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MEMORANDUM

TO: Honorable Board of Supervisors
Jeffrey V. Smith, County Executive

FROM: James R. Williams, County Counsel *JRW*
Tony LoPresti, Assistant County Counsel
Elizabeth G. Pianca, Lead Deputy County Counsel
Lizanne Reynolds, Deputy County Counsel

RE: Implementation of State Minimum Fire Safe Regulations

DATE: September 26, 2022

EXECUTIVE SUMMARY

This memorandum summarizes the issues regarding application of the State Minimum Fire Safe Regulations (“Regulations”)¹ to development projects in unincorporated Santa Clara County and provides a recommendation for processing such applications. The memorandum also discusses application of the Regulations to existing roads and the approaches that other counties have been taking to implement the Regulations.

The County must refer all development applications within the State Responsibility Areas (SRA)² to the local CAL FIRE unit for its review of whether the application complies with the Regulations. Most of the unincorporated area is subject to the Regulations, and it is likely that many development projects cannot feasibly comply with the access road requirements in the Regulations. Even though the Regulations have been in effect for decades, the local CAL FIRE

¹ Cal. Code Regs. tit. 14 (“14 CCR”), § 1270.00 *et seq.* This memorandum also responds to the Board of Supervisors referral from the June 28, 2022 meeting (Item No. 12) to County Counsel to provide an assessment of whether the County’s interpretation of the Regulations is accurate.

² State Responsibility Areas (SRA) are those areas of the state in which the financial responsibility of preventing and suppressing fires has been determined to be primarily the responsibility of the state. (Pub. Res. Code § 4102.)

unit with responsibility for Santa Clara County did not start applying them until late-2020. By contrast, many other CAL FIRE units are still not applying the Regulations or are only applying them to new subdivisions and other large developments. CAL FIRE's inconsistent approach to implementation across the state has created a challenging regulatory landscape for project applicants and local governments alike.

In 2020, the Board of Forestry and Fire Protection ("Board of Forestry" or "Board") began a rulemaking process to update the Regulations. The first official draft, released in April 2021, would have been significantly more onerous than the existing Regulations. In response to lengthy comments submitted by the County and other local jurisdictions,³ the Board of Forestry released a revised draft in January 2022 that incorporated many of the County's comments and would have provided more flexibility for existing roads and other situations where compliance was extremely costly or infeasible. However, due to litigation threats from interested parties with opposing viewpoints, in May 2022 the Board released another revised draft that severely reduced the scope of the amendments and retained the strict access standards in the existing Regulations for all roads, including existing roads. At its August 17, 2022 meeting, the Board of Forestry directed staff to take all necessary actions to finalize the limited scope of amendments released in May 2022.

Given the uncertain regulatory landscape, County staff and applicants with projects in the permitting process were unable to determine what Regulations and associated conditions of approval would apply to their projects, which understandably caused tremendous frustration.

To facilitate a streamlined approach to the Regulations designed to accelerate review and action on a project application subject to the Regulations, County Counsel recommended that the County undertake project-specific evaluations as soon as feasible during the application process to determine whether the County could lawfully waive compliance with some or all of the Regulations on the basis that applying them would violate the Takings Clause of the U.S. Constitution. This approach was developed in coordination with and is supported by the Administration, which began implementing this process in July 2022.

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³ June 3, 2021 Letter from Jeffrey V. Smith, County Executive, to Board of Forestry; June 3, 2021 Letter from Mike Wasserman, President, County Board of Supervisors, to Board of Forestry, which are attached to the Aug. 17, 2021 Board agenda (Item No. 106), and are available at: http://sccgov.iqm2.com/Citizens/Detail_Meeting.aspx?ID=13226.

BACKGROUND

A. State Law

In 1987, the State enacted Public Resources Code section 4290 (“Section 4290”),⁴ which required the Board of Forestry to adopt regulations implementing minimum fire safety standards related to defensible space in the SRA. Those regulations must include:

- (a) road standards for fire equipment access;
- (b) standards for signs identifying streets, roads, and buildings;
- (c) minimum private water supply reserves for emergency fire use; and
- (d) fuel breaks and greenbelts.⁵

The Regulations “apply to the perimeters and access to all residential, commercial, and industrial building construction within the SRAs approved before January 1, 1991”⁶ except for the following “grandfathered” projects:

- where a building permit application was filed before January 1, 1991; or
- where a parcel or tentative subdivision map or other developments were approved before January 1, 1991, if the final subdivision map was approved within the time required by local ordinance.⁷

In light of growing wildfire activity and significant losses of life and property, in 2018 the State amended Section 4290 to require the Board of Forestry to (i) expand the regulations to all lands within designated Very High Fire Hazard Severity Zones (VHFHSZ)⁸ effective July 1, 2021, and (ii) periodically update the Regulations for fuel breaks and greenbelts near communities to provide greater fire safety for residential, commercial, and industrial building construction.⁹ Approximately 80 percent of unincorporated Santa Clara County is within the SRA or the VHFHSZ (see Attachment 1).

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⁴ Stats. 1987, c. 955 (S.B. 1075), § 2.

