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# New Housing Laws: Navigating & Implementing SB 8, 9, 10

Thursday, May 5, 2022

Claire Lai, Of Counsel, Meyers Nave  
Alex Mog, Of Counsel, Meyers Nave  
Scott Porter, Assistant City Attorney, Whittier, Deputy City Attorney,  
Fullerton, Jones & Mayer

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# **New Housing Laws: Navigating & Implementing SB 8, 9, 10**

Thursday, May 5, 2022 General Session 3:45-4:45 p.m.

Claire Lai, Of Counsel, Meyers Nave  
Steve Mattas, Principal, Meyers Nave  
Alex Mog, Of Counsel, Meyers Nave  
Scott Porter, Assistant City Attorney, Jones & Mayer

This paper analyzes Senate Bills (SB) 8, 9 and 10. These bills took effect on January 1, 2022 and are intended to help address California’s housing shortage by expanding opportunities for construction of residential units. The bills change how cities must process housing development projects, including mandating various ministerial approval processes. Local governments do retain some control in crafting zoning standards and regulations. In light of these legislative changes, this paper analyzes the bills and shares practical insights for cities as they implement these laws. This paper also analyzes the experiences of various municipalities, and offers additional options to cities crafting their own regulations.

## **I. Senate Bill 9**

### **A. The Basics: Summary of SB 9 Provisions**

Signed into law on September 16, 2021 and effective on January 1, 2022, SB 9 was widely discussed as the “end of single-family zoning.” SB 9 requires cities to ministerially consider and approve development projects consisting of two-lot subdivisions and/or up to two (2) housing units per lot. Generally, SB 9 overrides all discretionary local subdivision and development standards, but does preserve some authority for municipalities to enact regulations through the adoption of new objective zoning regulations. To be considered for ministerial approval, however, the proposed subdivision or development project must meet certain location and development criteria.

#### **1. SB 9 Projects Must Meet Certain Location Requirements.**

To benefit from the mandatory process under SB 9, a proposed two-lot subdivision or two-unit development must meet certain location requirements.<sup>1</sup>

<b>The Project must be located in:</b>	<b>The Project cannot be located in:</b>
<p>(1) A single-family residential zone; and</p> <p>(2) Within an “urbanized area” or “urban cluster”, when the project is proposed to be located in a city or an unincorporated area. This definition covers most urban and suburban municipalities in California.</p>	<ul style="list-style-type: none"> <li>➤ A designated historic district or on a historic or landmark site (unless allowed by the city).</li> <li>➤ “Sensitive” areas identified under section 65913.4(a)(6)(B)-(K) (the statute created by SB 35), including:               <ul style="list-style-type: none"> <li>• Wetlands, earthquake fault zones, and hazardous waste sites</li> <li>• Land designated for agricultural protection by a local ballot measure</li> <li>• Lands subject to “conservation easements”</li> <li>• FEMA-designated flood plains or regulatory floodways</li> <li>• High Fire Hazard Severity Zones (based on CalFire maps)</li> </ul> </li> </ul>

There are two points worth highlighting. First, although not specified in SB 9, “conservation easements” likely includes those restrictive covenants binding upon successive land owners that are intended to protect against future developments. However, nothing in SB 9 cites

<sup>1</sup> Gov. Code §§ 66411.7(a); 65852.21(a).

to Civil Code section 815 *et seq.*, sections which contain extensive requirements for certain conservation easements created by deed, will, or other restrictive instruments that are binding upon successive owners in perpetuity, and which may only be held by certain non-profit organizations, public entities, and federally recognized tribes. As such, the term “conservation easement” likely also includes an area that is subject to a restrictive covenant to retain the area predominantly in its natural, scenic, agricultural, or open-space conditions even if the restrictive covenant was not prepared or granted pursuant to the process specified in the Civil Code.

Second, “High Fire Hazard Severity Zone” restriction does not apply to sites that have been excluded from the hazard zone designation by a local agency, or sites that have adopted fire hazard mitigation measures.

## **2. The Project Must Meet Certain Anti-Displacement Requirements.**

To qualify for the SB 9 process, a subdivision or development project cannot involve the demolition or alteration of: (a) deed-restricted affordable housing; (b) rent-controlled housing; (c) housing withdrawn from the rental market in the last 15 years pursuant to the Ellis Act; or (d) housing that was occupied by a tenant in the past 3 years.<sup>2</sup> For SB 9 housing development projects, the project also may not demolish more than 25 percent of the existing unit’s exterior structural walls, unless that site has not been tenant-occupied in the last three years, or if there is a local ordinance permitting such demolition.<sup>3</sup>

## **3. A Subdivision Project Must Comply With Certain Restrictions.**

SB 9 includes certain restrictions for projects proposing to subdivide lots using the bill’s provisions. Specifically, each lot resulting from the subdivision must be at least 1,200 square feet and must be at least forty percent (40%) of the original lot (i.e., 50-50, 40-60, or a split between those ranges would be permitted).<sup>4</sup> In addition, lots previously subdivided pursuant to SB 9 cannot be subdivided again using SB 9.<sup>5</sup> Finally, adjacent parcels may only be subdivided via SB 9 if their owners are independent and not acting “in concert” with each other.<sup>6</sup>

## **4. If the SB 9 Project meets Criteria (1) – (3) above, as applicable, it must be reviewed and approved ministerially.**

If the proposed two-unit development project or lot subdivision satisfies the foregoing criteria, a city must approve the project ministerially. A project under SB 9 could be proposed as unit development or subdivision separately, or combined as one project. As explained further below, cities may impose objective zoning, subdivision, and design review standards that do not conflict with SB 9. However, cities may only deny an SB 9 project that otherwise meets such local standards and state law criteria if their “building official” makes a written finding, based on preponderance of the evidence (i.e., majority of the evidence supports such finding), that the project would have a specific, adverse impact on public health and safety that cannot be mitigated without denying the project. The specific, adverse impact must be based on specific, objective

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<sup>2</sup> Gov. Code §§ 65852.21(a)(3)(A)-(C), 66411.7(a)(3)(D)(i)-(iv).

<sup>3</sup> Gov. Code §§ 65852.21(a)(5).

<sup>4</sup> However, local agencies may adopt a smaller minimum lot size by ordinance (Gov. Code § 66411.7(a)(2)(B)).

<sup>5</sup> Gov. Code § 66411.7(a)(3)(F).

<sup>6</sup> Gov. Code §§ 66411.7(a)(1), (a)(2)(F)&(G).

public health or safety standards that were in effect prior to the project application submittal.<sup>7</sup> This is a high standard.

