



#### ATTORNEYS AT LAW

18101 Von Karman Avenue  
Suite 1800  
Irvine, CA 92612  
T 949.833.7800

John P. Erskine  
D 949.833.7800  
jerskine@nossaman.com

Admitted only in California

May 27, 2024

Chair Violante, Vice Chair Gordin, and Commissioners  
Santa Cruz County Planning Commission  
701 Ocean Street  
Santa Cruz, CA 95060

**Re: Comments on the County of Santa Cruz's Study Session Regarding Its Draft  
SB 9 Implementing Ordinances**

Dear Chair Violante and Planning Commissioners,

This law firm represents Kevin and Sandy Huber, owners of a partially improved lot located at 625 Beach Drive, Aptos, and current Senate Bill 9 ("SB 9") project applicants. This letter is in response to the County of Santa Cruz's ("County") May 28, 2024 Planning Commission meeting agenda item no. 7, "a study session to consider an ordinance implementing Senate Bill 9, allowing two-unit developments and urban lot splits."

The State Legislature stated that a key factor to solving the housing shortage is the implementation of policy reforms that enhance the approval and **supply of housing for Californians "of all income levels."** (Gov. Code, § 65589.5, subd. (a)(2)(B) [emphasis added].) Accordingly, in recent years, the Legislature has passed multiple bills that seek to "significantly increase the approval and construction of new housing for **all economic segments of California's communities**" by limiting local agency discretion to condition and deny housing projects. (*Id.* § 65589.5, subd. (a)(2)(K) [emphasis added].) Adopted in 2021, SB 9 is one of those bills and plays a critical role in the State's effort to address its historic housing shortage across all income levels, including market-rate housing. By permitting development on existing residentially-zoned lots, SB 9 is also consistent with Coastal Act section 30250, which states that new residential development, "shall be located within, contiguous with, or in close proximity to, existing developed areas . . . ."

SB 9's streamlining provisions expressly apply within the coastal zone. SB 9 states clearly that it authorizes local agencies to "adopt an ordinance to implement [SB 9's] provisions." (*Id.* § 65852.21, subd. (j).) The County is now considering adopting two such ordinances that would add sections 13.10.327 and 13.10.328 to the County code ("Draft Ordinances"). As proposed, the Draft Ordinances go beyond merely implementing SB 9 and instead impose overly restrictive requirements that appear to conflict with SB 9's terms. Such a conflict may result in the Draft Ordinances being determined to be invalid. (See Cal. Const. art. XI, § 7.) In the following, we discuss a number of recommendations and considerations for the County Planning Commission as it further considers the Draft Ordinances at its May 28, 2024 study session.

### **1. The Draft Ordinances Will Not Apply to Existing SB 9 Project Applications.**

First, in its May 10, 2024 report on the Draft Ordinances implementing SB 9 (“Staff Report”),<sup>1</sup> the County notes that there have already been eight formal applications for SB 9 projects in the County. While not expressly addressed in the Staff Report, we would like to remind the Planning Commission that under Government Code, section 65915, the Housing Accountability Act (“HAA”), the County may not retroactively apply local regulations to a housing development project that were not in effect at the time of the project’s application, unless otherwise agreed to by the applicant. (See Gov. Code, § 65589, subd. (j)(1).) The HAA protects projects such as the Hubers’ application filed with the County pursuant to SB 9. (See *Reznitskiy v. County of Marin* (2022) 79 Cal.App.5th 1016, 1037.) Thus, we want to make the County aware that any existing applications under SB 9 will not be automatically subject to the County’s Draft Ordinances unless expressly agreed to by an applicant.

### **2. The Proposed Ordinance’s Square-Footage Limitation is Overly Restrictive.**

The Draft Ordinances place a 1,200 square-foot limitation on all new two-unit developments under SB 9. This limitation is overly restrictive and must be removed or expanded in order for the County to effectively implement SB 9. The County already has floor-area-ratio requirements that limit the square footage on such parcels and there is no demonstrated need to limit second primary residences under SB 9 to be even more restrictive. (See Santa Cruz County Code, § 13.10.323, subd. (B).)

As State Housing and Community Development Department (“HCD”) has stated, “[a] local agency should proceed with caution when adopting a local ordinance that would impose unique development standards on units proposed under SB 9 (but that would not apply to other developments).” (SB 9 Fact Sheet, at p. 7.)<sup>2</sup> Furthermore, “HCD recommends that local agencies rely on the existing objective development, subdivision, and design standards of its single-family residential zone(s) to the extent possible.” (*Ibid.*) The County already adequately provides limitations on a residential unit’s size, and thus, there is no reason for the County to impose an even more restrictive limitation.

