

Planning Department  
Community Development Department, Town of Los Gatos  
110 E. Main Street  
Los Gatos, CA 95030

January 30, 2023

**Re: The Bouknight Residence, 144 Wood Road  
Letter of Justification**

To Whom it May Concern:

On behalf of my family, I am pleased to present this letter of justification in support of our appeal of the exception denial issued by the Santa Clara County Fire Department (SCCFD) on January 18, 2023.

**BACKGROUND ON PUBLIC RESOURCES CODE SECTION 4290 (PRC 4290)**

The State of California enacted PRC 4290 in 1987, requiring the Board of Forestry to adopt regulations implementing minimum fire safety standards related to defensible space in the State Responsibility Area (SRA). They were first adopted in 1991. The regulations relate to:

- Road standards for fire equipment access
- Standards for signs identifying streets, roads and buildings
- Minimum private water supply reserves for emergency fire use
- Fuel breaks and greenbelts

In 2018 the State amended PRC 4290 directing the Board of Forestry to increase the scope of the regulations to all lands within designated Very High Fire Hazard Severity Zones (VHFHSZ). The majority of Santa Clara County, including Los Gatos is designated within the SRA or the VHFHSZ and therefore prone to interpretations of how to implement PRC 4290. Approximately 80 percent of unincorporated Santa Clara County has been noted to be within the SRA or VHFHSZ and nearly 70 percent of the Town of Los Gatos lies within the VHFHSZ.

Article 2. Emergency Access and Egress (Section 1273) is the relevant article for residential property owners. Article 2 intends to provide for safe access for emergency fire equipment and provide for unobstructed traffic circulation.

There are seven (7) standards listed as sub-sections in Article 2, including:

1. Road width standard
2. Roadway surface standard
3. Grades standard
4. Radius standard
5. Turnaround standard
6. Turnout standard
7. Dead-end roads standard

In a memorandum from the Office of the County Counsel in the County of Santa Clara dated September 26, 2022 (Exhibit 4o – Written Description of Project), Office Counsel notes on page 5 that:

“A significant percentage of development applications in unincorporated Santa Clara County are served by public (County-maintained) and private roads that do not meet one or more of the requirements in the Regulations. The most common deficiencies are failure to meet 20-foot minimum width, and exceedance of the maximum length for dead-end roads. This has stalled many project applications while the County waited for the Board of Forestry to amend the Regulations to provide some relief for single-family residences and other small-scale developments.”

The same commentary applies to the Town of Los Gatos – a significant percentage of the public and private access roads do not meet all of the standards, particularly if interpreted under the most restrictive lens. One can easily assume that there are thousands of current and prospective homes in the Town with access roads that do not meet every letter of the seven (7) standards covered in the subsections.

Due to their unwieldiness, lack of clarity, lack of practicality and potential for frequent conflict with other State or Federal regulations, the PRC 4290 regulations enacted in 1987, have been under review for amendment by the Board of Forestry for several months. Most counties have either waited for clarity around the amendments to begin implementation or have coordinated through their Planning organizations to introduce common-sense interpretations of the standards in ways that do not broadly prohibit small-scale, residential development on existing legal lots along existing roads.

In our particular case, our parcel is an existing legal lot along an existing (public) roadway with approvals of site access, site development, and home construction just one month before requesting a grading permit and three months before requesting a building permit. We were denied both permits based on these standards without any warning, which reflects a proposed alteration of our final conditions of approval. Our concerns related to this have been noted at length in the Written Description of Project.

In a letter dated November 16, 2021, directed to the Board of Forestry, the County of Santa Clara’s Department of Planning and Development notes its significant concerns with the way in

which PRC 4290 has been implemented within the County (Exhibit 4n). In its letter, the department highlights the challenges with relying on an exception process, because those exceptions are routinely denied by CAL Fire. The letter notes:

“While there is an exception process set forth in § 1270.06, and our County has adopted a process to hear appeals of CAL Fire’s exception decisions, this has not provided relief to applicants at this time. The phrase limiting approval of these requests to ‘where the exceptions provide the same practical effect’ severely limits the ability to grant exceptions from the access and egress standards. For example, it is difficult to come up with any alternate method to reducing the length of a dead-end road short of constructing an entirely new loop road or other access connection.”

Concerns with the effectiveness of the exception process and the County’s decision to move away from it has also been noted in the Written Description of Project as noted in sections of Exhibit 4o.

#### **WOOD ROAD ASSESSMENT RELATIVE TO SECTION 1273 (EMERGENCY ACCESS AND EGRESS)**

As covered in the Written Description of Project, we have spent significant time and effort working in concert with SCCFD to assess Wood Road relative to section 1273 (Exhibit 4q – Written Description of Project). Through this process of engagement, SCCFD has found Wood Road to be acceptable with respect to five (5) of the seven (7) standards, including:

- (1) Road width standard
- (2) Roadway surface standard
- (4) Radius standard
- (6) Turnout standard
- (7) Dead-end road standard

There are two (2) of the seven (7) standards that did not meet point-by-point alignment:

- (3) Grades standard
- (5) Turnaround standard

For both of these two standards, there are clear justifications to support our appeal.