**5. Cities retain certain authority to impose specific requirements on SB 9 projects.**

The table below summarizes the permitted and prohibited requirements under SB 9.

	<b>City May Impose/Has Authority</b>	<b>City May Not Impose/No Authority</b>
<b>Subdivision Requirements</b>	<ul style="list-style-type: none"> <li>➤ Easements for provision of public services</li> <li>➤ Easements to ensure subdivided lots have access to the public right of way</li> </ul>	<ul style="list-style-type: none"> <li>➤ Dedication of right-of-way</li> <li>➤ Construction of offsite improvements</li> <li>➤ Correction of nonconforming zoning conditions</li> </ul>
<b>Objective Standards</b>	<p>Objective zoning standards, subdivision standards, and design standards</p> <p>*Note: adjacent or connected structures must be permitted if they meet building code safety standards and are sufficient to allow separate conveyance.</p>	<ul style="list-style-type: none"> <li>➤ No setback can be required if unit is built within the footprint of an existing structure</li> <li>➤ Otherwise, maximum 4’ setback from side and rear yards</li> <li>➤ Standards cannot physically prevent the development of an 800 square foot unit</li> </ul>
<b>Rental Restrictions</b>	<ul style="list-style-type: none"> <li>➤ Prohibit short term rental of any units created through SB 9</li> <li>➤ For lot splits, applicants must submit an affidavit stating intent to occupy one of the units as a principal residence for at least 3 years</li> </ul>	No additional owner occupancy standards allowed.
<b>Parking Requirements</b>	Maximum one parking spot per unit.	<p>No parking spots may be required if a Project site is:</p> <ul style="list-style-type: none"> <li>➤ Within ½ mile of a high-quality transit corridor or major transit stop <ul style="list-style-type: none"> <li>• An existing rail or bus rapid transit station</li> <li>• A ferry terminal served by either a bus or rail transit service</li> <li>• Fixed route bus service with service intervals no longer than 15 minutes during peak commute hours</li> </ul> </li> <li>➤ Within one block of a car share vehicle</li> </ul>
<b>ADU Restrictions</b>	<p>May prohibit ADUs and JADUs:</p> <ul style="list-style-type: none"> <li>➤ When the lot is subdivided pursuant to SB 9 and there are two units existing/constructed on each lot</li> <li>➤ When both subdivision and unit construction are done via SB 9</li> </ul>	Nothing in SB 9 authorizes cities to limit the construction of ADUs and JADUs when the lot is not being subdivided.

<sup>7</sup> Gov. Code §§ 65852.21(d); 66411.7(d).

## **B. SB 9 Became Effective; Now What?**

SB 9 authorizes municipalities to adopt an ordinance to implement the provisions of Government Code sections 65852.21 and 66411.7. Such local ordinances are not subject to the requirements of the California Environmental Quality Act (CEQA).<sup>8</sup> To date, most jurisdictions have not taken any formal action to implement SB 9, but a number of cities have adopted ordinances to regulate SB 9 projects, as authorized by the statute. While some ordinances simply restate the requirements of state law, others proactively regulate SB 9 units.

In March 2022, the California Housing and Community Development Department (“HCD”) published an SB 9 Fact Sheet (“HCD Fact Sheet”) that provides an overview of the law, its primary requirements, and relationship to other housing laws.

Cities that have not yet adopted an ordinance to implement SB 9 may consider taking certain steps to streamline the administrative process to review and approve an SB 9 application. Examples of these steps may include:

- *Forms.* Create deed restriction forms to prohibit the short-term rental of any units created through SB 9, and to prohibit future SB 9 lot splits and non-residential uses.
- *Affidavit.* Create an owner occupancy affidavit form for applicants seeking an SB 9 lot split.
- *Fees.* Consider which types of fees may now be inapplicable to SB 9 projects due to the ministerial review process. For example, instead of requiring a separate “design review” fee, the costs of any ministerial design review may be incorporated into a single SB 9 application fee.

## **C. Implementing SB 9: Frequently Encountered Issues**

For cities that have adopted an ordinance to implement SB 9, several commonly encountered issues come to mind. We examine those issues in this section.

### **1. Only “Single-Family Zones” are covered by the statutes.**

SB 9 requires a proposed subdivision or housing development project to be located within a “single-family residential zone.” This means that SB 9 does not apply to parcels within multi-family residential, mixed-use zones, and non-residential zones. For a zoning district that permits a combination of single-family residential and other uses, cities should review the land use designation and requirements for such district under the general plan, any applicable specific plans, and the zoning code, to determine whether the predominant, primary use in that district is single-family. If single-family uses are only an ancillary use in that zoning district, then such zone would not be considered a single-family zone and not subject to SB 9. This interpretation is reflected in the HCD SB 9 Fact Sheet and also consistent with the intent of the legislation to increase density in areas reserved for single-family use, rather than mandating the upzoning of multi-family areas or expanding residential uses in non-residential districts.

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<sup>8</sup> Gov. Code §§ 65852.21(j); 66411.7(n).

**2. Maximum number of new construction units.**

SB 9 produces a number of scenarios pursuant to which housing units may be constructed on whole and subdivided parcels. Housing development projects that propose only one unit are likely subject to SB 9.<sup>9</sup> Among different variations of these scenarios, the maximum number of units that may be located on an independent lot is four. We illustrate several common scenarios as follows:

**Scenario A: If the project proposes only units without subdivision:**

If project site is a vacant lot	If project site has an existing primary residence	If project site has existing primary residence + ADU
2 SB 9 units, plus whatever ADUs/JADUs would be allowed on site and in no event more than two. <sup>10</sup>	1 SB 9, plus whatever ADUs/JADUs would be allowed on site, and in no event more than two.	1 SB 9 unit plus whatever ADU/JADU would be allowed on site, and in no event more than two.

**Scenario B: If the project proposes both a subdivision and the construction of housing units:**

If project site is a vacant lot	If project site has an existing primary residence	If project site has existing primary residence + ADU
<p>After the project site is subdivided, each vacant lot created pursuant to the subdivision may have up to 2 units.</p> <p>These units can be a combination of primary residence, SB 9 unit, ADUs and JADUs.</p>	<p>If the project site is subdivided so that one of the new lots is vacant and the other contains the existing primary residence, the lot with the residence may add 1 SB 9 unit or an ADU or a JADU.</p> <p>The vacant lot may have 2 units of any kind (provided that at least one is a primary unit) but no more than 2 units.</p>	<p>If the project site is subdivided so that one of the new lots is vacant and the other contains the existing primary residence + ADU, the lot with existing home + ADU cannot have more units.</p> <p>The vacant lot may have no more than 2 units.</p>

**3. “Offsite” Improvements. What can a city require?**

The Subdivision Map Act permits local agencies to require the dedication of rights-of-way, easements, and reasonable “offsite and onsite improvements” for parcels created under a minor subdivision.<sup>11</sup> SB 9 creates an exception to this rule and prohibits municipalities from requiring

<sup>9</sup> Gov. Code section 65952.21(i)(1) specifies that a housing development is considered to contain two residential units if the development “proposes no more than two new units” or “proposes to add one new unit to one existing unit.”

