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April 22, 2020

Jeff Slaton  
Senior Board Counsel  
Board of Forestry and Fire Protection  
[Jeffrey.Slaton@bof.ca.gov](mailto:Jeffrey.Slaton@bof.ca.gov)

Re: Sonoma County's Fire Safe Standard Certification

Dear Mr. Slaton:

The County again requests the Board of Forestry certify its local fire safe standards. The County seeks to protect fire fighters and ensure access for fire equipment and concurrent civilian evacuation. It is of critical importance to protect our community.

The County's standards have already been certified. The Board of Forestry certified the same exemptions in 2017. The old road exemptions remain the same. The road width regulation remains the same. Board staff determined that Sonoma County's standards meet or exceed all of the new 2020 regulations.

The only alleged flaw appears to be that the County's standards don't comply with an implied "14 CCR section 1270.02(e) Retroactivity" – a newly interpreted regulation to mean that to build a single family home, a building permit applicant must pay her neighbors for easement rights and solely finance the grading and paving construction project outside of her parcel boundaries to turn the old neighborhood road into a modern two-lane twenty-foot wide road with shoulders and striping unless she can demonstrate that the old road had been specifically conditioned in a tentative map or parcel map.

Yet, a regulation that requires that does not exist. It is not a part of 14 CCR §1270.02 or any other regulation. It has never been noticed. Its impacts on housing costs, small businesses, the environment and fire disaster recovery have never been considered. The past thirty years of Legislative history, thousands of pages of rulemaking history and a series of Attorney General opinions make it clear that Public Resources Code section 4290 did not intend to require a property owner to have to solely finance the grading and paving of an old neighborhood access road outside of her parcel boundaries and across her neighbors' properties at hundreds of thousands of dollars cost. To suddenly require all of that now, for one to simply obtain a building permit for a house, does not comport with the law and is a significant overreach.

JOINT 3.2

The County is requesting the Board exert its authority in a manner that complies with the Legislature’s intent and avoids a constitutional problem.<sup>1</sup> The County of Sonoma exceeds all of the properly noticed and APA implemented regulations. The County requests certification of its local standards so it can proceed with its role as the local land use regulatory and permitting authority.

**I. Staff’s New Interpretation Would Be an Underground Regulation**

The Board of Forestry’s staff’s new interpretation effectively creates the following new regulation without following APA procedures:

**14 CCR §1270.02(e) Scope – Retroactivity.**

**These regulations shall apply retroactively to every private and public road throughout the state responsibility area that was constructed before Public Resources Code §4290 took effect in 1991. These regulations are the minimum floor construction standards that apply to all residential, commercial and industrial construction. To obtain a building permit for an accessory dwelling, a new single family residence, a disaster rebuild or a complete remodel of an existing home, the building permit applicant must prove that the old access road that serves her legal parcel was included in a condition of a tentative map or parcel map. If she can’t do so, then before she can receive a building permit she must first buy easement rights from all of her neighbors. The building permit applicant must pay for the old access road to become a new two lane, 20 foot wide road with shoulders and striping. The building permit applicant shall grade and pave this modern road (1 mile?) (1/2 mile?) (1/4 mile?) outside of her parcel boundaries before she can obtain a building permit to build -- or rebuild -- a single family dwelling.**

The Board of Forestry staff’s new interpretation would result in staggering housing costs, and may severely impair the ability of a great many counties and cities to meet their state-mandated housing goals. It would grind to a halt single family home construction—and fire rebuilds-- in the state responsibility area. It would clash with the Legislature’s affordable housing law. There is no statute or Attorney General opinion that supports this interpretation.

**A. The Board of Forestry Stated There Would Be No Impact on Housing Costs**

The Board of Forestry assured the public that these regulations would not have an impact on housing costs when it changed the road width standards seven years ago.<sup>2</sup> Yet, staff’s proposed new interpretation would require a single family homeowner or a fire disaster survivor to pay hundreds of thousands of dollars (or possibly millions) to transform an old access road

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<sup>1</sup> This new regulation would be an underground regulation without complying with the rulemaking notice procedures set forth in the Administrative Procedure Act rulemaking process set forth in Government Code section 11340 et seq.

