



**TOWN OF LOS GATOS
COUNCIL AGENDA REPORT**

MEETING DATE: 03/07/2023

ITEM NO: 8

DATE: March 2, 2023
TO: Mayor and Town Council
FROM: Gabrielle Whelan, Town Attorney
SUBJECT: Discuss and Provide Direction on Possible Modifications to Regulations Adopted in Response to Senate Bill 9 for Urban Lot Split and Two-Unit Housing Development Applications. Location: Town-wide. Applicant: Town of Los Gatos.

RECOMMENDATION:

Discuss and provide direction on possible modifications to regulations adopted in response to Senate Bill 9 for urban lot split and two-unit housing development applications.

BACKGROUND:

In September 2021, Governor Newsom signed new State law, Senate Bill 9 (SB 9), which went into effect on January 1, 2022. SB 9 requires ministerial approval of two-unit housing development projects and urban lot splits on a single-family zoned parcel, with the intent to increase residential densities within single-family neighborhoods across the State.

The law allows for two new types of development activities that must be reviewed ministerially without any discretionary action or public input:

- **Two-unit housing development** – Two homes on an eligible single-family residential parcel (whether the proposal adds up to two new housing units or adds one new unit on a parcel with an existing single-family residence).
- **Urban lot split** – A one-time subdivision of an existing single-family residential parcel into two parcels. This would allow up to four units (two units on each new parcel).

Reviewed by: Town Manager, Community Development Director, and Planning Manager

BACKGROUND (continued):

In most circumstances, SB 9 will result in the potential creation of four dwelling units on an existing single-family zoned parcel. Single-family zoned parcels are currently permitted three units throughout the State: a primary single-family dwelling; an Accessory Dwelling Unit (ADU); and a Junior ADU (JADU).

SB 9 also outlines how jurisdictions may regulate SB 9 projects. Jurisdictions may only apply objective zoning, subdivision, and design standards to these projects, and these standards may not preclude the construction of up to two units of at least 800 square feet each. Jurisdictions can conduct objective design review, but may not have hearings for units that meet the State rules (with limited exceptions).

On December 21, 2021, Town Council adopted an Urgency Ordinance to implement local objective standards for SB 9 applications. This Urgency Ordinance was valid for a period of 45 days. On February 1, 2022, Town Council adopted an extension of the Urgency Ordinance, making it valid to the end of the calendar year.

On November 1, 2022, the Town Council introduced the permanent SB 9 Ordinance, by title only, as recommended by the Planning Commission with modifications related to flag lot setbacks, driveway requirements, owner occupancy affidavits, and the second-story step-back requirement (Attachment 1). The permanent SB 9 Ordinance was adopted by the Council on November 15, 2022 (Attachment 2). The Town Council also directed staff to return to the Council in three months with options to address Fire Hazard Areas, affordability models, and information regarding owner occupancy requirements.

DISCUSSION:

Per Town Council direction, staff researched 19 jurisdictions in early February 2023 to analyze how each jurisdiction addresses Fire Hazard Areas, affordability models, and owner occupancy requirements for SB 9 Urban Lot Splits. The jurisdictions include: Town of Atherton, City of Berkeley, City of Campbell, City of Cupertino, City of Gilroy, City of Los Altos, Town of Los Altos Hills, City of Millbrae, City of Milpitas, City of Monte Sereno, City of Morgan Hill, City of Mountain View, City of Oakland, City of Palo Alto, City of San Jose, City of Santa Barbara, Santa Clara County, City of Saratoga, and City of Sunnyvale. As with any research effort, staff was not able to determine answers to all the three questions for each of the 19 jurisdictions surveyed as their Ordinance and website are not clear, and many of the jurisdictions have not responded to staff's outreach efforts at the time of publication of this staff report.

DISCUSSION (continued):

A. Fire Hazard Area

The Town Council asked staff to return with information regarding the extent to which the Town can prohibit and/or regulate SB 9 units in Very High Fire Hazard Severity Zones. Government Code Section 65852.21 provides that SB 9 applications are to be considered ministerially so long as they meet the standards set forth in Government Code Section 65913.4(a)(6)(B)-(K). Government Code Section 65913.4(a)(6)(D) exempts the following properties from streamlined review: “[properties] within a very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection . . . or within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection” In other words, properties within a Very High Fire Hazard Severity Zone are subject to discretionary review.

However, Section 65913.4(a)(6) goes on to state, “This subparagraph does not apply to ... sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.” With the adoption of the current Building and Fire Codes the Town has fire hazard mitigation measures in place for all properties in the Very High Fire Hazard Severity Zone. As a result, under existing law, the Town cannot prohibit SB 9 units in the Very High Fire Hazard Severity Zone.