<sup>10</sup> Unless a city is more permissive of ADUs and JADUs than required by state law, the number of permitted ADUs/JADUs depends upon whether the SB 9 units are attached or detached to each other. HCD has opined that if dwelling units are detached from each other, they are not within the definition of a “multifamily dwelling structure.” See Gov. Code § 65852.2(1)(D) which allows “existing multifamily dwelling” to have up to two detached ADUs that “are subject to a height limit of 16 feet and four-foot rear yard and side setbacks.”

<sup>11</sup> Gov. Code § 66411.1.

dedications of rights-of-way or the construction of “offsite improvements” as a condition of approving a parcel map for an SB 9 subdivision. This may include dedication of land within the subdivision that are needed for streets and alleys, drainage, parks and open space areas, and scenic easements. However, subdivision ordinances often require the subdivider to construct improvements that are necessary to serve the new parcels but are not intended to enhance or address the impact of the subdivision on neighboring public facilities. For example, cities often require a subdivision to collect and convey its storm water runoff by an approved storm drain system that protects off-site properties from increased runoff. To meet this need, storm drain facilities may need to be constructed outside of the subdivision area.

Do these facilities count as “off-site improvements” even though their intent is to serve the needs of the subdivision rather than alleviate impacts to the surrounding properties? It seems that the answer is “no” based on the nature and purpose of these improvements. Although the statutory language does not provide clear guidance, it appears that SB 9 likely did not intend to prevent cities from requiring improvements necessary for a subdivision to function properly. Instead, SB 9 probably intends to prohibit local agencies from deterring qualifying subdivision projects by requiring subdividers to provide public facilities or dedication of land that are clearly outside the scope of the subdivision. Thus, cities should review their subdivision ordinances with these considerations in mind.

#### **4. Cities may craft objective standards for SB 9 projects consistent with the Housing Crisis Act of 2019 (SB 330).**

SB 9 explicitly authorizes local agencies to “impose objective zoning standards, objective subdivision standards, and objective design review standards” provided the standards do not physically preclude the construction of up to two 800 square foot units, subject to certain other restrictions. However, this provision does not directly address the application of the Housing Crisis Act of 2019.

The Housing Crisis Act of 2019, also known as SB 330, prohibits cities from changing zoning of a parcel to a less intensive use or reducing the intensity of land use within an existing zoning district “below what was allowed under the land use designation or zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018.”<sup>12</sup> Reducing the intensity of land use “includes, but is not limited to, reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site’s residential development capacity.”<sup>13</sup>

Some argue, including many “YIMBY” housing advocacy groups, that the restrictions in SB 330 effectively prevent cities from adopting any regulations for SB 9 projects that are in any way different than the regulations that apply to single-family homes within the same zoning district. These groups argue that applying different regulations to SB 9 projects would necessarily reduce the intensity of land use since it would create a new restriction different from the status quo. They argue, for example, that adopting a 15-foot height limit for SB 9 projects in a zoning district with a 30-foot height limit for single family homes would violate SB 330 since it would require smaller units than would be possible applying the existing regulation for single family

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<sup>12</sup> Gov. Code § 66300(b)(1)(A).

<sup>13</sup> *Id.*



homes. Under this interpretation, the language in SB 9 authorizing local agencies to impose objective standards simply authorizes a local agency to impose the otherwise applicable standards for that zoning district, but not to adopt any new regulations.

This interpretation of SB 9 relies, however, on an expansive interpretation of SB 330 that is not well supported by the statutory text. SB 330 prohibits reducing the intensity of land use “below what was allowed under the land use designation or zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018.”<sup>14</sup> Since the typical jurisdiction’s zoning ordinance on that date would not have allowed the projects authorized by SB 9, subjecting SB 9 projects to standards different from what apply to traditional single family homes is not necessarily reducing the intensity of land use below that allowed on January 1, 2018.

Additionally, a reduction in the intensity of land use is defined as an action that would reduce a site’s “residential development capacity.” That phrase is not defined, and is not used anywhere else in the Planning and Zoning Law. However, the most logical way to understand SB 330’s requirement is to prohibit a change in zoning standards that would reduce the number of housing *units* that can be constructed and not the *size* of those units. This is consistent with the findings the Legislature made when adopting SB 330 that the development of more housing units was necessary to address the housing crisis.<sup>15</sup> In the context of multi-family housing, changes in zoning standards, such as a reduction in height, can directly impact the number of housing units that can be built on a site. The same is not necessarily true for SB 9 projects, where state law already restricts the number of units that can be constructed. For example, a strict regulation limiting SB 9 units to 800 square feet regardless of other standards would obviously limit the size of units built pursuant to SB 9, but would not limit the number of units. Accordingly, many types of regulations will arguably not reduce the “residential development capacity” of sites in single family zoning districts. SB 330 does not restrict a city’s ability to adopt a regulation specific to SB 9 projects if the regulation does not reduce “residential development capacity”.

Last, the text of SB 9 does not support this position because both Government Code sections 65852.21 and 66411.7 authorize cities to impose, “notwithstanding any local law”, objective zoning, subdivision, and design review standards. Because SB 9 was enacted after SB 330, the Legislature presumably took existing law into account.<sup>16</sup> Thus, the presence or absence of similar objective standards in a city’s zoning code to other types of residential projects arguably does not impact whether the city may adopt additional objective standards that are only applicable to SB 9 projects as long as such standards are consistent with state law.

## **5. SB 9 itself does not prohibit cities from imposing affordability restrictions.**

Some jurisdictions have adopted ordinances requiring that whenever two units are constructed on a lot through SB 9, at least one of the units must be deed restricted as affordable housing. This type of inclusionary housing requirement mandates that the unit be affordable to and occupied by a household meeting certain income requirements. Although SB 9 does not reference affordability restrictions, a primary sponsor of the bill tweeted that SB 9 allows cities to “apply

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<sup>14</sup> *Id.*

<sup>15</sup> See SB 330 (Stats. 2019 ch 654, Sec. 2).

<sup>16</sup> Later enacted legislative provision prevails over a former version on the same subject. *Woods v. Young* (2015) 53 Cal.3d 315, 324 (1991).

whatever affordability provisions they want.”<sup>17</sup> Furthermore, as described above, SB 9 authorizes cities to impose objective zoning standards, such as an inclusionary housing requirement.

