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April 17, 2020

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

Re: Certification of Sonoma County Ordinance under 14 CCR § 1270.04

Dear Ms. Schiltgen:

After reviewing the analysis and other information that you and Sonoma County have provided to the Board, it does not fully address our concerns regarding certification of the Sonoma County ordinance. It would be very helpful to the Board if you could provide the legal bases and analysis, including relevant case law where applicable or useful, supporting Sonoma County's interpretation of section 4290 and the SRA Fire Safe Regulations, particularly as to the issues and questions below. This would ensure that the Board fully comprehends Sonoma County's position with respect to these issues.

1. First, we understand that Sonoma County is asserting that Public Resources Code § 4290 does not apply to roads (or roads to legal parcels) in existence prior to 1991, or even perhaps the Subdivision Map Act. As you know, PRC § 4290 specifically directs the Board to adopt regulations implementing minimum fire safety standards related to defensible space, and that the adopted regulations apply to "the perimeters and access [which includes roads] to all residential, commercial, and industrial building construction within the [SRA] approved after January 1, 1991..." (Emphasis added.) In interpreting the statutory language, it is important to keep in mind that § 4290 does not address roads in isolation; roads, in and of themselves, are not exempted under § 4290. Rather, it is the perimeters and access to particular building construction that is relevant. Thus, the relevant inquiry is whether the building construction was or is being approved after January 1, 1991, and if so, then the minimum fire safety standards apply (including the minimum standards related to access), unless otherwise exempted.

Section 4290 provides specific exemptions and restrictions on the applicability of the regulations, including with respect to building standards and the 1991 parcel map exemption (which, as you know, was the subject of the 1993 Attorney General Opinion). As the Board currently understands these exemptions, none could reasonably be construed in a way that would exclude roads (or roads to legal parcels) from the

applicability of 4290 simply on the basis that they existed prior to the Subdivision Map Act or prior to 1991. In other words, the Board does not currently interpret the 1991 exemption language in § 4290 as meaning that the regulations do not apply to “parcel or tentative maps or other developments approved prior to January 1, 1991, and do not apply to roads and legal parcels in existence prior to the Subdivision Map Act or 1991.” Nothing in the 1993 Attorney General Opinion nor the 2019 Paraiso Springs Attorney General letter supports the interpretation advanced by Sonoma County. Section 4290 provides no other exemptions to its broad applicability to “the perimeters and access to all residential, commercial, and industrial building construction” within the SRA approved after January 1, 1991.

a. Please provide the legal basis and analysis for the argument that PRC § 4290 does not apply to roads (or roads to legal parcels) that existed prior to the Subdivision Map Act or prior to 1991. What language in § 4290 exempts these roads? Obviously, if the legislative history provides support for this position, please provide such legislative history, as this would be contrary to the broad scope of the plain language in the statute.

2. The Board disagrees with your interpretation of the 1993 Attorney General Opinion. The opinion does not address ministerial permits on legal parcels within the SRA. The opinion addresses the scope of the 1991 exemption in PRC § 4290 and notes the general rule that exceptions expressed in statute must be narrowly construed. The opinion addresses the specific language in the statute regarding tentative or parcel maps. It does not address ministerial permits or “legal parcels.” The opinion concludes “that the fire safety standards adopted by the Board for development on state responsibility area lands apply to the perimeters and access to buildings constructed after January 1, 1991, on parcels created by parcel or tentative maps approved prior to January 1, 1991, to the extent that conditions relating to the perimeters and access to the buildings were not imposed as part of the approval of the parcel or tentative maps.”

a. Please provide the legal basis and analysis for your interpretation of the 1993 Attorney General Opinion, particularly with respect to the position that the Opinion construes the 1991 exemption language in § 4290 as also exempting “legal parcels” prior to 1991 or the Subdivision Map Act.

3. The Board also disagrees with your analysis and interpretation of the amendments to the SRA fire safe regulations effective in 2013. These amendments, particularly regarding the scope in section 1270.02, were made explicitly to implement the 1993 Attorney General Opinion, which interpreted and limited the scope of the § 4290 exemption related to pre-1991 parcels. This is the reason the regulatory language stating that “[t]hese regulations do not apply to existing structures, roads, streets, and private lanes or facilities” was deleted. The 1993 Opinion made clear that the exemption in § 4290 did not include “existing structures, roads, streets,…” The discussion in the Initial Statement of Reasons specifically references the 1993 Attorney General Opinion, and the amended language is nearly identical to that used in the Opinion. Thus, the regulatory

amendment language must be interpreted consistently with the 1993 Attorney General Opinion.

The language Sonoma County references regarding redundancy appears to be related to internal language regarding proposed amendments; it says nothing to suggest that the specific language that was deleted regarding the inapplicability of the regulations to “existing structures, roads, streets,…” was somehow fully encompassed by the § 4290 exemption language as interpreted by the 1993 Attorney General Opinion. It is difficult to imagine that the Board in 2012 concluded that the language exempting “existing structures, roads, streets, and private lanes or facilities” was redundant with the 1993 Attorney General Opinion conclusion that “that the fire safety standards adopted by the Board for development on state responsibility area lands apply to the perimeters and access to buildings constructed after January 1, 1991, on parcels created by parcel or tentative maps approved prior to January 1, 1991, to the extent that conditions relating to the perimeters and access to the buildings were not imposed as part of the approval of the parcel or tentative maps.”