⁵ Pub. Res. Code § 4290(a)(1)-(4).

⁶ *Id.* at § 4290(a).

⁷ *Ibid.*

⁸ Very High Fire Hazard Severity Zones (VHFHSZ) are those areas designated as such by the State Fire Marshal that are not within a state responsibility area. (Gov’t. Code § 51177(i).)

⁹ Stats. 2018, c. 626 (S.B. 901), § 9.

B. State Minimum Fire Safe Regulations

1. Current Regulations

The State Minimum Fire Safe Regulations were first adopted in 1991. The Regulations contain detailed standards for access roads (e.g., minimum widths, maximum grades, minimum turning radii, turnarounds, turnouts, maximum dead-end road lengths), signage and building numbering, emergency water requirements, and fuel modification/defensible space standards.¹⁰

The Regulations include an optional process for a project applicant to request an exception from the requirements of the Regulations.¹¹ The first step is for the applicant to request an exception from the “inspection entity.” CAL FIRE is the inspection entity for projects in the SRA unless CAL FIRE has delegated that authority to the local jurisdiction.¹² If CAL FIRE does not grant the exception, the applicant may appeal that determination to the local jurisdiction. For projects outside the SRA, but within the VHFHSZ, the County is the inspection entity and may grant or deny exception requests.

On August 31, 2021, the Board of Supervisors adopted an ordinance establishing a specific appeal process for such exceptions.¹³ Pursuant to this ordinance, the decision-maker on an appeal from CAL FIRE’s denial of an exception for a project in the SRA is a person designated by the County Fire Marshal, who shall consult with the County Building Official and the Director of the Roads and Airports Department in making the decision.¹⁴ The decision-maker for an exception request for a project in the VHFHSZ is a person designated by the Fire Marshal for that purpose, and the County Fire Marshal if the initial exception decision is appealed.¹⁵

2. Application of Regulations

The vast majority of unincorporated Santa Clara County is in the SRA. Thus, the Regulations apply to most development projects in rural Santa Clara County. In late-2020, the local CAL FIRE unit began applying the Regulations to all development applications referred to them by the County Department of Planning and Development, including

¹⁰ 14 CCR § 1273.00 *et seq.*

¹¹ 14 CCR § 1270.06.

¹² 14 CCR § 1270.05(a).

¹³ Ord. No. NS-1100.134, effective Sept. 30, 2021, codified at County of Santa Ordinance Code § C1-100 *et seq.*

¹⁴ County Ordinance Code § C1-104(b).

¹⁵ County Ordinance Code § C1-104(c).

development on existing roads. This coincided with a significant rise in wildfires throughout the state and the California Attorney General taking a more assertive position opposing approvals of large development projects in high-fire hazard areas that did not comply with the Regulations and/or the California Environmental Quality Act (CEQA).¹⁶

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 of more of the requirements in the Regulations. The most common deficiencies are failure to meet the 20-foot minimum width,¹⁷ and exceedance of the maximum length for dead-end roads.¹⁸ 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.

We contacted other local government attorneys across the state who have significant experience dealing with the Regulations to better understand how the Regulations have been applied over time. They reported that many local jurisdictions have previously received delegations of authority from CAL FIRE to implement the regulations, and the Board of Forestry had also certified some local ordinances that exempted existing roads. They believe many of those jurisdictions are still operating under those prior delegations and are either not applying the Regulations to existing roads or are liberally granting exceptions from the Regulations.

By contrast, in October 2020, a Board of Forestry attorney informed Sonoma County that it would not certify Sonoma County's local fire safe ordinance because it was less stringent than the Regulations.¹⁹ The Board of Forestry attorney provided the following response regarding applicability of the Regulations to existing roads:

Sonoma County has repeatedly maintained that Public Resources Code section 4290 and the Fire Safe Regulations do not apply to existing roads. Sonoma County's position is incompatible with the plain language of PRC § 4290, the Fire Safe Regulations, and opinions and letters issued by the Attorney General of California. More importantly, the Fire Safe Regulations themselves—which

¹⁶ Pub. Res. Code § 21000 *et seq.* See, e.g., Oct. 25, 2019 Letter from Xavier Becerra, Attorney General, to Monterey County Planning Commission re Paraiso Springs Resort, available at: <https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/comments-paraiso-springs-resort-rdeir.pdf>.

¹⁷ 14 CCR § 1273.01(a).

¹⁸ The maximum dead-end road length ranges from 800 feet to one mile depending on the minimum lot size established by the applicable zoning. (14 CCR § 1273.08.)

¹⁹ Oct. 23, 2020 Letter from Jeff Slaton, Senior Board Counsel, Board of Forestry, to Linda Schiltgen, Deputy County Counsel, County of Sonoma, attached hereto as Attachment 2.

constitute the basis for the certification determination—clearly provide no exemption for existing roads, and it is these regulations that the Sonoma County ordinance must equal or exceed. This represents a fundamental and intractable disagreement between the Board and Sonoma County.

Regardless of whether and how the Regulations are being applied in other counties, the County must determine how to deal with this situation in a legally compliant manner.

