SB 9: Ministerial Urban Lot Splits and Duplexes

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Overview

What does SB 9 require?

This law requires that a city or county ministerially approve without discretionary review or a hearing either or both of the following in urban areas as defined, (subject to a number of exceptions and conditions):

- A housing development of no more than two units in a single-family zone (duplex*).
- The subdivision of an owner occupied parcel zoned for residential use, into two approximately equal parcels ("lot split") as long as neither parcel is less than 1200 square feet and the owner agrees to owner occupy one of the units for three years.

* The use of the term duplex for two units does not mean or imply that the two units must be connected.

What is ministerial approval?

There are generally two types of housing projects: Those that require discretionary vetting through public hearings and those that require only "ministerial" approval by the city or county planning staff, without further approval from elected officials.

Most large housing projects are not allowed ministerial review; instead, these projects are subject to public hearings and administrative review. On the other hand, projects reviewed ministerially require only an administrative review designed to ensure they are consistent with existing zoning rules and a general plan, as well as meeting standards for building quality, health, and safety as well as other objective standards that may be allowed. Most housing projects that require discretionary review and approval are subject to review under CEQA, while projects permitted ministerially generally do not thereby obviating the preparation of an environmental impact report. Ministerial approval is sometimes characterized as approval "by right."

Q1. Does SB 9 apply to single family residential zones?
A1. Yes, the law expressly applies to single family residential zones.

Q2. Are there other state laws that currently permit construction in single family residential zones?
A2. Yes. SB 9 is certainly not the first law to permit construction of additional units in single family residential zones. Current state law permits homeowners an effectively “by right” ability to construct accessory dwelling units (ADUs) on their property regardless of the home being in a single family residential zone.

In 2019 of a group of three laws (AB 68, AB 881 and SB 13) removed impediments to the construction of Accessory Dwelling Units (ADUs) and Junior ADUs. These three laws together require ministerial approval for ADUs and Junior ADUs which effectively allow the construction of up to three units even where the property is zoned for single family use. That existing law was in effect before passage of SB 9. Please see

this summary sheet prepared by Californians for Homeownership which described the impact of these laws in 2020. https://www.caforhomes.org/aduupdate

Q3. Will SB 9 help alleviate the state's housing shortage?
A3. SB 9 would allow for the development of up to four homes on lots on a plot of land where currently only one exists. This theoretically this could lead to the development of nearly 6 million new housing units. More realistically, assuming that only five percent of the parcels impacted result in the creation of new two-unit properties, this law would result in nearly 600,000 new homes.

The law also allows the creation of such units to be sold at market price and rented at market value. A lot of current developments limit the number of market rate units, and no such restrictions apply in this law.

However, this law contains a number of detailed conditions, exceptions and allowances that apply to the permitting of duplexes or to lot splits or both. So, SB 9 will not apply to every neighborhood within single family zoning.

Q4. Are there any provisions in SB 9 that are intended to preserve the character of a neighborhood or area?
A4. First, certain excluded areas such as historic areas, non-urban areas and "farmlands" are excluded in part so as to not disrupt the unique characteristics of the area. (See the section below which discusses exclusions from SB 9).

Second, SB 9 reiterates the right of cities and counties to adopt and enforce objective zoning standards, objective subdivision standards, and objective design review standards as long as such standards do not conflict with the other provisions of SB 9.

Third, SB 9 prohibits demolition of more than 25% or the exterior walls of an existing structure unless: 1) the site has been unoccupied by a tenant in the last three years or 2) unless approved by the locality. This last provision is primarily aimed at preventing the eviction of tenants from such properties for development.

Duplexes and Lot Splits -- Rules, conditions, exclusions and allowances

Excluded Properties

Q5. What types of properties or areas are excluded from the SB 9 ministerial procedures?
A5. SB 9 only applies ministerial approval to areas that are zoned for single family residential use. However, it does not apply to every such area. There are a number of excluded areas. For a property to be subject to the SB 9 procedures of ministerial approval for both duplexes and lot splits, the property *cannot* be located in any of the following areas:

1) Non-Urbanized areas

The duplex or parcel to be subdivided must be located within an urbanized area or urban cluster. If not, then the property is not subject to ministerial approval under SB 9. More than 80% of the population of California live within an urbanized area or cluster. Urbanized areas are so designated by the United States Census Bureau which defines urban and rural at the block level. To view maps for urbanized areas or clusters, go to the 2010 Census Urban Area or Cluster Maps on this site:
https://www.census.gov/geographies/reference-maps/2010/geo/2010-census-urban-areas.html

Note that an urbanized area is not limited to areas within the boundaries of a city. The law applies to unincorporated areas as long as the parcel is within a census defined urban area or cluster.