Inclusionary housing ordinances constitute a valid exercise of a city’s police power but can become illegally confiscatory if they deny a property owner a fair and reasonable return on their property.<sup>18</sup> Unlike a traditional inclusionary housing ordinance that commonly apply to at or below 15% of a housing development’s units, a similar restriction for an SB 9 project could potentially apply to as many as 50% of the development’s units. Because this percentage exceeds 15%, cities should ensure that there are no constitutional violations and obtain HCD approval, if required.<sup>19</sup>

## **6. Cities should exercise caution when designating landmark and historic property or district, or other sensitive areas.**

Cities may prohibit SB 9 units within “a historic district or 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.”<sup>20</sup>

In late 2021, the City of Pasadena adopted an urgency ordinance prohibiting the construction of two units on the same lot on properties with individually designated landmarks or on properties within the City’s Landmark Districts. Subsequently, the California Attorney General’s Office sent Pasadena a letter alleging that this restriction violated SB 9 and that the City could not prohibit the construction of duplex units in the City’s Landmark Districts.<sup>21</sup> The Attorney General reasoned that while SB 9 prohibits such projects on parcels “listed as a city or county landmark,” no similar restriction applies to projects within a landmark district. Rather, SB 9 only prohibits such projects within districts designated as historic. The Attorney General’s letter distinguished between “landmark districts” and “historic districts” and noted that the City’s ordinance allowed the creation of landmark districts based on “historical, cultural, development, and/or architectural context(s),” and therefore allowed the creation of landmark districts without regard to their historic value. More significantly, the Attorney General’s letter expressed concern that the City’s zoning ordinance only required 60% of the properties in a landmark district to contribute to the characteristics of the landmark district designation, and therefore the restriction on duplex units would potentially apply to parcels that did not themselves have “historical, cultural, development, and or/architectural context(s).” On April 1, 2022, the City of Pasadena transmitted to the Attorney General a nine-page legal analysis and supporting documentation to demonstrate why the Attorney General’s position is incorrect.<sup>22</sup>

The Attorney General’s position may have wide ranging impact. Many historic and/or landmark preservation ordinances are drafted broadly, to allow consideration of other factors, such as cultural and architectural context. The Attorney General’s letter suggests SB 9 units may be constructed in any district created under this type of broad ordinance, regardless of the specifics

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<sup>17</sup> On August 31, 2021 Senator Scott Weiner tweeted, that “cities can apply whatever affordability provisions they want”: [https://twitter.com/Scott\\_Wiener/status/1432727325850800132?s=20&t=2Y5yNz4SHN9EnUOT8iGtYQ](https://twitter.com/Scott_Wiener/status/1432727325850800132?s=20&t=2Y5yNz4SHN9EnUOT8iGtYQ)

<sup>18</sup> *California Bldg. Indus. Ass’n v City of San Jose* (2015) 61 Cal.4th 435.

<sup>19</sup> Gov. Code § 65850.01.

<sup>20</sup> Gov. Code §§ 65852.21(a)(6), 66411.7(a)(2)(E).

<sup>21</sup> A copy of the letter is available at <https://oag.ca.gov/news/press-releases/attorney-general-bonta-puts-city-pasadena-notice-violating-state-housing-laws>.

<sup>22</sup> See <https://www.cityofpasadena.net/city-manager/news-releases/pasadena-mayor-responds-to-california-attorney-general-bonta-letter-demonstrating-how-pasadena-complies-with-state-housing-law/>.

of that district. Second, historic districts rarely, if ever, are comprised solely of sites that all have historic value. Rather, a few sites will have undoubtedly been redeveloped or otherwise changed before historic preservation efforts began. The Attorney General’s letter appears to imply that SB 9 projects must be allowed on properties in historic districts that do not themselves have historic value, regardless of how such a project may impact surrounding historic properties and the district as a whole. It is unclear whether the Attorney General will pursue any enforcement actions based on this broad interpretation of the law.

SB 9 requirements do not apply to parcels located in one of the sensitive areas enumerated in Government Code section 65913.4(a)(6)(B)-(K), such as high fire hazard severity zones and earthquake fault zones. Cities have relied on this authority to restrict the areas where SB 9 projects are allowed. However, some of these efforts have faced scrutiny, including from the California Attorney General. This is illustrated in the case of the Town of Woodside, where the Town adopted an ordinance which established that all lands in the town were mountain lion sanctuary. The Attorney General sent a letter to Woodside that indicated that this action was “quite clearly – contrary to the law.”<sup>23</sup> The Attorney General noted that the “habitat” of a species is different than its “range.” The Attorney General also noted that an exemption for any specific lot must be based upon substantial evidence. In Woodside’s case, the Attorney General stated that land already developed is, by definition, not a habitat, and municipalities must examine the attributes of individual parcels to make exemption determination under SB 9.

## 7. SB 9 Summary: Examples of discretion a city does have.

As discussed above, SB 9 allows cities to impose objective zoning, subdivision and design review standards that do not conflict with SB 9. Cities may also elect to impose less stringent requirements than those contained in state law. In addition, there are several requirements that typically would be applicable to housing developments and subdivision projects that SB 9 does not otherwise prohibit. Thus, if municipal regulations do not go “too far” or otherwise violate SB 9 (such as the requirement to allow at least an 800 square foot unit), cities have discretion of whether to include the following regulations in their SB 9 ordinances:

### *Development Standards:*

- **Front Yard Setbacks.** Cities may retain the standard front yard setback requirements, or be more permissive and reduce the mandatory setbacks.<sup>24</sup>
- **Side and Rear Setbacks.** Cities may be more permissive than the 4 four-foot state law maximums.
- **Height.** SB 9 does not directly regulate minimum or maximum heights or limits on stories.
- **Maximum size.** Must allow units to be at least 800 square feet. But cities may increase the maximum. Some cities, for example, allow SB 9 units to be built up to the maximum building envelope otherwise allowed in the zone (when taking into account the existing original primary dwelling), when taking into consideration height, lot coverage, landscaping requirements, etc.
- **Parking.** At most 1 parking space per unit is allowed – cities can opt to require less parking.

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<sup>23</sup> The AG’s press release here: <https://oag.ca.gov/news/press-releases/attorney-general-bonta-memorandum-declaring-woodside-mountain-lion-sanctuary> . The Attorney General’s letter to Woodside is available here: <https://oag.ca.gov/system/files/attachments/press-docs/AG%20Letter%20to%20Woodside%20re%20SB%209.pdf>

<sup>24</sup> Gov. Code §§ 65852.21(b)(2)(i); 66411.7(c)(3)(B). Because state law does not prohibit front yard setbacks, they are allowed.