##### Grades Standard Assessment – 1273.03

The grade standard states that (a) At no point shall the grade for all roads and driveways exceed 16 percent and (b) The grade may exceed 16%, not to exceed 20% with approval from the local authority having jurisdiction and with mitigations to provide for same practical effect.

A topographical road survey (Exhibit 4u) was divided into seven (7) different segments (or sections) with an evaluation of grades across the seven (7) sections from the intersection of Wood Road and South Santa Cruz up to the driveway of the proposed home. Across the combined seven (7) segments, the average road grade was estimated to be 15 percent based

on the data in the survey. The segment analysis indicated that there are three sections that exceed 16 percent, with average grades just under 20 percent.

Mitigating factors were evaluated to support acceptance of road grades in excess of 16 percent across certain sections of Wood Road. In the proposed (final) State Minimum Fire Safe Regulations (<https://bof.fire.ca.gov/regulations/proposed-rule-packages/>), section 1273.04 notes that for roads with grades of 16 to 20 percent that they satisfy the requirement if they have been treated to prevent slippage and highlights paving as a mitigating factor. Wood Road has incorporated paving from South Santa Cruz Avenue up to the property in question, which serves as a mitigating factor for the sections evaluated as more than 16 percent grade.

SCCFD requested additional grade analysis of Wood Road in the form of a road profile, evaluating grades at tighter intervals (Exhibit 4v). This analysis shows that there are portions of road that go up to 21.8% in grade. The analysis does show that the average grade from the intersection to the driveway of the home is 16%.

#### Turnaround Standard Assessment – 1273.05

The turnaround standard states that (d) Each dead-end road shall have a turnaround constructed at its terminus. Where parcels zoned five (5) acres or larger, turnarounds shall be provided at a maximum of 1,320 foot intervals.

There is a SCCFD turnaround at the terminus of Wood Road, approximately 2,450 feet from the South Santa Cruz Avenue and Wood Road intersection. Recorded in easement #23549384 (Exhibit 4c – Written Description of Project), SCCFD is satisfied with this component Part (d) in 1273.05. There is not, however, a full turnaround within a 1,320 foot interval.

### **JUSTIFICATION**

#### Justification Based on Current Road Conditions and Proposed Development

Attempting to identify point-by-point alignment with these standards make it challenging for nearly any assessment to pass without the notation of misalignment on a given feature. As previously noted, any exception request will likely fail due to inability to incorporate broader perspectives on how the expressed intent of effective ingress / egress has been or can be achieved.

While SCCFD has expressed the inability to evaluate submissions beyond point-by-point evaluation due to its definition of “practical effect”, SCCFD has informally expressed support for our appeal.

The Planning Commission has a broader mandate to consider overall alignment with the intent of the regulation.

### **Grades – 1273.03**

While it is not possible for us to re-engineer Wood Road, road conditions related to grade do achieve the intent of ingress / egress. The average grade of Wood Road from the intersection to the proposed driveway is 16%.

There is also a secondary road that appears approximately 920 feet up Wood Road running North/South with a bulbus component that can serve as a turn-in as a fire apparatus makes its way up the road. This feature can provide additional fire apparatus support along the roadway.

### **Turnarounds – 1273.05**

Similar to the justification in support of the assessment of grades, there are features of our proposal that allow for alignment with the overall intent of the regulation. Specifically, we have added to our proposal a turnout at the entrance to our driveway, which will be placed at approximately 1,633 feet from the intersection. The turnout provides the fire apparatus with one more option to assist in navigating Wood Road in addition to the on-site fire apparatus turnaround to be constructed at the home site itself.

Important to our justification for both 1273.03 and 1273.05 is an operational assessment that could not be considered in a point-by-point assessment. On November 4, 2022 SCCFD had a fire apparatus conduct an operational drive on Wood Road, driving up to and beyond the subject property. The operational drive was conducted without issue. The fire apparatus also demonstrated successfully its ability to conduct a turnaround at the road terminus.

### Justification Based on On Site Improvements

Enacted in 1987, PRC 4290 does not contemplate certain onsite improvements that have been incorporated into our approved site development and architectural plans. These improvements speak directly to the intent of establishing defensible space, which is a core aspect of the regulations.

