

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Chris Burton

SUBJECT: SEE BELOW

DATE: October 15, 2021

Approved



Date

10/15/2021

INFORMATION

SUBJECT: OVERVIEW OF SENATE BILL 9 AND SENATE BILL 10 AND IMPLICATIONS TO PLANNING POLICY AND ZONING REGULATIONS

Building off the success of accessory dwelling units (ADUs) as a means to provide housing that is affordable by design, in recent years the California Legislature has focused on adding opportunities for infill housing in existing single-family neighborhoods. Although legislation furthering this type of development has been introduced in the past two legislative seasons, Senate Bill 9 (SB 9) and Senate Bill 10 (SB 10) are the first to pass. SB 9 and SB 10 were approved in the Assembly and Senate with an overwhelming majority and were signed into law by Governor Newsom on September 16, 2021. Both bills become effective on January 1, 2022.

This memorandum is intended to provide background information for the City Council in preparation for its Study Session on October 28, 2021 entitled *Overview of Senate Bill 9 and Senate Bill 10 and Implications to Planning Policy and Zoning Regulations*. In addition, this memorandum provides background information on the provisions of SB 9 and SB 10, steps the City must take to implement SB 9 and SB 10, and a comparison of SB 9 provisions with the draft Opportunity Housing policy proposal.

Senate Bill (SB 9)

Key Provisions

SB 9 states that access to affordable housing is a matter of statewide concern and not a municipal affair; therefore, SB 9 applies to all counties and cities, including charter cities. SB 9 can be broken into two primary components: 1) provisions that allow subdivisions of a single-family zoned lot into two lots; and 2) provisions that allow construction of two units on a single-family zoned property. These provisions can be used in concert, so an applicant could subdivide and build two units on each parcel.

Number of Units

Both two-unit projects and subdivisions authorized under SB 9 must be processed ministerially, meaning no public hearing and no review under the California Environmental Quality Act (CEQA); these ministerial approval processes will need to be administered by the Planning Division. Sites that are considered especially environmentally sensitive are excluded from this bill, as discussed later in this memorandum. ADUs may also be constructed on the property unless the property has been created using the SB 9 lot split provisions and uses the two-unit provisions on that same lot. Most interpretations of this legislation are that a single-family property could result in no more than four units. However, staff has recently reviewed an interpretation indicating that SB 9 allows the addition of two units on a property that already contains a single-family dwelling and may also have ADUs. It is possible that SB 9 would result in more than four units, and staff is still reviewing this issue with the City Attorney's Office and will seek guidance from the State Department of Housing and Community Development (HCD). At the time of the writing of this memorandum, no guidance has been issued.

Development Standards

The City may apply objective development standards, but those standards cannot preclude construction of at least two units of 800 square feet in size each. Objective standards are standards that involve no exercise in judgment to apply, such as numeric setback requirements, height, lot coverage, etc. SB 9 includes the following mandatory development standards:

- Cannot require more than four-foot side and rear setbacks for SB 9 developments;
- Cannot require more than one parking space per unit. Cannot require any parking for projects within a half-mile walking distance of high-quality transit or major transit stops, as defined by state law, or if there is a car share vehicle located within one block;
- Must allow construction of attached units; however, attached units must be designed to meet all requirements for selling each unit individually; and
- No setback can be required for existing structures nor can the City require the correction of non-conforming zoning conditions on a property as a condition of approval of a project or deny a project due to existing non-conforming conditions.

Under the subdivision provisions of SB 9, the City must also allow a single-family zoned property to be subdivided into two roughly proportional lots. To ensure rough proportionality, SB 9 specifies that one lot cannot be less than 40 percent the size of the other. No lot can be less than 1,200 square feet, but cities may adopt a lower minimum lot size. SB 9 includes the following allowances and restrictions on subdivisions:

- Cannot require dedication of right-of-way or construction of off-site improvements (such as installation of sidewalk where there is none);
- May require that parcels have access to a public right-of-way;
- May require easements for the provision of public services and facilities; and
- Must require the applicant to sign an affidavit stating that the applicant intends to live on one of the properties as their primary residence for at least three years after the date of the

subdivision. This requirement does not apply to an urban land trust or qualified non-profit.

Cities may deny an SB 9 two-unit project or subdivision that otherwise meets the requirements of SB 9 only if the Building Official determines it will result in a specific, adverse impact on health and safety and there is no feasible way to mitigate the impact.