Therefore, projects both inside and outside of a Very High Fire Hazard Severity Zone are subject to ministerial review. Even when a project is subject to ministerial review, the Town can apply “objective zoning standards.” “Objective zoning standards” are defined as “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 before submittal.” (Gov. Code Section 65913.4(o).) Therefore, the Town can adopt objective zoning standards that apply to properties within a Very High Fire Hazard Severity Zone. Any objective zoning standard applied needs to allow at least two primary units of 800 square feet each in a two-unit project, and must allow the lot to be subdivided with two primary units of 800 square feet each on each resulting lot.

Most other jurisdictions are adopting fire mitigation measures as part of their Safety Elements. The measures apply to all development projects and not specifically to SB 9 projects, which is recommended.

Staff’s research found that of the 13 jurisdictions that have responded to staff and that have Very High Fire Hazard Severity Zones within their jurisdiction, five do not have exceptions or have not adopted fire hazard mitigation measures for these zones. In other words, five of

DISCUSSION (continued):

13 jurisdictions surveyed do not allow SB 9 application on properties located within Very High Fire Hazard Severity Zones. These jurisdictions include the City of Oakland, City of Santa Barbara, Town of Los Altos Hills, City of Morgan Hill, and City of Sunnyvale. Staff also spoke with the California Department of Housing and Community Development (HCD) on this topic. HCD mentioned that this specific topic has not been resolved and will most likely be addressed in the next few years via amendments to the Senate Bill.

B. Affordability Models

While SB 9 does not expressly authorize the imposition of affordability requirements, it also does not expressly prohibit them. In the key California Supreme Court inclusionary zoning case (*BIA v. City of San Jose*, 351 P.3d 974 (2015)), the court stated that such requirements are legal so long as they are not “confiscatory” and allow a reasonable rate of return.

The Town’s existing inclusionary ordinance only applies to projects of five units or more. If the Council is interested in amending the Town’s inclusionary ordinance to include housing projects of fewer than five units, staff recommends that the Town obtain an economic feasibility study. Staff recommends that any inclusionary requirement be imposed on both SB 9 units and other housing units.

Staff’s research found that of the 17 jurisdictions that have responded to staff on this particular question, two have affordability requirements applicable to SB 9 applications. The City of Millbrae is requiring at least one unit to be made affordable when more than two SB 9 units are created; and the City of Santa Barbara requires that at least one unit in each two-unit development, or at least one unit on any lot created through an urban lot split, must be made affordable. Staff spoke with the HCD on this topic, who mentioned that this specific topic has not been resolved and will most likely be addressed in the next few years via amendments to the Senate Bill.

C. Owner Occupancy Requirements

SB 9 requires that property owners using SB 9 for urban lot splits sign affidavits stating that they “intend to occupy” one of the housing units as their primary residence for a minimum of three years from the date of approval of the lot split. (Gov. Code Section 66411.7(g)(1).) A member of the public asked that the affidavit be revised to state that the owner “will” occupy one of the units as their primary residence. Government Code Section 66411.7(g)(3) prohibits a local agency from imposing any owner occupancy requirements on urban lot splits beyond the owner occupancy requirement set forth in the statute. In other words, the Town is prohibited from requiring anything other than an “intent to occupy.”

DISCUSSION (continued):

Staff's research found that of the 19 jurisdictions surveyed, one requires the intent statement to be recorded against the property as a deed restriction: the City of Campbell. Staff spoke with the HCD on this topic, who directed staff that, per the language of SB 9, deed restrictions for owner occupancy are not allowed.

In the November 1, 2022, Town Council motion, the Town Council directed staff to conform the Town's owner occupancy affidavits with affidavits used by the Town of Atherton and Santa Clara County. Staff has reviewed the affidavits used by the Town of Atherton and Santa Clara County (Attachment 3). Those affidavits require property owners to attest that they "intend to occupy" one of the units as their primary residence. Staff confirmed with each jurisdiction that they do not require this affidavit to be recorded against the property. This language comports with State law and Town staff recommends using this language on the owner affidavits.

CONCLUSION:

Staff recommends that the Town Council receive the information provided by staff and provide direction.

FISCAL IMPACT:

Discussion of this item has no fiscal impact.

PUBLIC COMMENT:

Public comments received on this item are provided in Attachment 4.

ENVIRONMENTAL ASSESSMENT:

Because this is an informational report, the Town Council is not taking action at this meeting and this agenda item is not subject to CEQA. In addition, in accordance with Government Code Section 66411.7(n) and 66452.21(g), SB 9 ordinances are not a project subject to CEQA.

Attachments:

1. November 1, 2022 Town Council Meeting Minutes
2. Senate Bill 9 Town Ordinance 2334
3. Town of Atherton and Santa Clara County Owner Occupancy Affidavits
4. Public Comments received prior to 11:00 a.m., Thursday, March 2, 2023

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