SB 9: MINISTERIAL APPROVAL OF DUPLEXES AND URBAN LOT SPLITS

Introduction

Senate Bill 9 (SB 9), the California Housing Opportunity and More Efficiency (HOME) Act, was signed into law by Governor Newsom on September 16, 2021, which overrides existing density limits in single-family zones. SB 9 is intended to support increased supply of starter, modestly priced homes by encouraging building of smaller houses on small lots. Projects that meet SB 9 requirements are exempt from the California Environmental Quality Act (CEQA) provisions.

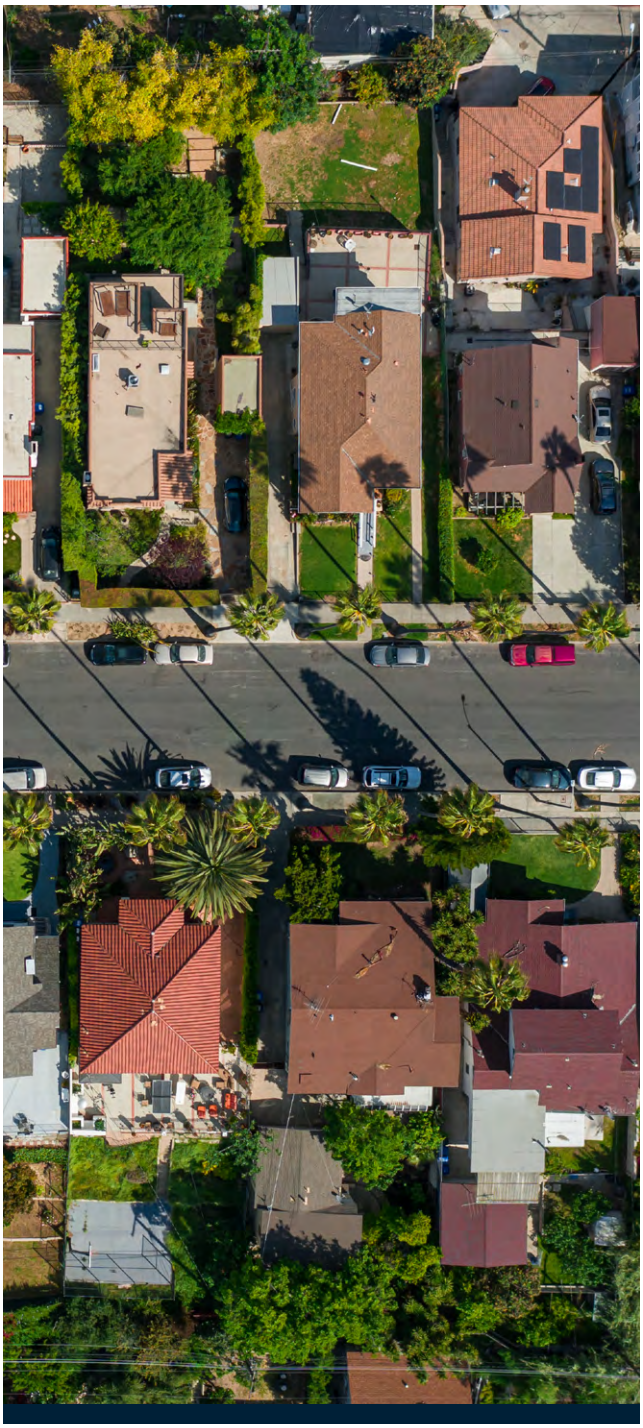
In addition, SB 9 waives any discretionary review and public hearings for:

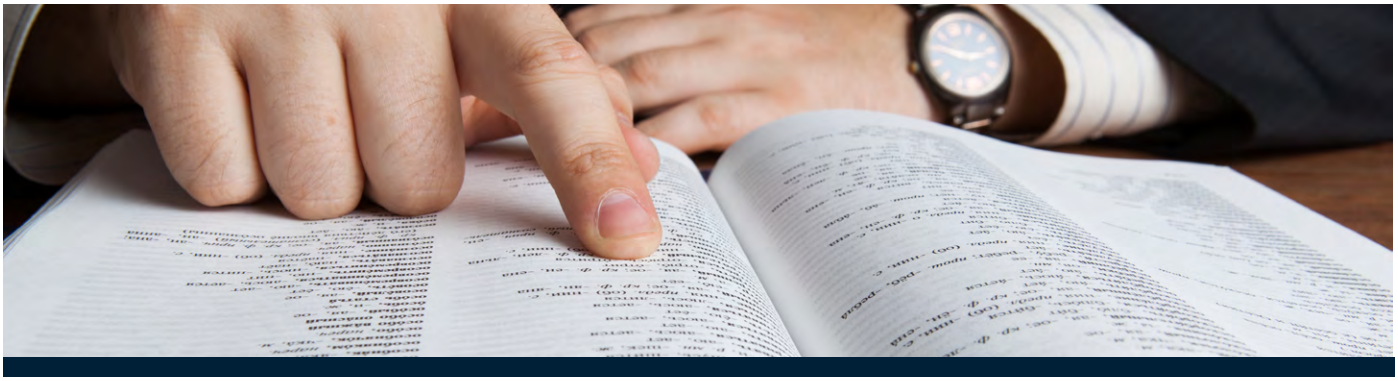
1. Building two homes on a parcel in a single-family zone typically referred to as a "Single Lot Duplex"; and,
2. Subdividing a lot into two that can be smaller than required minimum size, typically referred as a "Urban Lot Split".

Used together, this allows four homes, where one was allowed before. SB 9 can be used to:

1. Add new homes to existing parcel;
2. Divide existing house into two or multiple units; and,
3. Divide parcel and add homes.

SB 9 adds to Government Code Sections 65852.21 and 66411.7 and amends Government Code Section 66452.6 (Subdivision Map Act).





Key Definitions Guiding SB 9 Provisions

- **Single-family residential zones[1]:** Proposed SB 9 projects are to be in single-family residential zones. Parcels located in other zones (e.g., multi-family, commercial, mixed-use or agricultural) are not subject to SB 9 mandates even if they permit single-family residential uses. Agencies should carefully review the zone district descriptions in the zoning code and the land use designation descriptions in the Land Use Element of the General Plan to identify zones whose primary purpose is single-family residential uses and subject to SB 9.
- **Ministerial Review[2]:** A process for development approval involving no personal judgment by the public official as to the wisdom of carrying out the project. The public official merely ensures that the proposed project meets all the applicable objective standards for the proposed action but uses no special discretion or judgment in reaching a decision. A ministerial review is nearly always a "staff-level review" where staff compares the application materials (e.g., site plan, project description, etc.) with the objective development standards, objective subdivision standards, and objective design standards.
- **One-unit Development[3]:** SB 9 requires the ministerial approval of either one or two residential units. Government Code §65852.21 indicates that the development of just one single-family home was indeed contemplated and expected.
- **Objective Standards[4]:** The local agency may only apply objective development standards (e.g., defined front setbacks and heights), objective subdivision standards (e.g., minimum lot depths), and objective design standards (e.g., roof pitch, eave projections, façade materials, etc.). These three terms mean standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal.
- **Findings of Denial[5]:** To deny a proposed housing development or lot split, a local agency's building official must make a written finding, based upon a preponderance of the evidence, that the proposed housing development would have a specific, adverse impact, as defined in Government Code §65589.5, subdivision (d)(2), upon public health and safety or the physical environment and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. "Specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete (Gov. Code, §65589.5, subd. [d][2]).

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[1] *Gov. Code, §§ 65852.21, subd. (a); 66411.7 subd. (a)(3)(A))*