Qualifying Properties

SB 9 applies to any property zoned single-family that is within an urbanized area or cluster within San José's Sphere of Influence. In San José, this means the R-1 zoning districts and Planned Development districts that allow single-family residences. However, staff's experience with ADUs indicates that many single-family properties in Planned Development districts will have Homeowner's Association restrictions that will preclude SB 9 projects. Regardless of zoning, properties are excluded from using SB 9 for two-unit projects and/or subdivisions if they are located in any of the following areas:

- Prime farmlands or farmlands of statewide importance, or farmlands protected by a local ordinance
- Wetlands, as defined in the United States Fish and Wildlife Service Manual
- Within a very high fire hazard severity zone
- A hazardous waste site
- Within a delineated earthquake fault zone, unless the project is designed to meet building code requirements for building within such zone
- Within a special flood hazard area or regulatory floodway, unless certain requirements are met
- Lands identified for conservation in an adopted conservation plan or under a conservation easement
- Habitat for protected species
- Within a historic district or on a site that is designated as historic

A property can only be subdivided according to SB 9 once. SB 9 also precludes the same applicant, or someone working in concert with the applicant, from subdividing adjacent properties. This, along with the owner-occupancy provisions, appears to be an attempt to prevent absentee investors from using the subdivision provisions. Jurisdictions may not impose any additional owner-occupancy requirements.

Protection of Existing Rental Housing Stock

SB 9 includes several protections for existing affordable and rental housing stock and provisions to ensure that the units created by SB 9 add to a jurisdiction's housing stock. Specifically:

- Units created by SB 9 cannot be rented for terms of 30 days or less. This applies to both two-unit projects under SB 9 and to properties that are subdivided according to SB 9.

- SB 9 projects cannot alter or demolish rent-controlled units, deed-restricted units, units where the Ellis Act has been exercised to remove the unit from the rental market, or units that have been occupied by a tenant within the prior three years.
- SB 9 projects cannot result in the demolition of more than 25 percent of existing exterior walls of a unit unless it has not had a tenant in the prior three years, or the City adopts an ordinance allowing such demolition.

The City of San José's rent control and Ellis Act ordinances apply to properties of three or more units; therefore, it is not expected that the protections listed above will be a frequent constraint for those seeking to pursue an SB 9 project, although there may be other constraints that make an SB 9 project undesirable or infeasible for an applicant. The provision prohibiting demolition or alteration of a home that has been rented will likely be the most frequent situation that arises in San José with regards to the provisions that protect existing housing stock. While there is some allowance for cities to adopt their own standards, it is unclear how the two demolition provisions interact with each other as both prohibit demolition of a rental unit but only one of the provisions appears to allow a city to override that restriction. Staff is seeking clarification on this and other outstanding questions on the interpretation of various provisions of this law and will provide new information to the City Council when it is obtained.

SB 9 and Opportunity Housing

As part of the solution to the severe housing shortage and to establish a transition area between Urban Village boundaries and surrounding residential neighborhoods, the City Council directed Planning Division staff to explore Opportunity Housing as part of the [General Plan 4-Year Review](#).¹

Staff presented recommendations at the February, July, and August 2020 General Plan Review Task Force meetings. The staff recommendation included:

- Allow Opportunity Housing within the area approximately a half-mile around transit-oriented urban villages and/or on parcels that share a property line with lands that allow multifamily development; and
- Potential next steps to further explore Opportunity Housing.

At the August 20, 2020 Task Force meeting, the Task Force voted to recommend that:

- The City Council should explore Opportunity Housing for properties citywide with a Residential Neighborhood land use designation; and
- Staff should proceed with its recommended Opportunity Housing work plan and prioritize urban village planning.

As shown in the timeline below, staff plans to present to the City Council both the recommendations from staff and the Task Force, a summary of public comments, and a

¹ <https://www.sanjoseca.gov/your-government/departments/planning-building-code-enforcement/planning-division/citywide-planning/envision-san-jos-2040-general-plan/general-plan-4-year-review>

feasibility study that looks at the economics of Opportunity Housing. The City Council will then consider whether to direct any further action on Opportunity Housing.

Staff and the General Plan Review Task Force explored allowing up to four units per parcel that could include a mix of a single-family home, duplex, triplex, or fourplex for a total of four dwelling units on the parcel while generally maintaining zoning setbacks and heights. This type of development was allowed in San José before World War II and still exists in many older neighborhoods.