3. Recent Amendments to Regulations

In April 2021, the Board of Forestry proposed comprehensive changes to the Regulations. The County and numerous other interested parties submitted detailed comments recommending further changes to lessen the burdens on owners of legal parcels along existing roads, and to allow more flexibility to grant exceptions where strict compliance was infeasible. In December 2021, the Board of Forestry released a revised set of amendments that incorporated many of the County's requests. However, several other interested parties commented that the proposed amendments would weaken the Regulations and, therefore, the Board of Forestry was required to conduct a comprehensive environmental review under CEQA before it could adopt the amendments.

On April 29, 2022, the Board of Forestry released a significantly scaled-down set of amendments that did not include the County's requested accommodations for existing roads or other situations where compliance is infeasible (e.g., significant environmental or topographical constraints). At its May 5, 2022 meeting, the Board Chair explained that they had narrowed the scope of the amendments because they did not have time to resolve all of the conflicting comments. When asked if there was any plan to resume a more comprehensive amendment process, the Board Chair responded that they had other immediate priorities and no plans to resume a broader rulemaking. At its August 17, 2022 meeting, the Board of Forestry directed staff to take all necessary actions to finalize adoption of the scaled-down amendments. Consequently, the County does not expect any regulatory relief in the near term, and will need to determine how to deal with development applications that CAL FIRE determines would not comply with the Regulations.

ANALYSIS

A. Impact of Regulations on County Applications

Several circumstances have made it difficult for the County to promptly resolve situations where CAL FIRE determines that a project would not comply with the Regulations. These include the preemptive effect of the Regulations on less stringent local regulations, the timelines

imposed by the Permit Streamlining Act,²⁰ and the County's existing processes for reviewing, conditioning, and approving development projects.

The Department of Planning and Development's initial approach was to recommend that applicants apply for an exception from CAL FIRE and, if CAL FIRE denied the exception, to appeal that determination to the County Fire Marshal under the County's local ordinance. However, CAL FIRE has denied all exception requests on the grounds that the applicants have not proposed mitigation that would have the "same practical effect" as the Regulations. For example, CAL FIRE does not agree that installing sprinklers in structures or doing greater vegetation control has the same practical effect as ensuring that the access road is wide enough to accommodate concurrent emergency vehicle access and civilian evacuation from a wildfire zone. The County Fire Marshal denied appeals of these CAL FIRE determinations on the same grounds.

Anticipating that the Board of Forestry was going to amend the Regulations to exempt or lessen the requirements for single-family homes and other small-scale development on existing lots, the Department of Planning and Development began to condition projects to comply with the Regulations in effect when a building permit is issued. The hope was that the Regulations would be amended by the time building permits were issued, which usually takes several months. However, in light of the Board of Forestry's recent action to finalize the scaled-back amendments, this strategy is no longer viable.

In the meantime, some applicants have appealed their conditions of approval related to the Regulations to the Planning Commission on the grounds that the cost of compliance would be so exorbitant that it would result in an unconstitutional "taking" of private property for public use without just compensation.²¹

B. Recommendation for Future Processing of Applications and Appeals

After analyzing various options for how to handle development applications that are subject to the Regulations, County Counsel, in coordination with and supported by the Administration, recommends that for each application, and starting early in the application process, the County conduct project-specific determinations of whether compliance with the Regulations must be waived in full or in part to meet constitutional standards.

Under this approach, the County would continue to refer project applications to CAL FIRE for review. For projects that CAL FIRE determines would not comply with the Regulations, the Administration would begin the project-specific takings analyses as soon as possible after the application is submitted without waiting for it to be deemed complete under the

²⁰ Gov't Code § 65920 *et seq.*

²¹ U.S. Const. amend. V, made applicable to the states through U.S. Const. amend. XIV; Cal. Const. art. I, § 19.

Permit Streamlining Act. This option would significantly accelerate the process for determining whether compliance with the Regulations must be waived in full or in part to avoid an unconstitutional taking and allow the Department of Planning and Development to incorporate any waivers into the conditions of approval without delaying the Department's normal decision-making process.

The applicable takings tests are factually and legally complex and differ depending on whether the project takes access from a public or private road. For projects on private roads, the applicants would need to provide adequate documentation regarding the economic and technical burdens of complying with the Regulations and whether partial compliance with the Regulations would be feasible. For projects on public roads, the Department of Roads and Airports would do project-specific analyses of the cost and technical feasibility of complying with the Regulations.

The Administration began implementing this approach and process in July 2022.