Some jurisdictions have opted to also require parking spaces be covered (i.e., a garage or carport). While not prohibited by SB 9, such requirements cannot physically prevent the construction of an 800 sq. ft. unit. Additionally, cities may wish to consider aesthetic impacts of such requirements if the lot can only accommodate a covered parking space within the front yard setback.

- **Design Requirements.** Cities are authorized to adopt objective design review standards under SB 9 that do not physically preclude construction of an 800 square foot. unit. To be considered “objective”, such standards must involve “no personal or subjective judgement by a public official” and are uniformly verifiable by an external and uniform benchmark that is available and knowable by both the developer and the public official prior to submitting an application.<sup>25</sup> Jurisdictions have implemented a number of requirements that would qualify as objective design standards:
  - Eave projections
  - Roof pitch
  - Façade materials and minimum required articulation
  - Color requirements (e.g., matching the color of the primary dwelling)
  - Design requirements for features such as windows, porches, balconies, etc.
  - Exterior lighting direction and shield
  - Height requirements for units, entrances, fences, retaining walls, and landscape
- **Incentives.** Cities may include incentives to comply with specified standards. For example, in exchange for applicants volunteering to comply with setback standards that are more stringent than otherwise allowed by SB 9, a city could allow additional height or stories for such units.

### **Subdivision Standards**

- **Lot Depth.** HCD has stated that lot depth is an example of an acceptable subdivision standard.<sup>26</sup>
- **Access for parcels and “flag lots”.** Cities may require lots to “have access to, provide access to, or adjoin the public right of way.”<sup>27</sup> This means, for example, that a city may require lots to either have direct access to a street of some specified minimum width (e.g., no less than 10 feet of frontage parallel to the street), or to have an easement to allow the same width of road access. When setting the mandatory minimum width, cities often consider the extent to which first responders will have sufficient access. It would be reasonable, for example, for a city to require, as a condition of an urban lot split, that the subdivided lot meet the same access requirements as apply to other lots in the single family zone such as minimum street width requirements, and maximum permissible hose-pull distances from fire hydrants.

### **Other standards**

- **Percolation Test.** Cities are expressly allowed, but not required to, mandate that properties connected to an “onsite wastewater treatment system” (e.g., septic systems) to have “a percolation test completed within the last 5 years, or, if the percolation test has been recertified, within the last 10 years.”<sup>28</sup>
- **Demolition.** Cities must allow a minimum of 25% of walls to be demolished for sites with

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<sup>25</sup> Gov. Code §§ 65852.21(i)(2); 66411.7(m)(1).

<sup>26</sup> Lot depth is authorized by HCD in SB 9 Fact sheet, page 2.

<sup>27</sup> Gov. Code §§ 66411.7(e)(2).

<sup>28</sup> Gov. Code § 65852.21(c)(2).

no tenants in the last three years; but cities may allow more demolition than the minimum.<sup>29</sup>

- **Development Impact Fees.** SB 9 does not limit the collection of impact fees on duplex units. However, limits on the collection of impact fees on ADUs and JADUs continue to apply.<sup>30</sup>

#### **D. SB 9 - Frequently Asked Questions**

##### **Can a city regulate front yard setbacks?**

*Yes.* State law expressly prohibits cities from having side and rear setback requirements in excess of four feet, but says nothing about front yards.<sup>31</sup> Therefore, requiring front yard setbacks is allowed.<sup>32</sup> HCD's Fact Sheet also supports this conclusion. Page 2 lists "front setbacks" as an example of an "objective development standard." Page 3 of the HCD Fact Sheet notes that "SB 9 establishes an across-the-board maximum four foot side and rear setbacks," but does not mention any prohibition on the imposition of front yard setback requirements.

##### **Can a city prohibit more than 4 units?**

*Yes.* As described by HCD, "In no case does SB 9 require a local agency to allow more than four units on a single lot, in any combination of primary units, ADUs, and Junior ADUs." Moreover, SB 9 itself expressly states that if a lot split occurs, no more than two units (whether primary units, SB 9 units, ADUs, or JADUs) are required to be allowed on a lot.<sup>33</sup> SB 9 only requires allowing a lot to accommodate up to four units.<sup>34</sup> Section 65852.21(a) states that at most, two (duplex) units must be allowed on a lot. The statute only requires the addition of up to two new detached accessory dwelling units.<sup>35</sup>

##### **Can a city require on-site replacement sidewalks and curbs?**

*Yes.* Although cities cannot "impose regulations that require dedications of rights-of-way or the construction of offsite improvements,"<sup>36</sup> this prohibition, by its own terms only applies to "offsite" improvements. Typically, a single-family property extends to the centerline of the street, and the city has an easement over that property. Thus, requiring curb or sidewalk improvements on the property would be lawful.<sup>37</sup>

##### **Can a city require setbacks of at least four feet for structures that are only partially in the same location as a prior structure?**

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<sup>29</sup> See Gov. Code § 65852.21(a)(5).

<sup>30</sup> See Gov. Code § 65852.2(f)(3).

<sup>31</sup> See Gov. Code § 65852.2(b)(1).

<sup>32</sup> See Gov. Code §§ 65852.21(b)(1), 66411.7(c)(1) [authorizing regulations not in conflict with SB 9].

<sup>33</sup> Gov. Code § 66411.7(j).

<sup>34</sup> HCD Fact Sheet, Page 2 ["SB 9 facilitates the creation of up to four housing units in the lot area typically used for one single-family home."] See also page 5 [referencing three types of units: a single family residence, a duplex, or a four-plex]; see also page 6 ["SB 9 allows for up to four units..." and SB 9 has an "overall maximum of four units."]

<sup>35</sup> See Gov. Code § 65852.2(e).

<sup>36</sup> Gov. Code § 66411.7.

<sup>37</sup> Gov. Code § 65852.21(b) allows cities, for duplexes, to adopt "subdivision standards." Government Code 66411.7, relates to subdivisions, and implicitly allows standards for on-site improvements, by extension, for duplex units, cities may also impose such requirements.

