



COMMUNITY DEVELOPMENT DEPARTMENT

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CITY COUNCIL STAFF REPORT

Meeting: November 2, 2021

Subject

Consider new state legislation (Senate Bill 9) that provides for ministerial approval of up to two residential units and/or a lot split in a residential single-family zone (Application No.: CP-2021-001; Applicant: City of Cupertino; Location: Citywide in all residential single family zones)

Recommended Action

That the City Council receive the report and provide direction to staff.

Discussion

Background

Senate Bill (SB) 9 uses a two-pronged approach to require increased housing density in single family residential zones. First, if certain conditions are met, the statute requires ministerial approval of up to two units in single family residential zones. The units may be in one structure or two separate structures. Second, the statute requires ministerial approval of lot splits in single family residential districts, subject to similar conditions. No public hearing is permitted for these ministerial approvals. If the conditions are met for both approvals, the applicant can build at least four units on what was formally one single family residential lot. The requirements for approval are discussed in detail below.

A. Ministerial Approval of Housing Development Projects

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;¹

¹ The applicable SB 35 streamlining requirements exclude any parcel located within:

- (A) [Not applicable to SB 9 projects.]
- (B) Prime farmland or farmland of statewide importance.
- (C) Wetlands.

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 is not on a property that has been withdrawn from the rental market under the Ellis Act for the past 15 years; and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 public health and safety or the physical environment and (2) there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.

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- (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).)

B. Ministerial Approval of Lot Splits

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.

A lot split must comply with applicable objective requirements of the Subdivision Map Act, and the local agency may impose applicable objective zoning, subdivision, and design review standards, subject to the limitations described above. However, a local agency 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 be denied based on the specific findings of adverse impact 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 conflict with SB 9. Staff recommends developing objective standards for ministerial approval of up to two dwelling units on a parcel and approval of lots splits pursuant to SB 9. Elements of a potential ordinance implementing SB 9 are presented below for Council consideration.

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. For example, if the development potential (i.e., Floor Area Ratio) of an existing property is already maximized, the City could limit new construction to the minimum requirements of the statute. Specific issues for Council consideration are highlighted below.

- a. *Unit size and Floor Area Ratio:* Since SB 9 allows two units of up to 800 square feet, it is anticipated that any future ordinance would allow a minimum of 800 square foot units. In the event the applicant proposes a project that would meet all the other standards required pursuant to the City's adopted ordinance, staff recommends that the project be allowed at a Floor Area Ratio similar to that allowed under existing standards single family residential 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. Council may consider a higher or lower Floor Area Ratio, subject to legal constraints, including constraints on zoning changes that result in a net reduction in density.
- b. *Second story setbacks:* Pursuant to SB 9, the City can require a maximum setback of four feet on the side and rear. However, if a four-foot rear or side setback on the second floor is proposed, the City could regulate the kind of windows (opaque or non-openable) or sill height (e.g., taller than five feet) that can be installed at that setback. Staff also recommends that objective standards for landscaping and privacy protection be included in the SB 9 implementation ordinance.

- c. *Second story balconies/decks*: The City can regulate second story balconies and has the following options to minimize impacts on any adjacent side or rear yards:
 - i. Disallow balconies altogether on projects proposed pursuant to SB 9.
 - ii. Allow balconies with far greater setbacks than allowed under the City's current processes.
 - iii. Limit balconies to front yard facing balconies on lots with front yards adjacent to a public street.
 - iv. Limit balconies to properties above a certain size (e.g., 5,000 square feet or more, or wider than 50 feet and not adjacent to property with a building pad five feet or lower than theirs).

(Note that these development standards would not be applicable to all R-1 properties but only those that wish to pursue a project pursuant to SB 9.)

- d. *Parking*: SB 9 does not allow the City to require more than one parking space per unit. Staff recommends development standards that implement this requirement and impose objective standards related to the size and configuration of off-street parking. The City could require 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 an applicant were to propose any additional parking spaces, they would have to meet the City's requirements related to parking stall size and configuration.
- 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, the Council has the option to:
 - i. Disallow basements in SB 9 projects.
 - ii. Allow basements in SB 9 projects but regulate the size of lot on which basements are allowed (e.g., greater than 5,000 sq. ft.), location of basement (e.g., setback of basement and of lightwells), regulate size of lightwells to minimum required, etc. in a bid to minimize excavation and associated impacts to neighbors and to the environment.
- f. *Design standards*: The City could adopt objective design standards related to the architectural look of the buildings and Council can provide any specific direction on these items. Examples of design standards are: "All structures shall have 6" siding"; "All roofing must be at a 4:12 pitch"; "All windows must have a minimum three-inch-wide window trim or be inset a minimum of two inches." Staff also recommends developing objective design standards for entry features of duplexes developed under SB 9.