2) Ecological and farmland

The property cannot be located within these areas:

- Prime farmland or farmland of statewide importance (as defined pursuant to United States Department of Agriculture land inventory and monitoring criteria, as modified for California, and designated on the maps prepared by the Farmland Mapping and Monitoring Program of the Department of Conservation, or land zoned or designated for agricultural protection or preservation by a local ballot measure that was approved by the voters of that jurisdiction).
- Wetlands (as defined in the United States Fish and Wildlife Service Manual, Part 660 FW 2 (June 21, 1993))
- Land identified for conservation under a natural community conservation plan, or lands under conservation easement (pursuant to the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code), habitat conservation plan pursuant to the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), or other adopted natural resource protection plan).
- Habitat for protected species. These include habitats for protected species identified as candidate, sensitive, or species of special status by state or federal agencies, fully protected species, or species protected by the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code), or the Native Plant Protection Act (Chapter 10 (commencing with Section 1900) of Division 2 of the Fish and Game Code).

3) Historic or landmark district
The property cannot be located on a site located within a historic or landmark district, or a site that has a historic property or landmark under state or local law. To be precise, SB 9 does not apply to a property "located within a historic district or property included on the State Historic Resources Inventory, as defined in Section 5020.1 of the Public Resources Code, 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."

4) Hazard zones (but only if not mitigated)

The property cannot be located within these hazard zones, unless state mitigation requirements are met:

- Land within a high or very high fire hazard severity zone, unless the development complies with state mitigation requirements. Note that these zones are determined by Cal Fire. Local designation of very high fire hazard severity zones under Government Code 51179, which can be much broader, do not qualify.
- An earthquake fault zone as determined by the State Geologist in any official maps, unless the development complies with applicable seismic protection building code standards under both state and local law. Not included within the exception are seismic hazard zones.
- A property within the 100-year floodplain or a floodway as determined by the Federal Emergency Management Agency (FEMA). However, this may not be an impediment to ministerial approval under SB 9 if the site meets the FEMA requirements of flood plain management or has received a "no-rise" certification for property within a regulatory floodway.

The limitations based on fire hazard or earthquake, fault zones and floodplain zones will likely not affect many developments since SB 9 ministerial approval will be required as long as certain mitigation conditions, which do not appear to be overly burdensome, are met.

5) Outside a single-family zone

This law only applies to parcels within a single-family residential zone.

Excluded Properties Based on Tenant Use or Rent Restrictions

Q6. What are the landlord-tenant related exclusions to the application of SB 9?

A6. AB 9 seeks to expand housing construction in single family zones. But the law has been drafted so as not to encourage the displacement of existing tenants or to circumvent existing rent restrictions. Under SB 9 demolition or alteration of the following types of units is prohibited:

- Rent-restricted housing either by deed or covenant, or by any rent or price control law
- Housing that has been the subject of an Ellis Act eviction within the past 15 years, or
- Housing that has been occupied by a tenant in the last three years.

SB 9 also prohibits demolition of more than 25% of the exterior walls of an existing structure unless at least one of the following conditions has been met

- The local ordinance allows greater demolition or
- The site has not been occupied by a tenant in the last three years. (Comment: If the site has been occupied by a tenant within the last three years, the owner would still be precluded from demolition or alteration based on the third bullet point above).

Local Government/Agency Authority

Q7. How are localities constrained in their ability to establish preconditions to approval of SB 9 lot splits and duplexes?
A7. SB 9 limits the ability of local agencies to create impediments to the provisions of SB 9. .. To this end it includes a number of restrictions on the types of rules that a local agency can enforce as part of the approval process.

- *Parking.* Local agencies may require only one off-street parking space per unit. However, this requirement cannot be imposed if the property is close toa car share vehicle location or if the parcel is located within one-half mile walking distance of either a high-quality transit corridor (PRC 21155(b)) or a major transit stop (PRC 21064.3). This is the similar to the existing law for ADUs.

- *Setbacks of four feet or less.* Side and rear setbacks are limited to four feet or less generally. However, no set back may be imposed on an existing structure or one that is constructed in the same location and to the same dimensions as an existing structure.

- **Short term rentals prohibited.** Local agencies must prohibit rentals of less than 30 days.

- *Second unit may be connected or adjacent.* A second adjacent or connected structures must be allowed as long as it allows separate conveyance.

- **Percolation test**. The local agency may require proof of percolation test within a specified timeframe for residential units connected to an onsite wastewater treatment system. (Duplexes only).

- **Duplex units must be at least 800 square feet**. Cities cannot preclude the construction of up to two units or that would physically preclude either of the two units from being at least 800 square feet in floor area.

Q8. Given the state's ADU laws, does SB 9 now permit more than 2 units on a parcel?
A8. No. If the SB 9 ministerial procedure is utilized and two units are created on a parcel a local agency is not required to permit an accessory dwelling unit or a junior accessory dwelling unit in addition to a duplex. Nor if there is a lot split and a new duplex is the local agency required to allow an ADU in addition on the new parcel.

Some news articles and social media posts have reported that SB 9 will require as many as six units to be

developed by ministerial approval. But these articles were likely based on earlier versions of the bill or are based on a misunderstanding of how SB 9 interacts with the state's ADU laws..

Q9. What rules can a city or county adopt as part of their own local standard in approving or denying duplexes or lot splits under SB 9?
A9. Objective zoning standards. First, SB 9 grants local government the authority to impose objective zoning, subdivision, and design review standards that do not conflict with this law. However, such objective standards cannot physically preclude the construction of up to two units or that would physically preclude either of the two units from being at least 800 square feet in floor area.