*Yes.* Although no setback may be required for “a structure constructed in the same location and to the same dimensions as an existing structure”<sup>38</sup>, cities may require compliance with four foot setbacks for structures that do not have the same footprint.<sup>39</sup>

### **Can a city require applicants to record covenants?**

*Yes.* A city is allowed, but not required, to require recordation. Nothing prohibits a city to require the recordation of any covenants. The authors of this paper are aware of at least one city that is expected to require applicants to record their affidavit stating the applicant’s intent to reside on the property for at least three years from the date of the approval of the urban lot split.<sup>40</sup>

### **Does HCD have enforcement authority over SB 9?**

*No.* HCD has acknowledged that it does not have legal authority to directly enforce SB 9.<sup>41</sup> However, HCD has taken the position that “violations of SB 9 may concurrently violate other housing laws where HCD does have enforcement authority, including but not limited to the laws addressed in this document [such as the Housing Element Law, The Housing Accountability Act, and the Housing Crisis Act of 2019].”

### **If a lot is in a “Very High Fire Severity Zone”, is it automatically prohibited to build an SB 9 unit?**

*No.* Although compliance with Government Code 65913.4(a)(6)(B)-(K) is mandatory for both duplex units and urban lot splits,<sup>42</sup> subsection (D) does not automatically prohibit either duplexes or urban lot splits in very high fire severity zones. Rather, subsection (D) has a few exceptions. The most relevant is for “sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.”<sup>43</sup> As a result, most SB 9 units would be required to include various fire-safety mitigations to obtain a building permit.

### **May Cities Require An Applicant to Bring a Structure Into Compliance Prior to Approving an SB 9 project application?**

SB 9 specifies that municipalities may not condition the approval of an SB 9 subdivision application on the correction of nonconforming zoning conditions. Nothing in SB 9 states that cities are prohibited from requiring an applicant to correct building code violations or hazardous conditions creating a threat to health and safety. Such conditions are typically a part of the building

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<sup>38</sup> Gov. Code § 65852.21(b)(2)(B)(i).

<sup>39</sup> See Fact Sheet, page 3.

<sup>40</sup> See Gov. Code § 66411.7 (g)(1).

<sup>41</sup> See Fact sheet page 2.

<sup>42</sup> See Gov. Code 65852.21(a)(2) [for duplexes]; 66411.7(a)(3)(C) [for urban lot splits].

<sup>43</sup> Gov. Code § 65913.4(a)(6)(D) provides in full: “Within a very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178, or within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection pursuant to Section 4202 of the Public Resources Code. This subparagraph does not apply to sites excluded from the specified hazard zones by a local agency, pursuant to subdivision (b) of Section 51179, or sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.

permit review and issuance process and are intended to create safe and habitable housing conditions.

**Can cities still require compliance with other subdivision-related requirements such as tree protection, stormwater control and Model Water Efficient Landscape Ordinance (MWELO)?**

*Yes.* Cities should review such standards to make sure they are written in an objective manner as defined by statute, and that requirements such as tree protection rules do not prevent the construction of an 800 square foot unit. Otherwise, nothing under state law suggests these standards would be overridden.

**Does SB 9 state that it applies to charter cities?**

*Yes.* SB 9 states that “local agencies” must ministerially approve a qualifying subdivision or housing development project. SB 9 defines “local agency” to include both general law and charter cities.<sup>44</sup>

**Are there any lawsuits challenging SB 9?**

*Yes.* Four Charter cities have sued the state, challenging the legality of SB 9. The four Los Angeles County cities are: Redondo Beach, Carson, Torrance, and Whittier.<sup>45</sup> The Charter cities argue that, among other things, the state constitution guarantees charter cities “home rule” and SB 9 conflicts with such authority over municipal affairs held by Charter cities. They also argue that the absence of mandated affordability requirement under SB 9 show that the statute isn’t reasonably related to the rationale expressed in the statute (i.e., a lack of affordable housing).

**Is there an initiative to overturn SB 9?**

*There was.* “Our Neighborhood Voices” had attempted to qualify for the statewide November 2022 ballot. But on February 18, 2022, the initiative backers announced that they are no longer collecting signatures, but will instead try for the 2024 ballot.<sup>46</sup>

**Are there special considerations for the Coastal Zone?**

*Yes.* SB 9 expressly indicates that it does not lessen the applicability of the Coastal Act, except that cities “shall not be required to hold public hearings for coastal development permit applications” for duplexes or urban lot subdivisions.<sup>47</sup> HCD has not issued any guidance for how SB 9 is to apply in the Coastal Zone. However, on January 21, 2022, the California Coastal Commission issued a thirteen page memorandum analyzing how SB 9 should be applied in the Coastal Zone.<sup>48</sup>

**Must cities still ensure compliance with laws protecting tenants and affordable units?**

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<sup>44</sup> Gov’t Code §§ 65852.21(i)(3); 66411.7(m)(2).

<sup>45</sup> See: <https://therealdeal.com/la/2022/04/01/four-la-county-cities-sue-state-on-sb9s-split-resi-lots/>

<sup>46</sup> See: <https://ourneighborhoodvoices.com/our-neighborhood-voices-now-focusing-on-2024-ballot/>

<sup>47</sup> Gov. Code § 65852.21(k) [for duplex units]; Gov. Code § 66411.7(o) for urban lot subdivisions.

<sup>48</sup> <https://documents.coastal.ca.gov/assets/rflg/SB9-Memo.pdf>.

Yes. The Housing Crisis Act of 2019 establishes that if a housing project proposes to demolish existing units, it must create at least as many existing units as will be demolished. There are special protections for “protected units.” These are units which have been rented in the last 5 years to lower income households, units withdrawn under the Ellis Act, units subject to a restrictive rent covenant, or subject to rent control. If units are to be demolished, or tenants displaced, those laws remain in place.<sup>49</sup>

## **II. Senate Bill 8**

In 2019, the Legislature adopted SB 330, the Housing Crisis Act of 2019. The law enacted a number of restrictions on local agencies’ local control and discretion regarding proposed “housing development projects.” Many of SB 330’s provisions were originally scheduled to sunset on January 1, 2025. However, SB 8 extends the date of the current sunset provision. It also changes the definition of “housing development project” in potentially significant ways that impact the application of the Housing Accountability Act. The next two sections review these changes.

### **A. Extension of SB 330 Requirements**

The Housing Crisis Act contains numerous different provisions. One of the significant elements of SB 330 was a requirement that a proposed housing development project be subject only to the ordinances, policies, and standards in effect when a preliminary application is submitted. A preliminary application is submitted when an applicant pays the required permit processing fee and provides certain information specified in Government Code section 65941.1. Many of SB 330’s sections were originally scheduled to sunset on January 1, 2025. SB 8 extends the sunset provision to January 1, 2030.