[2] *Gov. Code, §§ 65852.21, subd. (a); 66411.7, subds. (a), (b)(1))*

[3] *Gov. Code, §§ 65852.21, subd. (a); 65852.21, subd. (b)(2)(A))*

[4] *Gov. Code, §§ 65852.21, subd. (b); 66411.7, subd. (c))*

[5] *Gov. Code, §§ 65852.21, subd. (d); 66411.7, subd. (d))*

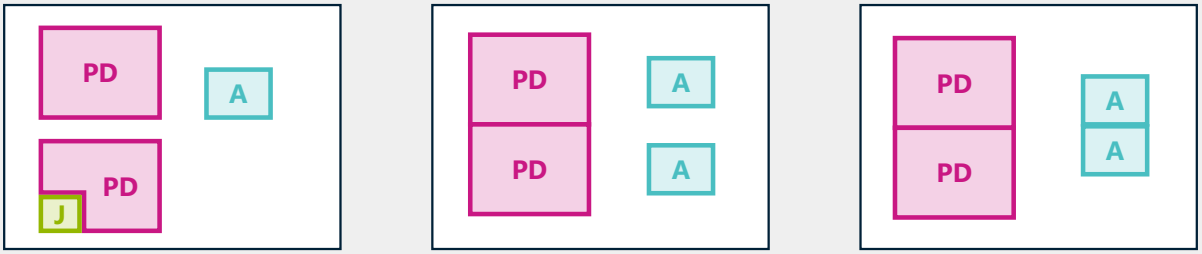
- **"Units" Defined:** Below are definitions of three types of housing units described in SB 9 and related ADU law to clarify which development scenarios are (and are not) made possible by SB 9:
  - **Primary Unit** - A primary unit (also called a residential dwelling unit or residential unit) is typically a single-family residence or a unit within a multi-family residential development, and distinct from an ADU or a Junior ADU. Examples: single-family residence (i.e., one primary unit), a duplex (i.e., two primary units), a four-plex (i.e., four primary units), etc.
  - **Accessory Dwelling Unit** - An ADU is an attached or a detached residential dwelling unit that provides complete independent living facilities for one or more persons and is located on a lot with a proposed or existing primary residence. It includes permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel on which the single-family or multifamily dwelling is or will be situated.
  - **Junior Accessory Dwelling Unit** - A Junior ADU is a unit that is no more than 500 square feet in size and contained entirely within a single-family residence. A Junior ADU may include separate sanitation facilities or may share sanitation facilities with the existing structure.

  The terms "unit," "housing unit," "residential unit," and "housing development" mean primary unit(s) unless specifically identified as an ADU or Junior ADU or otherwise defined. This distinction is critical to successfully implementing SB 9 because state law applies different requirements (and provides certain benefits) to ADUs and Junior ADUs that do not apply to primary units.

Housing Units Allowed For SB 9 Projects

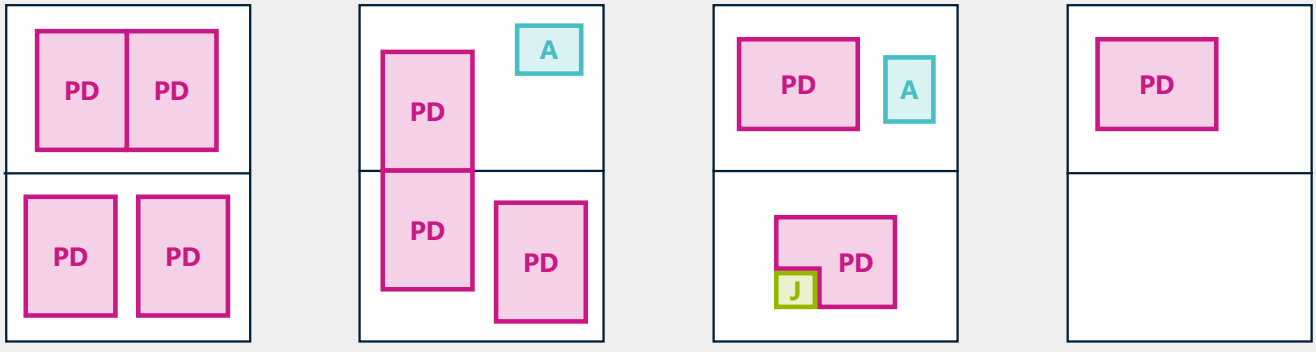
SB 9 allows for up to four units per eligible single-family zoned parcel, in the following combinations:

SB 9 Development Options: No Lot Split



SB 9 Development Options: Lot Split

Lot splits can include development of one or two PDs per lot, one PD + one ADU or JADU per lot, or no development on one lot.



PD = primary dwelling **A** = accessory dwelling unit (ADU) **J** = junior accessory dwelling unit (JADU)

Does the Project Qualify?