### **3. The Prohibition on Properties Containing Coastal Bluffs or Beaches is Vague and Ambiguous.**

The Draft Ordinances exclude parcels from using SB 9 that are located on “[c]oastal bluffs and beaches, or other Environmentally Sensitive Habitat Areas, as defined in [Santa Cruz County Code, section] 13.20.040.” Notably, section 13.20.040 does not contain any definition of the term “bluff” or “beaches,” or clarify when a parcel might contain either of the foregoing. This lack of clarity results in the Draft Ordinances being vague and ambiguous as to SB 9’s application to certain properties in the coastal zone.

---

<sup>1</sup> County of Santa Cruz, Memo re Study Session to Consider an Ordinance Implementing Senate Bill 9, Allowing Two-Unit Developments and Urban Lot Splits (May 10, 2024), available at <https://www2.santacruzcountyca.gov/planning/plnmeetings/PLNSupMaterial/PC/agendas/2024/20240528/007.pdf>.

<sup>2</sup> Available at: <https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf>.

#### 4. The County Should Not Prohibit SB 9's Use on Properties Containing Coastal Bluffs or Beaches.

In the Draft Ordinances, the County proposes to exclude projects located on coastal bluffs and beaches; however, such a blanket prohibition is inconsistent with SB 9. In adopting SB 9, the Legislature broadly applied the streamlining provision to projects located on residentially zoned sites. The Legislature utilized a list of exclusions from a separate housing streamlining bill, Senate Bill 35 ("SB 35") in enumerating the excluded properties under SB 9. (See Gov. Code, § 65852.21, subd. (a)(2).) This list of exclusions from SB 35 includes specific properties that include farmland, wetlands, fire and flood hazard zones, hazardous waste sites, earthquake fault zones, and conservation lands. (*Id.* § 65913.4, subd. (a)(6)(B)-(K).)

Relevant here, the only exclusion from SB 35 that the Legislature stated would **not** apply to SB 9 is the coastal zone exclusion. Despite the Legislature's refusal to exclude SB 9's use from certain parts of the coastal zone, the County, by placing a wholesale ban of SB 9's use on the properties containing bluffs and beaches, seems to be doing just that. In order to remain consistent with the purpose of SB 9 and its broad application, the Draft Ordinances should not exclude properties containing coastal bluffs or beaches, especially in existing residentially zoned developments where SB 9 housing is not inconsistent with the surrounding homes.

#### 5. The County Should Limit the Mitigation Imposed on SB 9 Projects.

In the Draft Ordinances, the County broadly proposes to allow "sufficient mitigation" to be required on three areas: (1) geologic hazard areas; (2) qualifying flood areas; and (3) fire hazard areas. However, SB 9 already states that in the event a local agency—here, the County—finds that an SB 9 project would result in a specific adverse impact to public health and safety—such as a geologic hazard—then the County must determine whether there is a "**feasible method to satisfactorily mitigate** or avoid the specific, adverse impact." (Gov. Code § 65852.21, subd. (d) [emphasis added].) Importantly, in such circumstances, the burden of proof for determining both the existence of an adverse impact and the feasibility of the mitigation is on the public agency. (*Ibid.*) Thus, SB 9 already adequately addresses the issue of mitigating adverse impacts. In the event the County wants to include such language in the Draft Ordinances, it should simply adopt the language (including the burden of proof) that SB 9 uses.

We appreciate the County's consideration of the foregoing recommendations and look forward to the successful, lawful implementation of SB 9 throughout the County of Santa Cruz. It is beyond debate that coastal communities—including Santa Cruz—are in critical need of more housing at all economic levels. Thank you for the opportunity to provide our comments.

Very truly yours,



John P. Erskine  
Nossaman LLP

May 27, 2024  
Page 4

*JPE:nd3*

cc: Nicholas Brown [*Nicholas.Brown@santacruzcountyca.gov*]  
Jacob Lutz [*Jacob.Lutz@santacruzcountyca.gov*]  
Matt Machado [*Matt.Machado@santacruzcounty.us*]  
Kevin and Sandy Huber [*Khuber@grupehuber.com*]  
Cove Britton [*Cove@matsonbritton.com*]