The following table compiles the SB 330 main provisions that were extended and/or modified by SB 8:

<b>Gov. Code</b>	<b>Regulation</b>	<b>Extend to</b>	<b>Additional changes under SB 8</b>
65905.5	<u>Five Hearing Rule:</u> A housing development project that otherwise complies with objective standards in effect at the time an application is complete under the Permit Streamlining Act must be approved or denied within 5 hearings.	2034	<ul style="list-style-type: none"> <li>➤ Specifies that 5 hearings includes appeals.</li> <li>➤ “Housing development project” used in this section includes both discretionary and ministerial projects, and includes a proposal to construct a single dwelling unit (but this does not change the definition of a housing development project under the HAA, which is plural and indicates two units or more).</li> <li>➤ Applies to projects that submits a preliminary application before 1/1/2030.</li> </ul>

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<sup>49</sup> See Gov. Code § 66300.



<b>Gov. Code</b>	<b>Regulation</b>	<b>Extend to</b>	<b>Additional changes under SB 8</b>
65589.5(o)	Part of the HAA that created the preliminary application. Cities cannot disapprove a housing project or approve it at a lower density if project complies with applicable, objective standards in place upon complete preliminary application. A preliminary application remains valid as long as certain subsequent requirements are met.	2034	<ul style="list-style-type: none"> <li>➤ Affordable housing projects can get the benefit of a preliminary application if, among other requirements, they commence construction within 3.5 years (instead of 2.5 years).</li> <li>➤ The preliminary application rules apply to housing development projects that submits a preliminary application before 1/1/2030.</li> </ul>
65941.1	Specifies information that must be submitted in a preliminary application. Cities may not require additional information.	2030	<ul style="list-style-type: none"> <li>➤ Clarifies that submission of a preliminary application does not preclude the listing of a tribal cultural resource on a national, state, tribal, or local historic register list on or after the preliminary application submittal date.</li> </ul>
65589.5(h), (5), (8) & (9)	Definitions of objective standards, “determined to be complete” (filing of formal planning application) and “deemed complete” (filing of preliminary application).	2030	N/A
65913.10	If the City is required by state or local law or regulation to determine whether a site proposed for housing project is an historic site, it must make that determination at the time the housing project application is deemed complete. The City cannot revisit this determination (it remains valid) while the project application is pending, unless there were additional archaeological, tribal cultural resource discoveries during the course of the project.	2030	N/A
65943	Permit Streamlining Act provision specifying the 30-day timeline pursuant to which cities must review and determine whether a project application (traditional planning application) is complete.	2030	<ul style="list-style-type: none"> <li>➤ Specifies that a “development project” for the purposes of this section includes a housing development project as defined by Gov. Code section 65905.5, which means that a ministerial project or a project to construct a single dwelling unit would also be subject to this section.</li> </ul>

Gov. Code	Regulation	Extend to	Additional changes under SB 8
65950	Timelines under the Permit Streamlining Act to approve projects based on CEQA action. SB 330 shortened some of these timelines.	2030	➤ Specifies that a “development project” for the purposes of this section includes a housing development project as defined by Gov. Code section 65905.5, which means that a ministerial project or a project to construct a single dwelling unit would also be subject to this section.
65940	Permit Streamlining Act provision requiring cities to compile a planning application checklist. An “affected city” as defined under SB 330 must include information necessary to comply with the demolition prohibition under Gov. Code section 66300(d)(1).	2030	➤ Specifies that a “development project” for the purposes of this section includes a housing development project as defined by Gov. Code section 65905.5, which means that a ministerial project or a project to construct a single dwelling unit would also be subject to this section.
66300 & 66301	Requirements and determination related to “affected cities”. For example, affected cities may not adopt a policy that would change a property’s general plan or zoning designation to a less intensive use. Also limits the right to relocation benefits and the right of first refusal during demolitions to lower-income occupants of the protected units only.	2030	<p>➤ Broader definition of what “less intensive use” means.</p> <p>➤ Housing projects that submit a preliminary application before 1/1/2030 would continue to be governed by the Housing Crisis Act of 2019 until 1/1/2034.</p> <p>*Also note that the declaration of a statewide housing emergency is extended from 2025 to 2030.</p>

**B. Notable Change: Definition of “Housing Development Project”**

The Housing Accountability Act (“HAA”), among other things, prohibits a local agency from disapproving a housing development project, or requiring it to be developed at a lower density, if the proposed project complies with all the applicable, objective standards except in very limited circumstances. The HAA defines a “housing development project” as “a use consisting of any of the following:

- (A) Residential units only.
- (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
- (C) Transitional housing or supportive housing.”<sup>50</sup>

When originally enacted by SB 330, all sections of the Housing Crisis Act of 2019 used this same definition of a “housing development project.” However, SB 8 altered this definition. While the law still defines housing development project to have the same meaning as contained in the HAA,

<sup>50</sup> Gov. Code § 65589.5(h)(2).

SB 8 provides that the term includes “projects that involve no discretionary approvals and projects that involve both discretionary and nondiscretionary approvals” and a “proposal to construct a single dwelling unit.” This altered definition applies with respect to requirements for project application review timelines under the Permit Streamlining Act and the five-hearing rule added by SB 330, but does not impact the applicability of the HAA.<sup>51</sup>

This change may be significant. While not explicit, the definition of “housing development project” contained in the HAA arguably did not include a single-family home. The definition uses the term “units,” and that plural term is used throughout the HAA. HCD’s *Housing Accountability Act Technical Assistance Advisory* also opined that because the term “units” is plural, a development must consist of more than one unit to qualify under the HAA.<sup>52</sup> The department further stated that the development can consist of attached or detached units and may occupy more than one parcel, so long as the development is included in the same development application.<sup>53</sup> Currently, a project seeking to construct one single-family home is typically not processed and reviewed under the same lens by cities as with other multi-unit development projects or subdivisions. Thus, the change introduced by SB 8 now expands procedural protections and streamlined review to single-unit projects that were arguably not contemplated by the HAA. Such change may be signaling a further change in direction with respect to how single-unit projects are to be handled by cities.

### **III. Senate Bill 10**

SB 10, codified as Government Code section 65913.5, is the final of the three major housing bills enacted by the Legislature during the 2021 legislative session. However, unlike SB 8 and SB 9, SB 10 creates no new mandates or requirements for cities. Rather, SB 10 creates a streamlined process for cities to voluntarily increase residential density up to 10 units per parcel on eligible parcels. Under the law, rezoning actions pursuant to SB 10 are not subject to CEQA.