<sup>2</sup> Notice of Proposed Action, SRA Fire Safe Regulations Update, 2011, Published December 23, 2011, “Significant effect on housing costs: None.” (page 2). “The regulatory proposal will not have a significant impact on housing cost. This again depends on the existing local requirements.”

outside her parcel boundaries into a large modern road for the benefit of the whole neighborhood without anyone else sharing in the cost.

This would be the ultimate NIMBY tool. Any of the neighbors would have full power to stop development by refusing to sell easement rights to grade and pave a new large two-lane road over their properties. If one disgruntled neighbor refused to sell easement rights, the neighbor could unilaterally stop any development. The road could not be developed, so the building permit would not be issued.

Even if the single family homeowner convinced her neighbors to sell her easement rights to grade and pave over their properties, only the wealthy could build a home. These are minimum construction standards. These standards apply to single family homes in the state responsibility area throughout California. Attaching a staggering price tag to the construction of a new single family home would be in direct conflict with our State's affordable housing laws.

### **B. The Board of Forestry's CEQA Review Failed to Consider the Significant Statewide Impacts on the Environment**

The published notice reassured the community these regulations would have minimal construction impacts. The Board of Forestry's 2013 Rulemaking Package concluded the regulations would have no significant impact because they would only require minor vegetation management and access construction work around existing structures.<sup>3</sup>

Yet, staff's proposed new interpretation would require hundreds of thousands of miles of existing public and private roads throughout the California state responsibility area to have massive grading, paving and construction to upgrade them all to two-lane, twenty-foot wide roads with shoulders and striping. Possible significant impacts include the following: Takings of federally listed species, wetlands in road side ditches, sensitive habitat removal, stormwater runoff, bank stabilization to support hillsides from the new twenty foot road projects cut across our state. There has been no environmental review for this new interpretation. This would result in statewide litigation.

### **C. The Board of Forestry Failed to Notify the Public of a Reversal of Thirty Years of Statutory Interpretation**

For almost thirty years, the Board of Forestry has repeatedly assured the public that the scope of its road standards do not automatically apply retroactively to roads that had already been developed to serve legal parcels before the statute took effect. The Board of Forestry and a series of Attorney General opinions has made it clear it is the jurisdiction of the local land use

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<sup>3</sup> Notice of Proposed Action, SRA Fire Safe Regulations Update, 2011, Published December 23, 2011, "General evaluation of potential significant impacts indicates that significant impacts are unlikely as these regulations are for administrative modifications only. The projects themselves affect limited area around existing homes. Such areas generally do not contain substantial areas of native habitats . . . The nature of maintenance and construction work conducted under these regulations consists of minor alterations to vegetation and removal for the purpose of maintaining native growth around residential structures, as well as access to structures for emergency purposes. The Board has found that these regulations have less than significant potential for adverse effects on the environment." (page 5).

permitting authority to decide when it is legally appropriate to attach development conditions to require old road upgrades outside of a parcel's boundaries.

If there is a desire to proceed with this new regulation, the Board of Forestry must notify the public and explain the scope of its intent. How far would a permit applicant have to pay to upgrade old access roads to modern standards outside of their parcel boundaries? Is it the same requirement regardless of the size of the development? Would an 800 square foot home have to upgrade the same amount of old access road as a new hotel? When does an existing road become "existing nonconforming"? One mile? ½ mile? ¼ mile? The 2013 Rulemaking Package notices indicated this would not impact housing costs or small business costs. Yet, even a requirement to purchase easements, grade and pave a new two lane, twenty-foot old private road for ½ mile could cost over a million dollars to retain a geotechnical engineer for slope stabilization, consider impacts on federally listed species and wetlands in ditches and prevent storm water runoff.