In accordance with state ADU law effective January 1, 2021 and existing local zoning regulations for setbacks and height limits, ADUs could also be allowed. State law now allows duplexes to potentially have two detached ADUs (one detached ADU per duplex unit) and one attached ADU, for a total of five units. Triplexes and fourplexes are potentially allowed two detached ADUs and one attached ADU, for a total of six units for a triplex and seven units for a fourplex. The multifamily unit would have to be built and occupied first before it could qualify to build ADUs. Unless this state law and the zoning ordinance are amended, opportunity housing proposals could also build ADUs within these parameters – if the City Council decides to move forward with the Opportunity Housing concept.

SB 9 and the City’s draft Opportunity Housing policy proposal overlap in many ways, as they both introduce additional units into single-family neighborhoods. The following table compares the two policies:

SB 9 & Opportunity Housing Comparison

	<i>SB 9</i>	<i>Opportunity Housing</i>
<i># Units allowed</i>	Two new units on any single-family zoned property. This bill would allow up to four units if there is a subdivision. Staff needs guidance from the state as to whether the existing provisions for ADUs could result in more than four units on properties developed under SB 9.	Up to 4 units on a parcel + 3 ADUs per City ADU ordinance and State law (two detached, one attached) Maximum number of units: 7
<i>Type of Units allowed</i>	Duplexes and Single-Family Homes	Duplexes, Triplexes, and Fourplexes
<i>Geographic bounds</i>	Citywide in any single-family zone. Certain hazard zones are excluded (e.g., areas with high wildfire risk, geologic hazard zones).	<u>Council Direction:</u> On properties with a Residential Neighborhood land use designation near transit-oriented Urban Villages or adjacent to properties that allow multi-family uses.

		<p><u>Staff Recommendation to Task Force:</u> On properties with a Residential Neighborhood land use designation within a half-mile of Transit Urban Villages or adjacent to properties with existing multifamily housing types or properties designated for multifamily housing.</p> <p><u>Task Force recommendation:</u> Citywide on any properties designated Residential Neighborhood</p>
<i>Lots can be subdivided?</i>	Yes, allows subdivision into two lots.	To be determined (TBD), should Council provide direction to develop a policy and ordinance framework to allow Opportunity Housing.
<i>Allows demolition of an existing structure?</i>	Yes, in certain circumstances. Prohibits demolition of rent-controlled units, restricted affordable units, units where the Ellis Act has been used, and units that have been rented in the past three years.	TBD. Restrictions on rent-controlled or restricted units are proposed to be evaluated should Council provide direction to develop an Opportunity Housing policy and ordinance framework.
<i>Parking</i>	Cannot require more than one space/unit, none if near transit.	TBD, should Council provide direction to develop a policy and ordinance framework to allow Opportunity Housing.
<i>Excludes historic properties?</i>	Yes	As presently proposed would consider adaptive re-use of designated or eligible properties/structures
<i>Ministerial project approval?</i>	Yes	Yes

Practical implications of implementing SB 9

1. Potential owner/developer interest in building units under SB 9

With ADUs, there was a slow ramp-up over several years before this development type gained large-scale popularity. Staff does not anticipate such a slow ramp-up for SB 9 projects as many construction and design companies that focus on ADUs will add SB 9 projects to their repertoire and begin to promote them. Staff is already fielding about five or six questions daily from homeowners, property owners, and developers on SB 9. Still, staff’s experience is that many

owners with properties eligible for an ADU have not taken advantage of the ability to build one often due to financial feasibility. Additionally, neighborhoods with homeowner's associations are likely to have Conditions, Covenants, and Restrictions (CC&Rs) that preclude SB 9 projects, and the legislature has not included the override to CC&Rs in SB 9 that is included in ADU legislation.

Staff expects that the effects of SB 9 will be similar to that of recent ADU law and city ordinance changes, and do not anticipate SB 9 to result in wholesale changes to single-family neighborhoods throughout the City. Further, the requirement that lots be roughly proportional will likely require demolition of the existing home to accommodate an SB 9 subdivision which, combined with the owner-occupancy requirement, will limit the use of the subdivision provisions. The Turner Center for Housing Innovation at the University of California, Berkeley issued a report in July 2021 that assesses the viability of new housing under SB 9.² The Turner Center found that SB 9 will have limited impacts and most parcels in the state cannot feasibly build new homes. Their report estimates that 97 percent of all existing single-family homes would be retained and that most parcels are too small to feasibly subdivide. Of the 331,000 single-family parcels in Santa Clara County, the Turner Center estimates that only 30,500 are market-feasible for new units. The most financially advantageous model was to create a duplex out of existing structures.