CONCLUSION

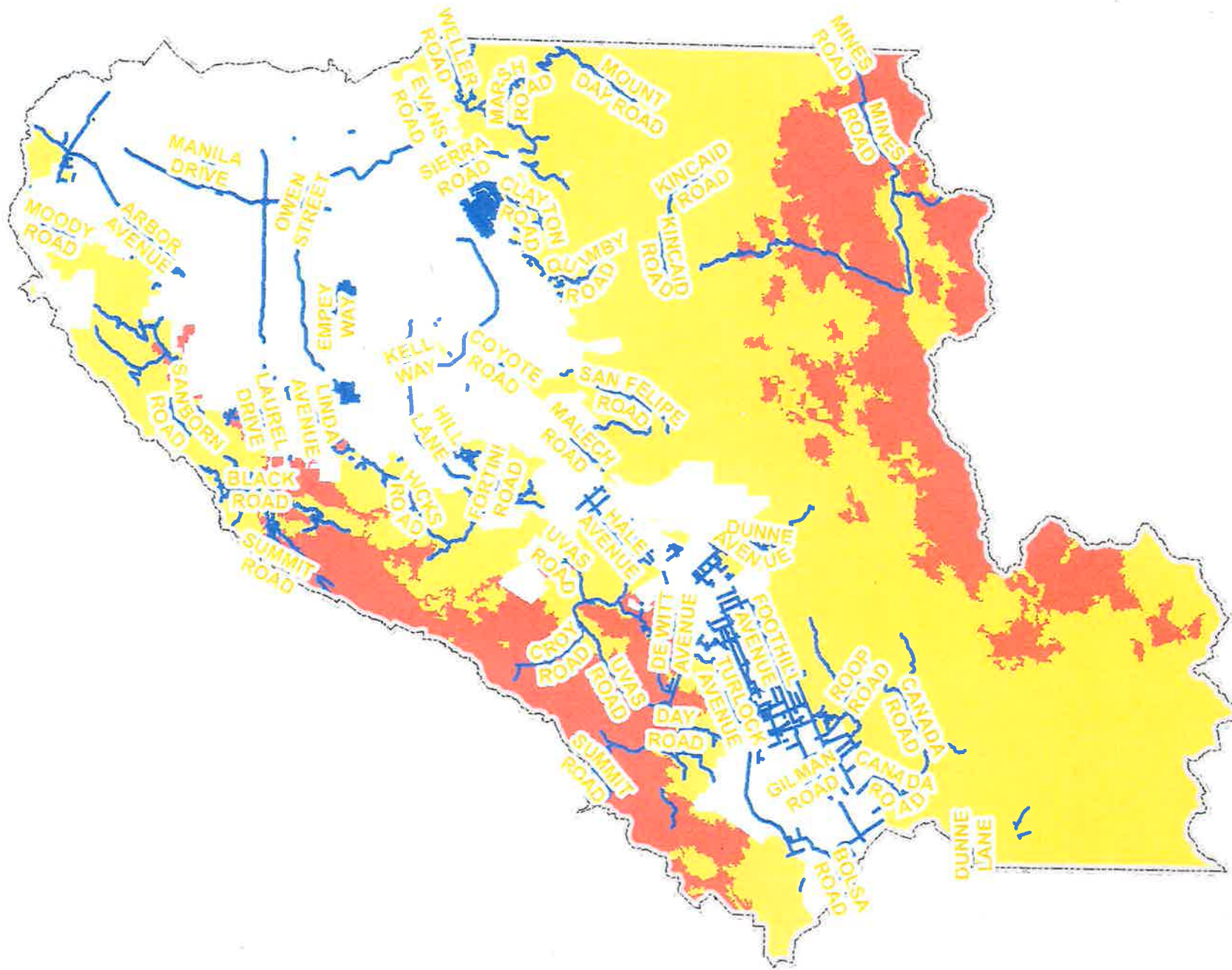
We recommend that the Administration make project-specific determinations of whether compliance with some or all of the Regulations must be waived on constitutional grounds as soon as feasible during the application process instead of waiting until applications have been deemed complete or deferring waiver determinations to the Planning Commission or Board of Supervisors on appeal. Applicants could still appeal the Administration's determinations, but there should be significantly fewer appeals. This approach has been designed to facilitate a streamlined approach to the Regulations and to accelerate review and action on a project application subject to the Regulations.

Attachments:

- 1) Map of SRA and VHFHSZ Areas in Santa Clara County
- 2) Oct. 23, 2020 Letter from Jeff Slaton, Senior Board Counsel, Board of Forestry, to Linda Schiltgen, Deputy County Counsel, County of Sonoma

c: Greta S. Hansen, Chief Operating Officer
Sylvia Gallegos, Deputy County Executive
Jacqueline Onciano, Director, Department of Planning and Development
Harry Freitas, Director, Department of Roads and Airports

ATTACHMENT 1



BOARD OF FORESTRY AND FIRE PROTECTION

THE NATURAL RESOURCES AGENCY
STATE OF CALIFORNIA

KEITH GILLESS, CHAIRWade Crowfoot, *Secretary*Gavin Newsom, *Governor*

P.O. Box 944246
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October 23, 2020

Linda Schiltgen
Deputy County Counsel
County of Sonoma
Linda.Schiltgen@sonoma-county.org

Re: BOF Certification Questions: Sonoma County Responses

Dear Ms. Schiltgen:

The Board is in receipt of your letter dated October 18, 2020, and addressed to Board of Forestry and Fire Protection (Board) Chair Keith Gilles and Vice Chair Darcy Wheelles. It has been distributed to the Board members for consideration. Because your letter provides responses to questions posed by Board staff, please accept this response by Board staff on their behalf.