Housing construction costs in the state responsibility area would skyrocket. Small businesses would have significantly higher development costs to finance modernization of old neighborhood roads. It would be a nail in the coffin for our fire survivors trying to rebuild across our State. This regulation has not been noticed and is not valid until it proceeds through an APA rulemaking process.

The people of our State must have an opportunity to comment on the impacts. Our State's home owners, small business owners, affordable housing advocates, environmental protection advocates, environmental justice advocates, all other community interests and disaster survivors need a voice in this decision.

## **II. Public Resources Code Section 4290 is a Minimum Construction Standard; It Does Not Require All Construction Permits to Improve Old Access Roads Outside of Parcel Boundaries**

Attaching a staggering price tag to the minimum construction standard is not in the scope of this law. Staff's new underground regulation is not supported by thirty years of legislative history, Attorney General Opinions, and thousands of pages of rulemaking history.

Public Resources Code section 4290 carved out of its scope all developments that already had been approved before January 1, 1991.<sup>4</sup> The legislative committee reports in

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<sup>4</sup> The focus of that language was on modern subdivision permitting laws involving parcel maps and tentative map conditions and "other developments approved prior to January 1, 1991." That is a reference to modern subdivision map and permitting laws. Many roads throughout the state responsibility area were constructed to serve legal parcels before modern subdivision map act and tentative map conditions of approval requirements. It appears that the Board of Forestry's staff's new interpretation is that the Legislature intended to prohibit applying its new road width standards to roads constructed between 1960-1991, but the Legislature intended to retroactively apply 2 lane 20 foot wide road standards to roads constructed to serve legal parcels between 1880-1960. We have found nothing in the legislative history that indicates the Legislature intended to leapfrog over those modern subdivision permitting years and then re-apply its reach retroactively to require single family homes to be conditioned on financing upgrades of old private roads and public roads outside of parcel boundaries that were constructed to serve the legal parcel between 1880 to 1960. The Board of Forestry raised this exact question with the Attorney General in 2010, the Attorney General advised the Board of Forestry that the

earlier versions of the bill described the intent: “Specifically exempted are areas where building permits were filed ... and areas where a parcel or tentative map or other developments as approved prior to July 1, 1989. (August 1, 1987 and August 25, 1987 committee reports).

The legislative committee reports and finalized statutory language indicate the intent was to carve out existing infrastructure that had been developed before the final statute took effect on January 1, 1991. Staff’s new interpretation ignores the term “other developments as approved.” The legislative history indicates infrastructure that had already been developed to serve legal parcels before the statute’s effective date was outside the scope of the new law. Moreover, the statute explains these are minimum standards that apply to all residential, commercial and industrial construction. These are the floor of construction standards that apply to all new residential construction.

#### **A. 1991 Rulemaking History Explains The Regulations Do Not Apply to Existing Roads**

To further understand the scope of Public Resources section 4290, it is helpful to review the rulemaking history. The Board of Forestry’s 1991 rulemaking history explains that the new road width standards only apply to newly constructed roads.<sup>5</sup> The letter explains that the regulations do not apply to existing roads providing service to existing parcels. Where a parcel is not accessed by a road or easement for an approved unconstructed road, then the new road standards apply. Two lane roads for all developed parcels in the state responsibility area is “just not practical” and these regulations apply to roads and existing parcels where there is no access to that parcel. The letter states that an individual property owner applying for a building permit or ministerial permit would be very unlikely to be solely responsible for financing modern upgrades to a public or private road outside of parcel boundaries.

The Attorney General has not contradicted this intent. In 1993, the Attorney General responded to an inquiry from Amador County Counsel’s Office about whether perimeter and access requirements for the fire safe standards apply for projects in the pipeline right after the new statute was passed. 76 Ops. Cal. Atty. Gen. 19, 22 (1993). The Attorney General clarified that a construction project in the pipeline still must comply with the State’s fire safe standards even if it takes place on a legal parcel that existed prior to 1991. The Attorney General was interpreting a pipeline provision for those who had applied for a building permit or a parcel or tentative map prior to 1991 but had not constructed the perimeter and access yet. “These exceptions were apparently designed by the Legislature to exempt construction and development activity already in the ‘pipeline’ as of January 1, 1991.”