2. Actions to Implement SB 9

Even though there are projected to be limited locations and situations where SB 9 housing would be feasible, staff still expects interest in SB 9 projects. There also will be a significant body of work for staff to prepare a zoning update to integrate SB 9 into existing zoning standards that do not anticipate this type of project. The City has some leeway on developing development standards for SB 9 projects and based on the community interest in Opportunity Housing, staff expects that any update to establish SB 9 development standards will include significant community interest with varying opinions. To facilitate local jurisdictions in implementing this new law, the legislature has included an exemption from the California Environmental Quality Act (CEQA) for any local ordinance that is adopted to implement SB 9. Issues that will need to be addressed to implement SB 9 include:

- Clarifying how SB 9 projects intersect with other state mandates, such as the Permit Streamlining Act, the Housing Accountability Act, the Housing Crisis Act of 2019, and various ADU legislation.
- Amending the Zoning Ordinance and Subdivision Ordinance to address SB 9 housing projects. While not required, staff also recommends developing citywide design standards for SB 9 housing that would promote good design and further neighborhood compatibility.
- Updating City processes to accept and process SB 9 applications. This will require coordination between departments, such as Public Works updating their subdivision application materials and processes, coordination with the Building Division and Fire Department to ensure that SB 9 developments do not create hazardous conditions,

² <https://turnercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf>

updates to Planning and Building application forms and processes, and developing interdepartmental materials to communication SB 9 projects to the public.

- Develop a process to monitor and enforce compliance with the SB 9 provisions requiring owner-occupancy of one of the units when new units are created through a subdivision.
- Determining staffing needs to implement SB 9, including near-term actions to comply with State law which becomes effective January 1, 2022 (such as basic development standards) and staff resources required to process SB 9 project applications. Staff will also need to assess what, if any additional permitting staff within Development Services are anticipated to be needed to process SB 9 permits in this and future fiscal years.

3. Items that City Council may want to consider and SB 9 Implementation Challenges

There are other outstanding questions and issues that will complicate San José's implementation of SB 9. SB 9 applies only to R-1 zoned properties, but due to historical development and zoning patterns, many of San José's single-family residential properties are zoned R-2 and would not qualify for SB 9. R-2 allows the construction of duplexes only on a small percentage of properties if consistent with the General Plan designation and following CEQA compliance and a publicly noticed discretionary hearing process. The City needs to decide if it makes sense to maintain more complex processes to construct two-family units in the two-family zoning district than it is to develop in the single-family zoning districts.

The City may also want to adopt other standards beyond SB 9 that are being contemplated as part of Opportunity Housing, such as allowing limited SB 9-type projects on historic properties where the project will not have a negative impact on the historic resource. It appears, however, that consideration of additional standards or policies beyond what is covered under SB 9 would not be covered under the SB 9 CEQA exemption, thereby necessitating environmental clearance for any additional policies or standards to be considered. Additionally, any such standards would need to be expressed as objective criteria.

Staff anticipates that the work to implement SB 9 will require at least one full-time Planner position to complete. This position would be responsible for proposing zoning code amendments, developing citywide design standards, and coordinating with Public Works, the Fire Department, and the Building Division to revise permit processes and application materials. Further complicating this work is that SB 9 will go into effect on January 1, 2022, and it is not possible to draft an ordinance that addresses all of these complex implementation issues by that time. In order to start accepting applications for SB 9 projects in January, at minimum the Development Services partners will need to coordinate to create application forms and processes, develop public communication materials, and determine how to integrate required SB 9 development standards within existing code language.

General Plan Four-Year Review and Opportunity Housing

Staff anticipates bringing its recommendation on Opportunity Housing, as part of the Four-Year Review of the General Plan process, to the Planning Commission on November 17, 2021, and to City Council on December 14, 2021; staff will also bring forward the Task Force's recommendation. The Staff recommendation will be provided within the context and the legal

parameters of SB 9; staff will also provide a cost feasibility analysis of Opportunity Housing prepared by its consultant, Strategic Economics, that analyzes where and what type of Opportunity Housing could be anticipated to be built in current market conditions. This study analyzes the feasibility of Opportunity Housing citywide and will provide some additional insight on the cost feasibility of SB 9 housing type projects.

Senate Bill SB 10

Similar to SB 9, SB 10 was approved in the Assembly and Senate with an overwhelming majority and was signed into law by Governor Newsom on September 16, 2021. SB 10 becomes effective on January 1, 2022.