While the meaning of the standalone sentence Sonoma County references regarding “perimeter and access standards outside the boundaries” is unclear, what is determined by the local permitting authority is the boundaries of the parcel or lot. In any event, no regulatory changes were made to suggest that the Board was interpreting the statute or the 1993 Attorney General Opinion in the manner suggested by Sonoma County, and the Board does not currently interpret § 4290 or its regulations in the manner suggested by Sonoma County.

a. Please provide the legal basis and analysis for the position that the 1993 Attorney General Opinion construes the 1991 exemption language in § 4290, or other language in § 4290, as exempting “existing structure, roads, streets, and private lanes or facilities” such that this language would be redundant with the conclusion by the Attorney General.

4. Sonoma County has repeatedly argued that the local standards in its ordinance are more stringent than the SRA fire safe regulations. While in some areas this may be correct, in other areas the local standards appear less stringent than the Board’s, and therefore would not equal or exceed the Board’s regulations. For example, the Board’s minimum standards in sections 1273.00 and 1273.01 require that all roads and driveways, whether public or private, unless exempted under section 1270.02(d) [the 1991 exemption in PRC § 4290] “shall provide for safe access for emergency wildfire equipment and civilian evacuation concurrently”, and that all roads “shall be constructed to provide a minimum of two ten (10) foot traffic lanes, not including shoulder and striping.” In comparison, the ordinance Sec. 13-25(f) exempts “[a]ny existing road that provides year-round unobstructed access to conventional drive vehicles, including sedans and fire engines, which was constructed and serving a legal parcel prior to January 1, 1991…”

a. Please explain how the language in Sec. 13-25(f), that a road provides year-round unobstructed access, meets the minimum standard in regulation § 1273.00 requiring concurrent civilian evacuation and emergency wildfire equipment access. Simply because a road provides year-round access does not mean it will provide for concurrent civilian evacuation and wildfire equipment access. As the Board understands Sec. 13-25(f), nothing in it addresses concurrent evacuation of civilians and wildfire equipment access. Not only does the ordinance not appear more stringent than the SRA fire safe regulations, it does not even appear to meet the minimum standard.

b. Similarly, please explain how the language in Sec. 13-25(f), that a road provides year-round unobstructed access, meets the minimum standard in regulation § 1273.01 of two ten-foot traffic lanes. Nothing in Sec. 13-25(f) requires two lanes, nor does it address the width of the lanes. Again, the ordinance section appears to be less stringent than the SRA fire safe regulation's minimum standards.

5. The Board understands Sonoma County's position to be that applying section 4290 to the perimeters and access to building construction within the SRA approved after January 1, 1991, would constitute, at least in some circumstances, an impermissible retroactive application of the statute. The Board disagrees. The Board is not interpreting section 4290 as applying to building construction within the SRA approved prior to January 1, 1991, which would seem to be an impermissible retroactive application. Rather, the statute applies to building construction approved after January 1, 1991. Building construction approved prior to January 1, 1991, is not subject to the scope of § 4290; building construction approved after January 1, 1991, is subject to the scope of § 4290 (except as specifically exempted).

a. Please provide the legal basis and analysis for the position that applying § 4290 to building construction approved after January 1, 1991, except as specifically exempted, would constitute retroactive application of the statute.

6. The October 25, 2019, Attorney General Letter regarding Paraiso Springs appears to specifically address the scope of § 4290 and the SRA fire safe regulations, particularly with respect to the existing road issue. The Letter states that "whether [a road] is an existing road is inconsequential," when that existing road will be "the sole access to new [] construction within the SRA." It goes on to state that the SRA fire safe regulations explicitly "apply to: (1) the perimeters and access to all residential, commercial, and industrial building construction within the SRA approved after January 1, 1991..." (Emphasis in original). Further, the letter states that while the existing road may have been exempt from the minimum fire safe standards prior to the new development, it is the "construction of a new project that triggers the application of the SRA fire safe regulations." The only exemption for existing roads that the Attorney General recognizes is that in § 1270.02(d), (which exempts roads used solely for agricultural, mining, or the management and harvesting of wood products). The Attorney General finds that this interpretation comports with intent of the regulations to ensure that the future design and construction of

structures, subdivisions and developments provides for basic emergency access, and that a “contrary interpretation would incentivize development without adequate evacuation routes and emergency access in the SRA rather than prevent it.”

a. If you disagree with the analysis and conclusions reached by the Attorney General in the October 25, 2019, Letter, please provide the legal basis and analysis explaining how the Attorney General’s analysis is flawed.

b. If the Paraiso Springs development was proposed in Sonoma County, under the same circumstances, how would the requirements in the Sonoma County ordinance ensure that access to the new development equaled or exceeded the minimum standards in the SRA fire safe regulations?

c. If Sonoma County believes that if proposed in Sonoma County the Paraiso Springs development would be exempt from the SRA fire safe regulations, please provide the legal analysis to support this position.

7. Sonoma County appears to assert that applying § 4290 and the SRA fire safe regulations to building construction in the SRA approved after January 1, 1991, without exempting pre-1991 roads, would violate the takings clauses under the federal and/or California constitutions. Please provide the legal analysis, including applicable case law, to support this assertion. Note, however, that under Article III, section 3.5 of the California Constitution, an administrative agency, such as the Board, has no power to “declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.”

The Board appreciates the efforts of Sonoma County to improve fire fighter and civilian safety and to improve protections for your community. We share the goals of ensuring that construction within the SRA provides adequate fire safety standards, including civilian evacuation routes and emergency access. Your answers to the questions above will assist the Board in its review of the Sonoma County ordinance to determine whether it equals or exceeds the minimum standards in the SRA Fire Safe Regulations.

Best Regards,



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cc: Matt Dias, Executive Officer of the Board