Background

A brief summary is appropriate for context. For several months, the Board, its staff, and representatives from the County of Sonoma (Sonoma County) have been engaged in discussions relative to the potential certification of Sonoma County's local fire safe ordinance as equaling or exceeding the Board's Fire Safe Regulations (14 CCR § 1270 et seq.). Board members and staff have expressed concerns about portions of Sonoma County's ordinance that either omit standards included in the Fire Safe Regulations or set standards that, on their face, appear to be less stringent than the Fire Safe Standards. At the September 22, 2020, Joint Committee Meeting of the Board, Board staff were directed to provide Sonoma County with a list of specific questions posed by both Board members and staff, that, if answered, would allow Board staff to properly evaluate the local ordinance and enable staff to make a recommendation to the Board in favor of certification. By letter dated October 12, 2020, Board staff issued those questions to Sonoma County. By your letter dated October 18, 2020, Sonoma County provided its responses for Board staff consideration.

When being presented with the myriad of issues related to certification, it is important not to lose sight of the fundamental task before the Board. The Board is reviewing the Sonoma County ordinance pursuant to 14 CCR § 1270.04 to decide whether to exercise its discretion "to certify [the ordinance] as equaling or exceeding [the Board's regulations] when they provide

the same practical effect.”¹ While it is generally not difficult to determine whether a particular provision of an ordinance equals or exceeds a corresponding provision in the Board’s regulations, the same cannot be said for determining whether a local ordinance that fails to equal or exceed the Board’s regulation nonetheless provides the *same practical effect*. To aid in this determination, the Board’s regulations provide a detailed definition of the term *same practical effect*. With these tools, the Board must evaluate each provision of a local ordinance and compare it to the corresponding provision in the Board’s regulations to determine whether the local ordinance provision equals or exceeds the Board’s regulation or provides the same practical effect. Still, the task before the Board is challenging and requires careful and deliberate consideration, especially when applying the complex definition of *same practical effect*.

Summary of Staff Findings

At its core, the Board’s task is fundamentally a very narrow inquiry: *For each substantive requirement in the Fire Safe Regulations, does the local ordinance have a provision that equals or exceeds or has the same practical effect as that Fire Safe Regulation standard?*

Board staff have completed their review of Sonoma County’s responses and continue to have significant concerns that the ordinance does not satisfy the Board’s standards for certification. Sonoma County’s responses pertaining to standards for existing roads and for ingress/egress that allows concurrent civilian evacuation are of particular concern. Accordingly, Board staff lack an evidentiary basis to support a recommendation for certification. Board staff have enclosed an updated matrix, dated to reflect the upcoming November 3, 2020, Joint Committee Meeting of the Board, that provides more specific observations and staff recommendations.²

This is an appropriate point to address Sonoma County’s position that if the Board does not certify its ordinance, then Sonoma County is prevented from enjoying the benefits of the portions of its ordinance that it believes clearly equal or exceed the Fire Safe Regulations. The Board would like to reiterate to Sonoma County that certification of its ordinance by the Board is not required for Sonoma County to apply its own standards that go above and beyond the state minimum standards. Board certification is a creature of regulation, the benefit of which is to publicly document a mutual understanding of the Board and the local jurisdiction that a local ordinance equals or exceeds the Fire Safe Regulations. Under Public Resources Code § 4290, subdivision (c), the Board’s minimum standards do not supersede any Sonoma County

¹ References in this letter to the “equal or exceed” standard includes this “same practical effect” standard.

² The attached November 3, 2020, matrix represents Board staff’s current evaluation and recommendations to the Board, and supersedes any prior matrix, whether final or draft, including the deliberative draft September 4th matrix, which apparently Sonoma County misunderstood to be something more than merely an informal tool to facilitate productive discussion in advance of the September Board meeting.

ordinance that equals or exceeds the minimum state standards.³ Thus, if Sonoma County has stricter, greater, or enhanced requirements in its ordinance, the lack of certification by the Board does not preclude Sonoma County from deciding to apply these stricter requirements.

Turning now to Sonoma County's responses, it is worth mentioning that it is unnecessary for Board staff to address each individual response. The purpose of the exercise is to provide Board staff sufficient information so that it may complete its evaluation of Sonoma County's ordinance and issue a recommendation for the Board's consideration. As noted above, the certification determination is made in light of the language of the local ordinance and any documents incorporated by reference. Supplemental information, such as Sonoma County's responses, merely illuminates the local jurisdiction's interpretation of its ordinance and how it equals or exceeds the Fire Safe Regulations.

In any event, Sonoma County's responses reflect a number of recurring issues of concern to Board staff that can be summarized generally without focusing on the content of specific responses or specific sections of the ordinance. Board staff have consistently expressed concerns that the Sonoma County ordinance and Administrative Policy do not articulate specific minimum standards for each type of road referenced in the ordinance and Administrative Policy⁴ nor does it articulate what standards govern the fire official's assessment that a road provides concurrent civilian evacuation. Board staff's questions were particularized and specific attempts to identify those standards so that Board staff could evaluate where they equal or exceed the Fire Safe Regulations.