The bill would authorize a local government to voluntarily adopt a zoning ordinance to allow up to ten dwelling units on any parcel within a transit-rich area or urban infill site³ at the height specified in the ordinance. The bill defines a “transit-rich area”⁴ as an area within a one-half mile radius of a “major transit stop,”⁵ or a parcel on a “high-quality bus corridor,” with average service intervals of no more than 15 minutes during peak hours. While cities could always adopt these types of ordinances using their local land use authority, that work requires CEQA analysis. Under SB 10, zoning ordinances that comply with SB 10 are exempt from CEQA review. SB 10 sunsets at the end of 2028 so should a local government adopt an ordinance update after January 1, 2029, it would not be exempt from CEQA; however, the operative date of an ordinance may extend beyond January 1, 2029.

SB 10 is voluntary and is not a mandate of local agencies. The bill does not directly change any land use regulations or allowances, nor does it require a local agency to adopt any new regulations or allowances. Any zoning ordinance update, General Plan update, or other policy updates that allows up to ten units per property on properties that meet SB 10 criteria are exempt from CEQA review. A local government can use SB 10 to override voter-imposed land-use

³ “Urban infill site” means a site that satisfies all of the following: (a) A site that is a legal parcel or parcels located in a city if, and only if, the city boundaries include some portion of either an urbanized area or urban cluster, as designated by the United States Census Bureau, or, for unincorporated areas, a legal parcel or parcels wholly within the boundaries of an urbanized area or urban cluster, as designated by the United States Census Bureau. (b) A site in which at least 75 percent of the perimeter of the site adjoins parcels that are developed with urban uses. For the purposes of this section, parcels that are only separated by a street or highway shall be considered to be adjoined. (c) A site that is zoned for residential use or residential mixed-use development or has a general plan designation that allows residential use or a mix of residential and nonresidential uses, with at least two-thirds of the square footage of the development designated for residential use.

⁴ “High-quality bus corridor” means a corridor with fixed route bus service that meets all of the following criteria: (a) It has average service intervals of no more than 15 minutes during the three peak hours between 6 a.m. to 10 a.m., inclusive, and the three peak hours between 3 p.m. and 7 p.m., inclusive, on Monday through Friday. (b) It has average service intervals of no more than 20 minutes during the hours of 6 a.m. to 10 p.m., inclusive, on Monday through Friday. (c) It has average intervals of no more than 30 minutes during the hours of 8 a.m. to 10 p.m., inclusive, on Saturday and Sunday.

⁵ “Major transit stop” means a site containing any of the following: (a) An existing rail or bus rapid transit station. (b) A ferry terminal served by either a bus or rail transit service. (c) The intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.

restrictions by a two-thirds supermajority vote of the legislative body. Other key provisions in SB 10 include:

- When adopting an ordinance, SB 10 requires that a local government demarcate the areas that are subject to the ordinance and make findings that the increased density supports the agency's duty to affirmatively further fair housing.
- A local government that approves a zoning ordinance according to SB 10 shall not subsequently reduce the density of any parcel subject to the ordinance.
- Up to two ADUs or junior ADUs would be permitted on each parcel, and these ADUs would not count toward the ten-unit threshold.
- SB 10 does not apply to parcels in a very high fire severity zone, in an open space or park, or recreational lands approved by the voters.
- A project may not be subdivided into smaller projects to avoid the limitations of SB 10.

SB 10 only exempts legislative acts of the local agency (general plan amendment and rezoning) and does not provide a CEQA exemption or specify an approval process for individual housing project permit applications that may be submitted under an ordinance that is voluntarily adopted by a local agency according to SB 10. For this reason, if the City were to adopt an ordinance according to SB 10, new housing development applications under that ordinance would be subject to appropriate CEQA review unless the local ordinance provides for ministerial processing or the project is exempted by CEQA or another law.

If the City were to move forward with Opportunity Housing or other strategies to facilitate medium density housing units, SB 10 could be used to exempt General Plan or zoning ordinance amendments from CEQA analysis to implement these strategies but only in locations that meet the transit proximity and urban location criteria.

CONCLUSION

Staff is currently coordinating with the California Department of Housing and Community Development (HCD), Santa Clara County Planning Collaborative, Association of Bay Area Governments, and the City Attorney's Office on interpretations and ideas for SB 9 implementation. Staff expects that HCD will release guidance, much like they did with recent ADU legislation. A City Council Study Session entitled *Overview of Senate Bill 9 and Senate Bill 10 and Implications to Planning Policy and Zoning Regulations* will be held on October 28, 2021.

HONORABLE MAYOR AND CITY COUNCIL

October 15, 2021

Subject: Senate Bill 9 and Senate Bill 10 Implications to Planning Policy and Zoning Regulations

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COORDINATION

Preparation of this information memorandum was coordinated with the City Attorney's Office and the Housing Department.

/s/

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