- g. *Regulations in the RHS zoning district:* There are several large lots on steep slopes in the RHS zoning district that could be developed under SB 9. To ensure that the impacts from development in the hills are minimized, the City limit the amount of grading and the size of units.

There is language in several areas in the General Plan related to preservation of the preservation of the natural environment and hillsides (page LU-4, LU-9, and Goal LU-12, Policies LU-12.1, Strategy LU-12.3.1, Policy LU-12.2, Policy LU-12.4). To preserve the intent of the General Plan policies, staff recommends that subdivision in the hillsides should 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.

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 only "in cases where they are the sole alternative to integrate subdivisions with the surrounding neighborhood."² 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. Doing so could in some cases result in narrow lots with smaller building frontages. Council could provide direction regarding other preferred lot configurations.

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

- b. *Shared driveways*: General Plan Policy M-3.5 encourages policies to “[m]inimize the number and width of driveway openings” in the interest of pedestrian and bicycle safety. To the extent possible, particularly in cul-de-sac or pie-shaped lots, Council may consider shared driveways to minimize conflicts with pedestrians and bicyclists and the number of curb cuts.
 - c. *Orientation of flag lots*: Where flag lots are allowed, requiring the orientation of resulting lots in the same orientation as the existing lot would minimize the impacts to existing neighbors. (*I.e.*, the front yard for the new lots would be located where the front yard of the existing lot is, minimizing impacts to abutting neighbors.)
 - d. *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 those sites, staff recommends requiring shared access to minimize points of conflict with pedestrians and to minimize grading in the hills. Staff also recommends applying existing objective grading standards to limit excessive grading on hillside lots. Council may consider these and other policies to limit the impact of ministerially approved lot splits in the RHS zone.
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 SB 9 implementation 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.

B. Approval Process

SB 9 requires the City to process permits ministerially without public hearings. Council may consider requiring public notification prior to approval of SB 9 lot splits or housing development projects, but it is important to recognize that decisions regarding the approval of SB 9 projects will be determined based on the application of objective development standards.

A summary of existing and SB 9 approval process is provided below.

Type of Development	Non-SB 9 projects (Existing and future)	SB 9 projects	Difference
Single Story Development (1 or 2 units)	<ul style="list-style-type: none"> ▪ Building permit for principal unit and ADU in R1 zoning district and RHS zoning district. 	<ul style="list-style-type: none"> ▪ Building permit for up to two units 	<ul style="list-style-type: none"> ▪ No change in approval process
Two Story Development (1 or 2 units)	<ul style="list-style-type: none"> ▪ Two story permit with site signage and noticing of adjacent property owners ▪ Decision made after two-week comment period ▪ Building permit in RHS zoning district 	<ul style="list-style-type: none"> ▪ Ministerial permit approval ▪ Building permit in RHS zoning district 	<ul style="list-style-type: none"> ▪ No site signage ▪ No comment period ▪ Council may consider notice requirements
Lot split	<ul style="list-style-type: none"> ▪ Parcel Map with 300 foot noticing and public hearing in accordance with Subdivision Map Act requirements 	<ul style="list-style-type: none"> ▪ Parcel Map with no public hearing 	<ul style="list-style-type: none"> ▪ No public hearing permitted ▪ Council may consider notice requirements

Sustainability Impact

No sustainability impact.

Fiscal Impact

No fiscal impact.

California Environmental Quality Act (CEQA)

Receiving the staff report and providing preliminary direction to staff is not a final discretionary decision that has a potential to result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. As such, this action is not a project under CEQA Guidelines section 15378(a). Further, an ordinance adopted to implement SB 9 “shall not be considered a project” under CEQA. (Gov. Code, §§ 66411.7(n), 65852.21(j).)

Next Steps

The Community Development Department and City Attorney’s Office will continue developing an ordinance to implement SB 9 and will incorporate feedback received from

the City Council. We anticipate introducing an urgency ordinance for Council's consideration on December 7, 2021.

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Approved for Submission:

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Attachments:

A – Senate Bill 9 (Atkins, 2021)