Detailed Discussion

Board staff acknowledge that some of Sonoma County's responses on certain other issues resolved Board concerns or provided additional clarity. This letter focuses on major issues that preclude the Board staff from issuing a recommendation in favor of certification. Board staff refer interested parties to the staff-prepared final matrix for the November 3, 2020, Board meeting for a more comprehensive discussion of portions of the ordinance that equal or exceed the Fire Safe Regulations.

Sonoma County's ordinance and responses to staff questions on the following topics are inadequate. Sonoma County's responses do not provide the requested citations nor identify the specific standards that Sonoma County contends apply. Instead, the responses reiterate

³ It is necessary to acknowledge that the statute does not include a "same practical effect" standard. A local ordinance applied pursuant to Public Resources Code § 4290(c), without obtaining Board certification, must "equal" or "exceed" the Fire Safe Regulations in the ordinarily understood sense of those words. Thus, a non-certified local ordinance applied by a local jurisdiction is potentially subject to a stricter legal standard than is required for certification under 14 CCR § 1270.04.

⁴ The ordinance and Administrative Policy contemplate new roads, existing roads, existing public roads, existing private roads, and existing roads approved on a discretionary basis and a ministerial basis. Sonoma County is entitled to have as many subcategories as it chooses, but each must have an established standard that equals or exceeds the Fire Safe Regulations.

positions that, while not unimportant, are nonetheless irrelevant to the narrow certification inquiry before the Board.

We will first address the various arguments that are not relevant to and therefore do not inform staff's analysis.

Sonoma County Argument 1: Some portions of the ordinance equal or exceed the Fire Safe Regulations

Sonoma County's introductory paragraph includes a chart outlining several provisions showing how its ordinance equals or exceeds the Fire Safe Regulations. This general claim is reiterated in response to several questions.

The Board acknowledges that many elements of Sonoma County's standards clearly equal and exceed the minimum standards of the Fire Safe Regulations. This has been well established in documents provided for Board consideration, as well as testimony at several Board and Joint Committee Meetings this year. However, exceeding the Fire Safe Regulations in certain aspects does not excuse an ordinance's failure to equal or exceed other standards imposed by the Fire Safe Regulations.

Thus, the Board's determination that one provision of a local ordinance equals or exceeds the Fire Safe Regulations has no bearing on the Board's consideration of other unrelated provisions of the local ordinance. This argument is an unnecessary distraction and does not inform whether all provisions satisfy the certification standard. As such, the Board does not focus on these statements when applying the certification standard.

Sonoma County Argument 2: Takings / Inability to secure easements for expanding roads

Another argument advanced in Sonoma County's preliminary comments asserts that the Fire Safe Regulations effect an unconstitutional "taking" of private property for public use because they make a landowner individually responsible for upgrading existing roads that serve other parcels. Other variations of this argument suggest that the Fire Safe Regulations encourage Not-In-My-Backyard (NIMBY) opposition to prevent development or allow a landowner to extort a neighbor by refusing to sell an easement to facilitate road widening to comply with state standards. These arguments are also reiterated in response to several questions seeking clarity about Sonoma County's standards and how they equal or exceed the Fire Safe Regulation.

The Fire Safe Regulations have not been legally challenged, let alone invalidated, as being unconstitutional in any sense. They are binding as minimum standards on Sonoma County, notwithstanding speculative practical inconveniences at the local level. It is Sonoma County's prerogative to impose those burdens on individual landowners instead of exercising other options at its disposal, such as eminent domain. In any event, the issue of who bears financial responsibility for upgrading existing roads that serve as access to new building construction has no bearing on whether road standards in Sonoma County's ordinance – such as minimum road

widths – equal or exceed the corresponding standard in the Fire Safe Regulations. As such, the Board does not focus on this argument when evaluating the ordinance for compliance with its certification standard.

Sonoma County Argument 3: Fire Safe Regulation Exception Process

Another argument advanced in Sonoma County's preliminary comments asserts inadequacies in the Fire Safe Regulations' "exception process" (14 CCR § 1270.06), including a loophole authorizing local jurisdictions to waive any requirement in the Fire Safe Regulations. This argument is reiterated in response to several questions.

While the Board appreciates Sonoma County's comments and will certainly take these into account to consider whether regulatory changes are warranted to address this point, Sonoma County's concerns regarding 14 CCR § 1270.06 do not have bearing on the present issues related to certification of Sonoma County's ordinance, for multiple reasons. First, Sonoma County adopted its own "exceptions to standards" provision, § 13-23, in its ordinance. Notwithstanding certain staff comments in the matrix, the Board may determine that these provisions equal or exceed the minimum standards in § 1270.06. Second, assuming for the sake of argument that 14 CCR § 1270.06 allows for "behind closed doors" determinations, or fails to provide a thorough open and public process, this is irrelevant as to whether *other* sections of Sonoma County's ordinance equal or exceed the Board's minimum standards. Finally, to the extent Sonoma County finds the minimum standards in 14 CCR § 1270.06 unsatisfactory, the regulation expressly states that local jurisdictions "may establish additional procedures or requirements for exception requests." Thus, to the extent Sonoma County believes that the Board's exception standards in § 1270.06 are deficient, Sonoma County may remedy these by imposing additional requirements. Consequently, the Board does not focus on this argument when evaluating the ordinance for compliance with its certification standard.