QUALIFICATIONS FOR 2-UNIT DEVELOPMENTS AND LOT SPLITS

- Single-family lot (usually R-1)
- Located in an urbanized area or urban cluster, as defined by the Census Bureau
- Not in state/local historic district, not an historic landmark
- Meets requirements of SB 35 subparagraphs (a)(6)(B)-(K)[7]:

Property cannot be:

- Prime Farmland of statewide importance (B)
- Wetlands (C)
- Identified for conservation easement (I+K)
- Habitat for protected species (J)

Property cannot be (unless meeting specified requirements):

- Within a very high fire hazard safety zone (D)
- A hazardous waste site (E)
- Within a delineated earthquake fault zone (F)
- Within a 100-year floodplain or floodway (G+H)

Project would not alter nor demolish:

- Deed-restricted affordable housing
- Rent-controlled housing
- Housing on parcels with an Ellis Act eviction in the last 15 years
- Housing occupied by a tenant currently or in the last 3 years a lot can split and new units can be added to the lot without the Ellis-affected building.

ADDITIONAL QUALIFICATIONS FOR 2-UNIT DEVELOPMENTS

- Project does not remove more than 25% of exterior walls on a building that currently has a tenant or has had a tenant in the last 3 years (even if the rental unit itself isn't altered)

ADDITIONAL QUALIFICATIONS FOR LOT SPLITS

- Lot is split roughly in half – smaller lot is at least 40% of the original lot. Each lot can be smaller than required minimum lot size.
- Each new lot is at least 1,200 square feet. If minimum size is 1,200 square feet, this requires a 2,400 square feet lot, or 3,000 square feet if it is a 60/40 split. In addition, the 1,200 square feet minimum can be lowered by local ordinance.
- Lot is not adjacent to another lot split by SB 9 by the same owner or "any person acting in concert with the owner"
- Lot was not created by a previous SB 9 split. This does not apply to previous lot splits taken under usual Map Act procedures.

[7] *See §65913.4(a)(6) Exclusions for full details and definitions*

Limitations Applied

2-UNIT DEVELOPMENTS AND LOT SPLITS

- Agencies ***MUST*** only impose objective zoning standards , subdivision standards[8], and design standards (they may impose a local ordinance to set these standards)
  - These standards ***MUST*** not preclude 2 units of at least 800 square feet
- Projects ***MUST*** follow local yard, height, lot coverage, and other development standards, ***EXCEPT***:
  - A local agency ***MAY NOT*** require rear or side setbacks of more than 4 feet, and cannot require any setback if utilizing an existing structure or rebuilding a same-dimensional structure in the same location as an existing structure
  - Project ***MAY*** be denied if a building official makes a written finding of specific, adverse impacts on public health or safety based on inconsistency with objective standards, with no feasible method to mitigate or avoid impact
- Agency ***MAY*** require 1 parking space/unit, unless the project is:
  - Within ½ mile of a "high quality transit corridor" or a "major transit stop"[9]
  - Within 1 block of a carshare vehicle
- Agency ***MUST*** require that units created by SB 9 are not used for short-term rental (up to 30 days)
- Agency ***MUST*** allow proposed adjacent or connected structures as long as they comply with building safety codes and are sufficient to allow separate conveyance"
- HOAs ***MAY*** restrict use of SB 9

ADDITIONAL LIMITATIONS FOR 2-UNIT DEVELOPMENTS

- Without a lot split, agency ***CANNOT*** use SB 9 to limit ADUs/JADUs (e.g., lot can have 2 primary units +1 ADU, + 1 JADU)
- Agency ***MUST*** include number of SB 9 units in annual progress report
- For properties with on-site wastewater treatment, agency ***MAY*** require a percolation test within last 5 years or recertification within last 10 years

ADDITIONAL LIMITATIONS FOR LOT SPLITS

- Agency ***MAY*** approve more than 2 units on a new parcel (including ADUs, JADUs, density bonus units, duplex units)
- Project ***MUST*** conform to all relevant objective requirements of Subdivision Map Act
- Agency ***MAY*** require easements for provision of public services and facilities
- Agency ***MAY*** require parcels to have access to, provide access to, or adjoin public right of way
- Project ***MUST*** be for residential uses only
- Applicant ***MUST*** sign affidavit stating they intend to live in one of the units for 3+ years[10]
- Agency ***MUST*** include number of SB 9 lot split applications in annual progress report
- Agency ***CANNOT*** require right-of-way dedications or off-site improvements
- Agency ***CANNOT*** require correction of nonconforming zoning conditions

