. Existing objective grading standards would also be applied to limit excessive grading on hillside lots. Additionally, the Floor Area Ratio of the original lot would be split proportionately between the two resulting lots.
- d. *Process*: Urban lot splits would be processed similar to a Parcel Map. However, no public hearing would be required due to limitations of state law. Notice would be sent to adjacent property owners as a courtesy prior to action on a project, to inform them of upcoming potential development. However, no appeals are allowed of ministerial decisions pursuant to state law.
3. Limitations on construction of accessory dwelling units
- Under SB 9, a local agency is not required to permit the construction of an accessory dwelling unit or a junior accessory dwelling unit on the resulting parcels, where a duplex has also been approved for construction. Staff recommends that the Ordinance limit the construction of accessory dwelling units and junior accessory dwelling units on subdivided lots where the construction of a duplex has been approved.

### **Sustainability Impact**

No sustainability impact.

### **Fiscal Impact**

No fiscal impact. Staff will present a permit fee for the new Miscellaneous Ministerial Permit at a future date to allow the City to recoup the costs of processing such permits.

### **California Environmental Quality Act (CEQA)**

An ordinance adopted to implement SB 9 “shall not be considered a project” under CEQA and is therefore statutorily exempt. (Gov. Code, §§ 66411.7(n), 65852.21(j).)

### **Next Steps**

The adoption of an interim ordinance under Government Code Section 65858 requires a four-fifths vote of the City Council. If adopted, the Interim Ordinance would take effect immediately and would remain in effect for 45 days. Within the 45-day period, Council may vote to extend the Ordinance for an additional 10 months and 15 days. In addition, it is anticipated that staff will develop a permanent ordinance to implement SB 9 prior to the expiration of the Interim Ordinance. An updated ordinance is expected to be presented to the Planning Commission and City Council by the Spring of 2022.

---

<u>Prepared by:</u>	Piu Ghosh, Planning Manager
<u>Reviewed by:</u>	Benjamin Fu, Director of Community Development Christopher Jensen, City Attorney
<u>Approved for Submission:</u>	Greg Larson, Interim City Manager

### **Attachments:**

A – Draft Interim Ordinance No. 21-2235

B – Senate Bill 9 (2019, Atkins)