Sonoma Ordinance Issue 1: Existing Road Standards

We now turn to Sonoma County's discussion of the specific standards and citations in response to the Board staff's questions relating to existing road standards and the concurrent evacuation requirement. Sonoma County's responses continue to make conclusory statements about the quality of its ordinance and Administrative Policy. Board staff are repeatedly told that these documents have "clear standards" and a "strict set of requirements," but do not reference actual standards or citations. Board staff needs this information to properly evaluate the ordinance for certification. Without it, Board staff are compelled to conclude that no such standards exist and recommend to the Board that Sonoma County's ordinance does not satisfy the certification standard for existing roads.

Throughout the certification process, Sonoma County has repeatedly maintained that Public Resources Code section 4290 and the Fire Safe Regulations do not apply to existing roads. Sonoma County's position is incompatible with the plain language of PRC § 4290,⁵ the Fire Safe Regulations,⁶ and opinions and letters issued by the Attorney General of California.⁷ More importantly, the Fire Safe Regulations themselves – which constitute the basis for the certification determination – clearly provide no exemption for existing roads, and it is these regulations that the Sonoma County ordinance must equal or exceed. This represents a fundamental and intractable disagreement between the Board and Sonoma County. Sonoma County's position on existing roads, standing alone, is a legitimate basis for determining that the ordinance does not equal or exceed the Fire Safe Regulations.

Moreover, Sonoma County's position has a discernible impact on it characterizes its ordinance, and the amount of effort necessary for Board staff to parse its assertions for accuracy and compliance with the certification standard. Specifically, any assertion Sonoma County makes about "roads" requires the Board to evaluate whether Sonoma County intends to apply that standard to existing roads.

Setting aside this fundamental disagreement as to the applicability of the Fire Safe Regulations, Sonoma County has argued that, in the alternative, even though it believes existing roads are exempt, Sonoma County's Administrative policy nonetheless applies to existing roads and equals or exceeds the Fire Safe Regulations.

Board staff have reviewed the ordinance and Administrative Policy in great detail. The only specific standard identified in the Administrative Policy is a 12-foot width requirement for existing private roads. On its face, this falls short of the minimum road standard in 14 CCR § 1273.01. That is a significant obstacle to Board certification. More concerning, however, is that the policy provides no standards for other types of existing roads. As noted before, the Administrative Policy contemplates a public/private distinction, as well as a discretionary/ministerial distinction. No standards for these types of existing roads exist in the ordinance or Administrative Policy. Until these deficiencies are remedied to the Board's satisfaction, Sonoma County's ordinance and Administrative Policy is conclusively ineligible for certification. As Sonoma County's responses fail to provide the requested information with sufficient detail, Board staff can only conclude that no such standards exist and recommend to the Board that the ordinance does not meet the certification standard.

Additionally, Sonoma County's reliance on the Administrative Policy as setting the exclusive standard for existing roads raises concerns beyond the road width issues. The Fire Safe

⁵ "These regulations apply to the perimeters and access to all residential, commercial, and industrial building construction within state responsibility areas..." (Emphasis added.)

⁶ See 14 CCR § 1270.02 which includes the same language in fn5 and includes an exemption for roads that is limited to agricultural, mining, and timber-related operations.

⁷ See, e.g., AG Opinion No. 92-807 (1993); AG letter to Monterey County Planning Commission (Oct. 25, 2019).

Regulations set other standards for roads, such as grade, surface requirements, radius, turnouts, turnarounds, and dead end roads. However, the Administrative Policy is silent on those issues, and Sonoma County's responses do not identify what standard, if any, apply for those existing road requirements, and where they can be located in the ordinance or Administrative Policy.

In this respect, Sonoma County's response to Question 1.1.3.3 is emblematic. The Board staff posed a direct request seeking specific information: "For convenience and reference, please complete the following table by filling in the specific ordinance section or Administrative Policy section that addresses the specified SRA Fire Safe Regulation." One axis of the referenced table identified (with citations) all of the above-referenced road requirements in the Fire Safe Regulations that Sonoma County's ordinance must equal or exceed. Along the other axis, the table identified all of the categories of existing roads referenced in the Administrative Policy. Sonoma County's task was to provide an ordinance or Administrative Policy citation in each box.

Board staff believed the table provided the best and simplest opportunity for Sonoma County to provide the information necessary to support certification with respect to requirements for existing roads. Sonoma County's response does not provide any relevant or informative citations. For two columns, Sonoma County cross-referenced six of its other responses to unrelated questions. The County responses did not comply with the call of the question to provide a citation, nor could any relevant citations or standards be discerned from the referenced answers. In fact, some of the cited responses made no mention of the relevant terms. With respect to the remaining categories of existing road standards (public/private and ministerial/discretionary), Sonoma County referenced provisions of its ordinance that apply to *new roads*.⁸ These citations are also unresponsive to the call of the question because §13-25(f) of the ordinance clearly states that existing road standards are governed by the Administrative Policy.

