SB 9 and Housing Element Site Inventories

*Please note that (1) this technical assistance is for informational purposes only and does not constitute legal advice, (2) no attorney-client relationship will be created with any local jurisdictions, and (3) jurisdictions are advised to seek legal counsel for advice on implementing all laws.*

Senate Bill 9 (SB 9) is a new California state law that took effect January 1, 2022. It is intended to support increasing the supply of starter, modestly priced homes by encouraging building of smaller houses on small lots. SB 9 changes existing density limits in single-family zones, and it waives discretionary review and public hearings for two types of projects:

* 2-unit developments on a parcel in a single-family zone
* Subdividing one parcel into two (“urban lot split”) in a single-family zone

In general, this means that most single-family parcels could now hold four units, though staff should seek guidance from legal counsel to confirm.

Since the Bay Area’s jurisdictions are currently preparing their sixth cycle housing elements, a number of them have asked for guidance on whether they can use SB 9 units to help satisfy their Regional Housing Needs Allocation (RHNA) requirements. While theoretically possible, there are challenges in doing so, including:

* Little to no local or regional track record (see below), and
* In some cases, there is no adopted ordinance to analyze.

Generally, HCD has approved the use of two methodologies for including projected housing units in the Sites inventory:

* **Recent trends** – For accessory dwelling units (ADUs), HCD directs jurisdictions to multiply recent annual trends by eight (because there are eight years in the planning cycle). If there were a track record for SB 9, this could be the preferred method for the sites analysis. If a jurisdiction has strong track record of approving building permits associated with SB 9 applications in the first half of 2022, there may be a solid argument for using this method.
* **Analysis of individual sites** – For most vacant and nonvacant sites – for example, a closed department store – HCD directs jurisdictions to conduct an analysis of the site and evaluate the potential for redevelopment. The analysis must consider the existing uses, site characteristics, zoning, access to infrastructure, etc. Applying this method to SB 9 would require listing each site where SB 9 is applicable and conducting an analysis.

An additional key consideration is whether the jurisdiction has adopted a local ordinance to implement SB9, and whether the ordinance generally encourages homeowners to use the law (e.g., goes beyond the minimum requirements). Further, without an implementing ordinance (which is not required by state law), it is even more difficult to predict how much property owners will use the law and therefore how many units will realistically be created.

HCD provided comment letters to several Southern California jurisdictions that proposed using SB 9 projections in the housing elements and has also provided this guidance in their SB 9 Fact Sheet.[[1]](#footnote-1) HCD states that to utilize projections based on SB 9 legislation, a jurisdiction would need to:

1. include a site-specific inventory of sites where SB 9 projections are being applied
2. include a nonvacant sites analysis demonstrating the likelihood of redevelopment and that the existing use will not constitute an impediment for additional residential use and
3. identify any governmental constraints to the use of SB 9 in the creation of units (including land use controls, fees, and other exactions, as well as locally adopted ordinances that impact the cost and supply of residential development)
4. include programs and policies that establish zoning and development standards early in the planning period and implement incentives to encourage and facilitate development. The element should support this analysis with local information such as local developer or owner interest to utilize zoning and incentives established through SB9

Short of a track record or conducting the type of analysis that HCD is requesting, it will be difficult to count SB 9 units in the inventory.

A more promising path may be a well thought out missing middle housing strategy to promote units allowed under state law (both ADUs and SB 9 units) as well as other middle housing types. HCD has shown more interest in a broad-based missing middle approach. But even this strategy is not easy. See this guidance memo[[2]](#footnote-2) regarding counting middle housing units toward RHNA, which was developed through the work of ABAG’s Middle Housing Work Group.[[3]](#footnote-3)

*Please note: There is a provision in state Housing Element law that allows cities to commit to rezone after the Housing Element is adopted. This is sometimes called a “program to rezone” and is used if the zoning is not in place at the time of Housing Element adoption. Using this provision for Missing Middle or SB 9 is not possible for sites intended for lower income housing because, without evidence that affordable housing is feasible, state law does not allow jurisdictions to use small sites as part of a program to rezone. However, if a community has a shortage of sites for above-moderate and moderate-income households, a Missing Middle or SB 9 zoning program may be an option.*

Published by the Association of Bay Area Governments: June 2022

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1. [HCD SB 9 Fact Sheet](https://hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf) [↑](#footnote-ref-1)
2. [21 Elements Middle Housing Zoning Changes and RHNA](http://21elements.com/documents-mainmenu-3/housing-elements/rhna-6-2022-2030/1325-middle-housing-zoning-changes-and-rhna-draft-jan-27-2022/file) [↑](#footnote-ref-2)
3. [ABAG’s Missing Middle Housing Website](https://abag.ca.gov/technical-assistance/missing-middle-housing-website) [↑](#footnote-ref-3)