This opinion does not address or discuss the issue of access roads *outside of a parcel’s boundaries* that existed prior to 1991. The extent to which "perimeters and access"

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scope of applying its laws outside of parcel boundaries was a matter for the local permitting jurisdiction to decide based on their police powers within their legal constraints. The same message is included in the 2013 Rulemaking Package.

<sup>5</sup> Please see January 29, 1991 Board of Forestry rulemaking history letter from Bob Paulus to Region Chiefs and Ranger Unit Chiefs, pp. 47-52.

encompasses offsite improvements is, of course, entirely distinct from questions regarding the scope of the "prior to January 1, 1991" exclusion. The opinion does not state that all permit applicants must solely finance the cost to upgrade their neighborhood access roads outside parcel boundaries.

In fact, the Attorney General has warned against imposing unreasonable conditions on a building permit. In 1995, the Attorney General provided additional helpful advice. The California Building Standards Commission asked the Attorney General if a city or county could condition a building permit on the installation of a paved driveway from the property line to the residence for emergency vehicle access. 78 Ops. Cal. Atty. Gen. 53 (1995). The Attorney General considered the Board of Forestry's fire safe standards in 14 C.C.R. §1270. The Attorney General explained the regulation of land development is a traditional subject for the exercise of the constitutional police power by a city or county. The Attorney General explained that the exercise of the police power is subject to the limitations imposed by the state and federal constitution. *Id.* at 54-55. The Attorney General also explained that the general rule is that a builder must comply with the laws which are in effect at the time a building permit is issued. The Attorney General assured the California Building Standards Commission that "the local standard must be reasonable." The Attorney General concluded that it was reasonable for a city or a county to require a paved driveway from the property line to the residence for emergency vehicle access for building permits.

Similarly, the Attorney General has warned against using the fire safe road standards to hinder fire disaster rebuilds. On March 2, 2010, the Attorney General wrote a letter to the Board of Forestry Regulations Coordinator Chris Zimny to help prepare for an update to the regulations. The Attorney General explained that there were many issues about how section 4290 applies to the reconstruction of buildings burned in a fire.

In that 2010 letter to the Board of Forestry, the Attorney General had been asked if a local government must – or even could -- condition a rebuilding permit on upgrading road widths. The Attorney General did not opine on that point because the Attorney General explained it was up to the local jurisdiction to decide how construction permits should be granted. The Attorney General explained it was a local government decision to attach conditions for permits for reconstruction after a fire and the local governments must base that decision upon all state statutes that govern these decisions. The Attorney General cited its previous 1995 decision in which it opined it was a reasonable exercise of local police power to require a driveway upgrade -- to the property line.

This understanding was actually embodied in the 2013 regulatory package, which includes the assurance that "[t]he Board's regulations *may* also apply to perimeter and access standards *outside the boundaries* of a parcel or lot *as determined by the local permitting authority*."<sup>6</sup> This language is not ambiguous, but rather is very clear on its face, and in context of the foregoing Attorney General opinions included in the rulemaking record. It is questionable whether the Board could alter this provision consistent with Section 4290 – but, at a minimum, any such alteration would require compliance with the APA, which has not occurred.

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<sup>6</sup> Please see the 2013 rulemaking package, Notice of Proposed Rulemaking Published December 23, 2011, "Specific Purpose of the Regulation for Section 1270.02" page 2.