In the last couple of weeks, Sonoma County has advanced a new argument indicating that its adoption of an optional appendix from the California Fire Code satisfies the requirement for establishing road requirement standards that satisfy the Fire Safe Regulations. As Board staff made clear in a prefacing comment to Question 2.2 and subsequent follow up questions, compliance with the California Fire Code does not ensure compliance with the Fire Safe Regulations. Those standards are relevant only to the extent that they equal or exceed the Fire Safe Regulations. The Board staff's follow up questions on this point quoted a number of the appendix standards which Sonoma County revised so that the standard may also be satisfied by compliance "with the Sonoma County Fire Safe Standards or as approved by the fire code official." The reference to the Sonoma County standard is a circular reference to the very

⁸ If Sonoma County intends the particular referenced ordinance provisions to apply both to new roads and existing roads, the ordinance and Administrative Policy will require substantial revision.

standard that Sonoma County has been unable to identify to Board staff. Additionally, it appears that the fire code official has unfettered discretion to impose any standard – including a lesser standard or no standard at all. Sonoma County’s responses do not contradict this reasoning or clarify the requirements. Board staff stand by the position that Sonoma County’s adoption of the California Fire Code Appendix is meaningless in connection with establishing that the Sonoma County ordinance and Administrative Policy provide minimum standards that equal or exceed the Fire Safe Regulations’ road requirement standards.

Again, Sonoma County has had repeated opportunities to identify and provide citations for these standards. Sonoma County repeatedly declines to do so. Until Sonoma County can provide direct and adequate responses to the Board’s important questions, the Board has no evidentiary basis to support a decision to certify the Sonoma County ordinance.

Sonoma County Ordinance Issue 2: Concurrent civilian evacuation

A distinct component of the Fire Safe Regulations that is somewhat related to the road conditions issue is that emergency access requirements must accommodate ingress and egress for emergency vehicles *and concurrent civilian evacuation*. Board members and staff have asked Sonoma County on prior occasions to clarify how Sonoma County’s ordinance and Administrative Policy satisfy this requirement.

The Administrative Policy states, in an introductory paragraph, that a Fire Inspector will perform an evaluation to “confirm that the proposed development equals or exceeds the below requirements, and the proposed development shall be safely accessed and served in the case of a wildfire, with adequate ingress, egress and the capacity for concurrent evacuation and emergency response.”

We acknowledge and appreciate that Sonoma County confirms in its responses that the concurrent evacuation standard is an additional standard to equaling or exceeding “the below requirements.” However, Sonoma County does not articulate what standards guide the Fire Official in making that determination.

The first requirement following that statement in the Administrative Policy highlights the importance of that query. The requirement sets a road width standard for existing private roads at 12-ft plus 1-foot of vegetation clearance on both sides. This leads Board staff to question how a 12-foot road, which falls short of the Fire Safe Regulation road width requirement, could be certified as ensuring concurrent civilian evacuation during a wildfire. Nor does this section of the Administrative Policy provide guidance as to what standards guide the Fire Official in making a subjective determination. Absent clarification – which did not occur in response to the Board staff’s questions – the Board is appropriately reluctant in determining that the ordinance and Administrative Policy equal or exceed the Fire Safe Regulations.

In addition, Sonoma County routinely refers Board staff to §§ 13-62 and 13-63, in response to Board staff's concerns about the lack of specific articulable standards in the ordinance and Administrative Policy. Sonoma County's reliance is misplaced, however, as those sections merely confer discretionary authority to require compliance with additional fire safety measures. Critically, permissive authority provides no assurances to the Board that additional requirements will be imposed at the level contemplated by the Fire Safe Regulations.

Conclusion

In conclusion, Sonoma County's responses to questions issued by Board staff fail to resolve a number of significant concerns expressed by Board members and staff over the preceding months. The question before the Board at the November 3, 2020, Board meeting is whether the Sonoma County ordinance equals or exceeds the substantive requirements in the Fire Safe Regulations. At this time, the Sonoma County ordinance and Administrative Policy include requirements that fall short of the Fire Safe Regulations and omit standards that are required as a counterpart to other provisions of the Fire Safe Regulations. Until Sonoma County addresses these infirmities, Board staff lack a basis to recommend, and the Board lacks a legal basis to certify, the ordinance as equaling or exceeding the Fire Safe Regulations.

Consistent with our prior communications and correspondence, this letter reflects only the position of Board staff. We wish to be transparent with Sonoma County regarding our ongoing concerns and how we intend to advise the Board in advance of the November Board meeting. Ultimately, the Board will be responsible for making its own assessment on the question of whether the Sonoma County ordinance should be certified as equaling or exceeding the Fire Safe Regulations. Similarly, we respect the right of Sonoma County to disagree with Board staff positions expressed in this letter or the enclosed matrix when the matter is considered by the Board's Joint Committee on November 3, 2020.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Jeff Slaton', is written over a horizontal line.

Jeff Slaton
Senior Board Counsel
Board of Forestry and Fire Protection
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