It is anticipated that most local governments will create such standards forthwith to ensure that any developments created due to SB 9 are consistent with "the look and feel of" the areas in which they are developed.

Limited grounds to deny. Second, local government also have authority to deny a housing project otherwise authorized by this law, if the building official makes a written finding based upon the preponderance of the evidence that the housing development project would have a specific, adverse impact upon health and safety or the physical environment and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact.

Additional rules and conditions governing lot splits

Q10. What additional rules apply to lot splits?
A10. All of the aforementioned rules apply equally the process of ministerial approval for both duplexes and lot splits (unless otherwise indicated). However, a number of rules apply only to lot splits. These are as follows:

- **Lot splits must be approximately equal.** The parcel map subdivides an existing parcel to create no more than two new parcels of approximately equal size, provided that one parcel shall not be smaller than 40% of the lot area of the original parcel.
- **At least 1200 square feet.** Both newly created parcels are at least 1,200 square feet, unless the city or county adopts a small minimum lot size by ordinance.
- **Tenant protections and rent restrictions**. The parcel does not contain rent-restricted housing, housing where an owner has exercised their rights under the Ellis Act within the past 15 years or has been occupied by tenants in the past three years.
- **No prior lot split.** The parcel has not been established through prior exercise of an urban lot split.
- **No prior split of adjacent parcel.** Neither the owner of the parcel, or any person acting in concert with the owner, has previously subdivided an adjacent parcel using an urban lot split.
- **Lot splits must comply with the Subdivision Map Act**. Requires a city or county to approve a lot split only if it conforms to all applicable objective requirements of the Subdivision Map Act except as otherwise expressly provided in this bill.
- **No right-of-way required.** Prohibits a city or county from imposing regulations that require dedicated rights-of-way or the construction of offsite improvements for the parcels being created, as a condition of approval.
- **No requirement of correcting violations.** Prohibits a city or county from requiring, as a condition for ministerial approval of a lot split, the correction of nonconforming zoning conditions.
- **Affidavit of owner occupancy.** Requires a local government to require an applicant for an urban lot split 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 lot split, unless the applicant is a community land trust, as defined, or a qualified nonprofit corporation. No additional owner occupancy standards may be imposed.
- **What rules can a city or county adopt as part of their own local standard in approving or denying lot splits under SB 9?**

Objective zoning standards. The rules here mirror the rules for duplexes. SB 9 grants cities and counties the authority to impose objective zoning, subdivision, and design review standards for lot splits that do not conflict with this law. Again, the same limitation applies: A city or county cannot impose objective standards that would physically preclude the construction of up to two units or that would physically preclude either of the two units from being at least 800 square feet in floor area.

Limited grounds to deny. Second, a cities and counties also have authority to deny a housing project otherwise authorized by this law if the building official makes a written finding based upon the preponderance of the evidence that the housing development project would have a specific, adverse impact upon health and safety or the physical environment and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact.

No more than two units per parcel. Cities and counties are not required to permit more than two units on a parcel (see question __ regarding SB 9's interaction with state ADU law.

CEQA and the Coastal Act

Q11. Is CEQA required under SB ministerial review?
A11. No. Because approval under SB 9 is ministerial, the California Environmental Quality Act does not apply. Thus SB 9 creates a new statutory exemption to CEQA for an ordinance adopted to implement this law.

Q12. Does the Coastal Act apply?
A12. Yes. The Coastal Act does apply, but the local agency is not required to hold a public hearing on a coastal development permit for an SB 9 approval. The Coastal Act applies in full to SB 9 lot splits and two-unit projects, with one exception—a local agency may not hold a public hearing for the issuance of a Coastal Development Permit.

Common Interest Developments

Q13. Does SB 9 apply to common interest developments when their own CC&Rs (covenants, conditions and restrictions) prohibit SB 9 type developments?
A13. Unlikely, but it is not certain at this point. SB 9 is silent on the issue. It simply contains no provisions that supersede any private covenants, nor are there any amendments or new provisions in the sections California law addressing common interest developments, commonly referred to as the Davis-Stirling Act. Thus, a plain reading of SB 9 means that such provisions remain enforceable. Furthermore such an application of SB 9 provisions to HOAs could create enormous complexity for such HOAs which would then have to figure out how to assess such properties for fees and other charges. Additional persons could also impact common area amenities and facilities which did not account for additional units when created. Also, while not legally binding the author of the bill, Senate pro Tempore Atkins, sent a letter to the Secretary of State stating that it was her understanding that the bill would not supersede existing HOA documents. Finally, most housing legislation intended to impact HOAs explicitly state the intent to do so. However, in the absence of explicit language saying it does not apply to HOAs, while unlikely, a court could potentially construe SB 9 as demonstrating "public policy" in favor of SB 9 type projects. Thus, any CC&Rs that restrict such projects would be in violation of public policy.

Q14. When does SB 9 go into effect?
A14. SB 9 goes into effect on January 1, 2022.

Q15. Where can I view the actual bill itself?
A15. See this link for. Senate Bill 9.

Q16. Where can I get more information?

A16. This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit car.org/legal.

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