## **B. 2013-2020 Rulemaking History Clarify It is the Realm of the Local Permitting Jurisdiction to Determine Their Constitutional and Statutory Legal Constraints to Impose Conditions of Development Outside of a Parcel's Boundaries**

In 2013, the Board of Forestry explained it was within the realm of the local permitting jurisdiction to determine their constitutional and statutory legal constraints and their ability to impose conditions of development outside of a parcel's boundaries. The Board followed the 2005 and 2010 advice of the Attorney General. The Board of Forestry's road width requirements were changed in 2013 to require two lane, 20 foot wide modern roads. However, the Board did not indicate these new road width standards would apply retroactively to all roads that existed before the statute passed. To the contrary, the Board deleted the exemption for existing roads and streets because the Board stated that exemption was "redundant." The Board explained the exemption "did not need to be repeated."<sup>7</sup>

Again in 2014, the Board reassured concerned members of the public that the new road standards would not impact existing infrastructure. The rulemaking records for the 2014 revisions to the SRA fire safe regulations describe the 2013 regulations as "minor amendments" and stated that the 2014 road rule changes then under consideration "would not apply to existing infrastructure, in other words existing infrastructure would not have to be brought into conformance."<sup>8</sup> That reassuring message was repeated in response to public comments. The Board of Forestry assured the public that its new road standards would not impact existing infrastructure.<sup>9</sup> When representatives from rural counties expressed concern about how the new road standards would impact existing roads, the Board responded: "This regulation applies when landowners in the SRA voluntarily decide to develop their property **and would not apply to existing infrastructure**. Additionally, the Board finds the adopted regulation will have no significant effect upon housing costs."

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<sup>7</sup> Please see the 2013 rulemaking package, Notice of Proposed Rulemaking Published December 23, 2011, "Specific Purpose of the Regulation for Section 1270.02" page 2.

<sup>8</sup> [https://web.archive.org/web/20170201075738/http://www.bof.fire.ca.gov/regulations/proposed\\_rule\\_packages/sra\\_fire\\_safe\\_regulations\\_update\\_2014/hearing\\_15\\_1\\_1270\\_fire\\_safe\\_regulations\\_update\\_2014\\_fsr\\_092914\\_2.pdf](https://web.archive.org/web/20170201075738/http://www.bof.fire.ca.gov/regulations/proposed_rule_packages/sra_fire_safe_regulations_update_2014/hearing_15_1_1270_fire_safe_regulations_update_2014_fsr_092914_2.pdf)

<sup>9</sup> Comment L3-1 from Staci Heaton, Regulatory Affairs Advocate, Rural County Representatives of California: "Changes to road width, roadway surfacing materials, requirements regarding road signs, size and shape of roadway turnarounds, turnouts, and bridges all could potentially increase costs to local governments. Even if these regulations were to be applied only to new developments, counties would likely be tasked with the maintenance and repair of these roads – larger roadways, specialty surfacing, increased strength and bracing in bridges all are likely to increase the costs of maintaining these roads. Moreover, substantive changes to these regulations could increase county liability for any existing roads or structures that do not meet standards even if the jurisdiction is not formally required to meet them.

**Board's Response:** "This regulation applies when landowners in the SRA voluntarily decide to develop their property **and would not apply to existing infrastructure**. Additionally, the Board finds the adopted regulation will have no significant effect upon housing costs."

Sonoma County received a similar message the last time we certified our local ordinance. In 2017, the Board of Forestry certified Sonoma County’s ordinance – including the exemptions for roads that existed before the statute passed. The Board confirmed Sonoma County’s road width standards and exemptions met State standards. Moreover, the Board of Forestry staff requested the County amend its exemptions to more closely align with the scope of the statute. The Board of Forestry staff at that time asked the County to revise its exemptions to change our pre-1992 road exemption to a pre-1991 road exemption to reflect the year the statute took effect. We did so. No one at the Board of Forestry indicated the County should eliminate these pre-1991 road exemptions. The scope of the statute has not changed since that time.