Specifically, on-site improvements that assist with fire safety and establishing defensible space include:

- Use of Class A roof assemblies.
- Use of materials and construction methods for exterior wildfire exposure in compliance with Section R337 of the 2019 California Residential Code, Public Resources Code 4291 and California Government Code Section 51182.
- Provision of defensible space / fire break landscaping plan. This is prepared by a California-licensed Landscape Architect in conformance with California Public Resources Code 4291 and California Government Code Section 51182.
- Provision of a letter from a California-licensed Landscape Architect certifying the landscaping and vegetation clearance requirements have been completed per the California Public Resources Code 4291 and Government Code Section 51182.
- Automatic residential fire sprinkler system shall be installed.
- Creation of an approved fire department engine driveway turnaround with a minimum radius of 36 feet outside and 23 feet inside.

- Implementation of a private fire protection system with wharf hydrant accessible at all times.
- Installation of water tanks with a capacity for a minimum of 20,000 gallons of water.
- Construction of a fire apparatus access driveway with a paved all-weather surface.

These elements are all features of our final conditions of approval.

The Planning Commission should contemplate these improvements as part of our justification as they substantially improve fire safety in comparison to leaving the parcel vacant with vegetation and these improvements have not been contemplated as part of a point-by-point evaluation of PRC 4290.

#### Justification Based on Conflict with Other State or Federal Regulations

Requirements to comply with certain sections of PRC 4290 can frequently conflict with other state and federal laws. In those cases, required compliance with conflicting off-site road improvements is abrogated.

In our particular case, strict implementation of sections 1273.03 (Grades) and 1273.05 (Turnarounds) is not feasible and requiring strict compliance with these sections would constitute a taking.

Under three different legal doctrines, the requirement to reengineer Wood Road would constitute a taking without just compensation in violation of the Fifth Amendment to the United States Constitution. First, the requirement is disproportionate to the impacts of our proposed single-family development project, and therefore violates the essential nexus and rough proportionality test announced by the United States Supreme Court in *Dolan v. City of Tigard* (1994) 512 U.S. 374 (“Dolan”). Second, the requirement constitutes a per se taking as described by the United States Supreme Court in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 (“Lucas”). Finally, applying the test announced by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104 (“Penn Central”), the requirement constitutes a regulatory taking. Supportive case law examples are included in Exhibit 4p (Written Description of Project).

We had a civil engineer familiar with Wood Road and our project evaluate the feasibility of reengineering Wood Road in accordance with 1273.03 and 1273.05. In a letter (Exhibit 4w) dated January 30, 2023, the civil engineer notes that: “Altering your final conditions of approval with imposition of these slope and turnaround requirements would introduce physically impossible requirements.”

Regarding cost of reengineering even if feasible, the civil engineer notes: “I cannot accurately or practically estimate how much it would cost to acquire the additional private lands to provide the space or to obtain the easements from the Town for the rights to reconfigure and reconstruct Wood Road given its public features, but I can estimate that the costs to reconfigure and reconstruct the road with the grading, creation of switchback horizontal curves

and extension of an additional 198 feet would easily be in the millions of dollars. Cost of land acquisition and negotiation of easements would be in addition to that not to mention having to navigate the disruption to the existing driveways.”

The Town simply may not impose off-site improvements that are infeasible. This has been established in multiple recent cases in Santa Clara County (Exhibit 4x) and was the basis of the Town’s approval of site development architecture plan S-21-021 on November 21, 2022.

Most importantly, irrespective of precedent and case law, we have put forth comprehensive justification supporting the view that we achieve the spirit of the regulations when road conditions and on-site improvements are evaluated together in concert against a practical assessment of the regulation’s intent.

### **SUMMARY**

I urge the Planning Commission to accept our request to appeal the exception denial issued by SCCFD. As noted, exception requests feature a point-by-point assessment, whereas when considering the totality of information supplied in our justifications, we clearly align well with the intent of the regulations.

More broadly, we do take issue with the alteration of final conditions of approval once rendered. In my humble opinion, this establishes a precedent that takes Planning Commission approvals to a slippery slope of second-guessing and introduces a new level of purgatory without finality. The process is hurdle-filled enough without having to be exposed to what is tantamount to “double jeopardy”.

Should the allowance of alteration of final conditions of approval be enacted, we urge the Planning Commission to uphold our appeal request and remove the proposed requirements to strictly adhere to 1273.03 and 1273.05. As noted, in our most recent discussion with SCCFD it has informally expressed support for our appeal and we are thankful for the opportunity to collaborate and finalize this step such that we can receive our building and grading permits. To that end, should the appeal request be granted and our final conditions of approval be altered, we would accept the notation of the other five 1273 subsections:

- (1) Road width standard
- (2) Roadway surface standard
- (4) Radius standard
- (6) Turnout standard
- (7) Dead-end road standard

In addition, we will endeavor to work with the Town to maintain road clearance objectives along Wood Road in support of fire apparatus access.

I thank you for your attention and support on this important appeal request.

Respectfully,



Omari V. Bouknight