#### **A. Eligible Parcels**

Local agencies may use SB 10 on parcels located within a urban infill site or transit-rich area.<sup>54</sup> A transit rich-area is defined as a parcel located within one-half mile of (i) an existing rail or bus rapid transit station, (ii) ferry terminal served by either bus or rail services, or (iii) a high-quality bus corridor.<sup>55</sup> SB 10 defines high-quality bus corridor to mean fixed route bus service that has average services intervals no greater than 15 minutes during the three peak hours between 6 a.m. to 10 a.m., and the three peak hours between 3 p.m. and 7 p.m. on weekdays, 20 minutes between 6 a.m. to 10 p.m. on weekdays, or 30 minutes between 8 a.m. to 10 p.m. on weekends.<sup>56</sup> Depending on the strength of the local public transportation system, a city may have many or very few parcels qualifying as transit-rich areas.

In contrast, most cities will have at least some, if not many, parcels meeting the broad definition of an urban infill site. Urban infill sites must be: (i) located in a city of which some

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<sup>51</sup> Gov. Code § 65905.5(b)(3)(C) states that the new definition does not affect how the HAA’s scope is interpreted.

<sup>52</sup> See Page 6 of HCD Technical Advisory available at: <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf>

<sup>53</sup> *Id.*

<sup>54</sup> Gov. Code § 65913.5(a).

<sup>55</sup> Gov. Code § 65913.5(e)(2).

<sup>56</sup> Gov. Code § 65913.5(e)(1).

portion is within an urbanized area or urban cluster as designated by the United States Census Bureau, (ii) at least 75% of the perimeter of the site must be developed with urban uses, and (iii) the site must be zoned for or have a general plan designation that allows residential use or residential mixed use, with at least two-thirds of the square footage designed for residential use.<sup>57</sup> The overwhelming majority of cities in California contain territory that is located within an urbanized area or urban cluster.<sup>58</sup>

Even if a parcel qualifies as an urban infill site or within a transit rich area, local agencies may not utilize SB 10 if the parcel is located within a high or very high fire hazard severity zone as determined by the Department of Forestry and Fire Protection, unless fire hazard mitigation measures have been adopted pursuant to existing building standards.<sup>59</sup> Similarly, SB 10 may not be used on property designated as open-space land or for park or recreational purposes through a local initiative.<sup>60</sup>

## **B. Required Procedures**

To utilize SB 10 to upzone parcels, a city must adopt an ordinance explicitly invoking Government Code section 65913.5, clearly demarcate the areas that will be upzoned pursuant to the law, and make a finding that the increased density is consistent with the City's statutory obligation to affirmatively further fair housing.<sup>61</sup> The adopted ordinance may not reduce the density of any parcel. Significantly, ordinances adopted pursuant to SB 10 can also override voter enacted zoning restrictions if the ordinance is adopted by a two-third's vote of the city council.<sup>62</sup> Any ordinance rezoning a parcel pursuant to SB 10 must be adopted prior to January 1, 2029.<sup>63</sup>

## **C. Environmental Review**

An ordinance adopted to rezone parcels pursuant to SB 10 is not a project for the purposes of CEQA.<sup>64</sup> Similarly, other actions taken to make a city's general plan, municipal code and other regulations consistent with the new zoning, are not projects under CEQA. This allows local agencies that want to upzone parcels to do so relatively quickly, without the delays that complying with CEQA can cause. First, no environmental review is necessary for the upzoning itself, regardless of how many different parcels are being upzoned. Second, the ability of opponents of the upzoning to file CEQA litigation to delay or prevent the upzoning is eliminated.

However, SB 10 excludes only the rezoning process itself from CEQA, and does not exempt the actual residential development projects proposed on upzoned parcels. Often housing projects on parcels rezoned by SB 10 will qualify for an existing CEQA exemption, such as the exemption for new construction of small structures of up to six units in urbanized areas (Class 3 categorical exemption) or the infill exemption (Class 32 categorical exemption). Depending on the

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<sup>57</sup> Gov. Code § 65913.5(e)(3).

<sup>58</sup> The Census Bureau defines an Urbanized Areas as a geographic area of 50,000 or more people, and a urban cluster as a geographic area of at least 2,500 and less than 50,000 people. See <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html>.

<sup>59</sup> Gov. Code § 65913.5(a)(4)(A).

<sup>60</sup> Gov. Code § 65913.5(a)(4)(A).

<sup>61</sup> Gov. Code § 65913.5(b).

<sup>62</sup> Gov. Code § 65913.5(b)(4).

<sup>63</sup> Gov. Code § 65913.5(a)(2).

<sup>64</sup> Gov. Code § 65913.5(a)(3).

project, significant time, resources and technical studies may still be necessary to substantiate the exemption. To avoid CEQA processing delays and litigation delays, a city may consider making residential developments of up to 10 units “by-right” or subject only to ministerial approval.

#### **D. Projects Over 10 Units**

SB 10 allows jurisdictions to increase the residential density up to 10 units per parcel on eligible parcels. However, if a preproposal project exceeds 10 units on parcels rezoned under the law, that project is not eligible for any CEQA exemption, or any ministerial or by-right process that would otherwise apply.<sup>65</sup> For example, if a parcel has been rezoned to allow 10 units, an applicant may not use a density bonus to exceed the 10 unit limit or SB 35 to obtain ministerial review.<sup>66</sup> Notwithstanding this limitation, up to two accessory dwelling units (ADUs) and junior ADUs (JADUs) may be ministerially approved on a parcel; these units would not count toward the 10-unit limit.

If an applicant desires to construct more than 10 units on a parcel zoned under SB 10, the parcel must be rezoned without using the provisions of SB 10. Such an ordinance would not be exempt from CEQA. Importantly, necessary environmental review would be required to study the change in zoning from the zoning that existed before the parcel was upzoned under SB 10.<sup>67</sup>

#### **E. How Important is SB 10?**

In recent years, the Legislature has enacted numerous laws restricting or eliminating local control and discretion regarding proposed housing projects. SB 10 differs from most recent legislation in that it does not mandate or require anything. Instead, SB 10 creates an optional tool for cities to use as they try to address the housing crisis within their communities, and particularly so-called “missing middle” housing, for households that do not qualify for deed-restricted affordable housing or rental subsidies. Cities that choose to implement SB 10 will be able to avoid the delays and expense that a typical rezoning would incur. For example, a city that needs to rezone property to meet its regional housing needs assessment for its sixth cycle housing element may be able to use SB 10 to expedite that process and ensure it has a compliant housing element. Making residential project of up to 10 units by-right, when combined with the streamlined rezoning authorized by SB 10, would allow a city to streamline housing production even more. The significance of SB 10 will depend on how many cities decide to utilize its tools.

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<sup>65</sup> Gov. Code § 65913.5(c)(1)

<sup>66</sup> The Density Bonus Law and SB 35 are two examples of statutes which require ministerial or by-right approval that would otherwise apply but for SB 10’s limitation.

<sup>67</sup> Gov. Code § 65913.5(c)(2).