In the 2020 rulemaking package, the Board of Forestry reiterated the same message. The Board responded to comments about the impacts to existing roads as follows: “existing roads over a mile in length are considered ‘existing nonconforming’ and do not necessarily preclude development along the parcels that they serve.”<sup>10</sup>

The Board of Forestry rulemaking history, combined with the series of Attorney General opinions, make it clear that the minimum construction standards do not require a single property owner to solely finance the upgrade of an old road outside of her parcel boundaries at a cost of hundreds of thousands of dollars to benefit the entire neighborhood when no one else contributes to the upgrade. Staff’s new interpretation defies the past thirty years of the Board of Forestry’s and the Attorney General’s interpretation regarding the scope of this law.

### **III. Sonoma County Exceeds the State Fire Standards**

The California Building Code, California Fire Code and the California Fire Safe Standards present the floor of the minimum construction standards that apply to all residential, commercial and industrial construction within a property’s boundaries and for new road construction projects. When a construction project requires a new road, an improved road or an extended road, Sonoma County requires modern road standards. These have been certified by the Board of Forestry in 2017, and again staff has confirmed the County meets all of the new 2020 regulations. Further, we exceed State standards by requiring all of the access roads that were developed to serve legal parcels before the statute took effect to have year round unobstructed fire engine access for minimum construction standards.

Sonoma County does not stop there. For discretionary approvals, we exercise our land use regulatory police power within the constitutional constraints of nexus and proportionality to require developers to upgrade old pre-1991 roads where necessary to ensure safe civilian evacuation concurrently with fire engine access. The County considers the impacts of a proposed development, and within the constitutional limits of nexus and proportionality, imposes conditions of approval to mitigate impacts and protect public health and safety. For example, the County can exercise its police powers to require conditions of approval to upgrade pre-1991 roads and require secondary access roads to ensure the proposed development accommodates increased visitors and traffic in a proportionate manner that protects the public health and safety for fire engine access and civilian evacuation.

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<sup>10</sup> Comment W3-5, Board response to Mike Muelrath, 2020 Rulemaking.



The County has submitted several examples of use permits with conditions of approval. For example, in 2004, the County issued a use permit for a 50 room hotel with a 300 square foot retail shop, 1,455 square feet of administrative offices, two meeting rooms and a swimming pool. The resort is located on State Highway 12 – a road that already exceeds the Board of Forestry’s minimum fire safe standards. Nevertheless, the use permit’s condition of approval required the developer to construct an access road, construct numerous improvements to the driveway, emergency access turnarounds, water storage for firefighting, a recorded vegetation management plan and create a new intersection and lane widening in compliance with Caltrans Standards. The road design improvements also ensure adequate fire protection access and widening of a road to provide a second northbound approach lane.

Another example Sonoma County submitted to the Board of Forestry was the use permit conditions of approval for a new winery expansion, including construction of new buildings for production, barrel storage, public tasting and a residence. Conditions of approval ensured fire equipment access and concurrent civilian evacuation. The developer was required to construct fire apparatus roads. Facilities having a gross building area of more than 62,000 square feet were required to have at least two separate and approved fire apparatus access roads. Buildings exceeding 30 feet were required to be provided with approved fire apparatus roads capable of accommodating fire department aerial apparatus. Twenty-six feet wide roads were required for aerial fire equipment access. Twenty-foot access roads were required for other fire apparatus access roads. Where a bridge was a part of a fire apparatus road, the bridge had to be constructed and maintained in accordance with AASHTO HB-17. Fire protection water supplies were required that were capable of supplying minimum fire flow of not less than 1,500 gallons per minute and fire hydrants had to be spaced not less than 500 feet apart along fire access routes. That is how we exercise police powers for land use regulation. The County of Sonoma far exceeds the State’s minimum standards.

We are going even farther. In December 2019, our Board of Supervisors directed staff to work with stakeholder groups to consider new methods to develop even more protections for our civilian evacuation routes and emergency fire equipment access. The Board of Supervisors has also retained a certified forester to help the Fire Prevention staff, planning staff and Transportation and Public Works staff coordinate with County Counsel to develop additional protections for fire safety that fall within the parameters of federal and state constitutional restrictions. We are continuing to develop new methods to improve our fire protection standards. It is a top priority to protect our community and our fire fighters.