[8] *"Objective" as defined by the Housing Accountability Act*

[9] *See §21155 and §21064.3 of the Public Resources Code for definitions*

[10] *Unless the applicant is a land trust or qualified non-profit*

Key Decisions for Agencies to Make

Whether to Require:

- 1 parking space per unit
- For 2-Unit Developments:
  - Septic tank percolation tests
  - Owner-occupancy
- For Lot Splits:
  - Public services/facilities easement
  - Right-of-way easements

Whether to Allow:

- Creation of lots to be less than 1,200 square feet
- Split to be more than 2 units or 2 new lots

Define:

- Objective zoning/subdivision/design review standards
- "Acting in concert with owner"
- "Sufficient for separate conveyance"

Create:

- Application forms and checklists
- Recording of deed restrictions for short-term rentals and future lot splits
- Owner-occupancy affidavit

Resources

- SB 9 Legal Text: leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9
- HCD's SB 9 Fact Sheet: www.hcd.ca.gov/docs/planning-and-community-development/SB9FactSheet.pdf
- HCD's ADU and JADU website: www.hcd.ca.gov/policy-research/accessorydwellingunits.shtml
- HCD's Streamlined Ministerial Approval Process: hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf
- California Coastal Commission's SB 9 Implementation Memo: documents.coastal.ca.gov/assets/rflg/SB9-Memo.pdf

Relationships to Other Laws

- **California Environmental Quality Act[11]:** CEQA does not apply to the decision to grant an application for a housing development or a lot split, or both.[12] Additionally, if a local agency chooses to adopt a local ordinance to implement SB 9 (instead of implementing the law directly from statute), the preparation and adoption of the ordinance is not considered a project under CEQA. In other words, the preparation and adoption of the ordinance is statutorily exempt from CEQA.
- **California Coastal Act of 1976:** The provisions of the California Coastal Act of 1976 are applicable to SB 9 urban lot splits, except that a local agency is not required to hold a public hearing for coastal development permit applications. SB 9 does contain Coastal Act savings clauses, meaning, that except for public hearing requirements, the Coastal Act continues to apply in full force in the coastal zone. In addition, certified Local Coastal Program (LCP) provisions continue to apply but, in most places, will need to be updated to conform with SB 9 to the greatest extent possible while still complying with the Coastal Act.
- **Accessory Dwelling Units[13]:** SB 9 and ADU Law (Gov. Code, §§65852.2 and 65858.22) are complementary. The requirements of each can be implemented in ways that result in developments with both "SB 9 Units" and ADUs. However, specific provisions of SB 9 typically overlap with State ADU Law only to a limited extent on a relatively small number of topics. Treating the provisions of these two laws as identical or substantially similar may lead a local agency to implement the laws in an overly restrictive or otherwise inaccurate way.
- **Housing Crisis Act (SB 330 and SB 8):** Local ordinances cannot impose restrictions that reduce the intensity of land use on housing sites (including total building envelope, density, etc.). In addition, SB 9 projects are subject to Permit Streamlining Act deadlines.
- **Housing Opportunity Act (SB 478):** Does not apply to single-family homes.
- **Homeowners Associations:** SB 9 contains no language related to superseding or limiting the scope of covenants, conditions, and restrictions (CC&Rs). Where the legislature has intended to supersede CC&Rs in order to promote housing, it has expressly done so. Therefore, it has been interpreted that HOAs may enforce a CC&R or other HOA governing document to prohibit or regulate the development of a unit or parcel that must be ministerially approved by the City under SB 9.

The purpose of this material is to provide guidance, which agencies and other entities may use at their discretion. This guidance does not alter lead agency discretion in decision-making, independent judgment and analysis, and preparing environmental documents for project or governmental action subject to CEQA requirements. This material is for general information only and should not be construed as legal advice or legal opinion.

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[11] *Gov. Code, §§65852.21, subd. (j); 66411.7, subd. (n))*

[12] *Pub. Resources Code, § 21080, subd. (b)(1), CEQA Guidelines, §§15300.1 and 15268.*

[13] *Gov. Code, §§65852.21, subd. (j); 66411.7, subd. (f))*