**IV. Let’s Work Together Collaboratively With Our Legislature, State Agency Partners, Other Local Government Agencies and Members of the Public to Improve Fire Engine Access and Civilian Evacuation to Protect Our Residents**

The County of Sonoma’s standards exceed the State’s minimum standards. The County looks forward to brainstorming additional ways our Legislature, State agency partners and local governments can enhance protections to expand road access on old roads in a proportionate and constitutional manner. Any new law would need notice so the community can review the proposed new law and comment on impacts. We look forward to working together collaboratively to accomplish this critical goal.

We believe we have provided more than sufficient information over the past four months to demonstrate that we meet or exceed State standards. However, if the Board of Forestry has additional questions, we can continue to research the full legislative history in the State Archives when the shelter in place is lifted. Unfortunately, our nation is in the middle of responding to a global pandemic. We are under shelter in place orders. The State Archives contains the historical information, but it is currently closed. If the Board of Forestry needs even more research to make this decision, please let us know.

In the meantime, we appreciate the ability to move forward with this discussion despite the current pandemic. Our land use permitting has been delayed for several months waiting for this certification. We are looking forward to moving ahead together.

Best regards,

*Linda Schiltgen*

Linda D. Schiltgen  
Deputy County Counsel

## Exhibit A: Responses to Board of Forestry's Questions

1. **Question:** 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.

### **Response:**

The answer to this question requires a deep dive into the legislative history, the series of Attorney General opinions on point and the thousands of pages of rulemaking history between 1991 and 2020.

**Legislative History of Public Resources Code Section 4290:** The Legislature specifically included language in Public Resources Code section 4290 to carve out of its scope all developments that already had been approved before January 1, 1991.<sup>11</sup> The legislative committee reports in earlier versions of the bill described the intent: “Specifically exempted are areas where building permits were filed ... and areas where a parcel or tentative map or other developments as approved prior to July 1, 1989. (August 1, 1987 and August 25, 1987 committee reports). The legislative committee reports and finalized statutory language indicate the intent was to carve out areas where developments had been approved before the final statute took effect in January 1, 1991. The Legislature’s use of the term “areas where other developments as approved” indicates it gave clear direction that the scope was to apply to future design of construction and infrastructure. Roads that had been approved prior to January 1, 1991 fall squarely within the definition of specifically exempted areas where other developments had been approved before the passage of section 4290. When the State Archives opens, we welcome the chance to continue to explore the full scope of the legislative history on this point.

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<sup>11</sup> The focus of that language was on modern subdivision permitting laws involving parcel maps and tentative map conditions and “other developments approved prior to January 1, 1991.” That is a reference to modern subdivision map and permitting laws. Many roads throughout the state responsibility area were constructed to serve legal parcels before modern subdivision map act and tentative map conditions of approval requirements. It appears that the Board of Forestry’s staff’s new interpretation is that the Legislature intended to prohibit applying its new road width standards to roads constructed between 1960-1991, but the Legislature intended to retroactively apply 2 lane 20 foot wide road standards to roads constructed to serve legal parcels between 1880-1960. We have found nothing in the legislative history that indicates the Legislature intended to leapfrog over those modern subdivision permitting years and then re-apply its reach retroactively to require single family homes to be conditioned on financing upgrades of old private roads and public roads outside of parcel boundaries that were constructed to serve the legal parcel between 1880 to 1960. The Board of Forestry raised this exact question with the Attorney General in 2010, the Attorney General advised the Board of Forestry that the scope of applying its laws outside of parcel boundaries was a matter for the local permitting jurisdiction to decide based on their police powers within their legal constraints. The same message is included in the 2013 Rulemaking Package.

The Board of Forestry staff's new interpretation ignores the term "other development approved before January 1, 1991." It focuses on modern subdivision permitting law language of parcel map and tentative map conditions. Sonoma County has pointed out that we have not found anything in the legislative history thus far that would support this interpretation. It would mean the Legislature intended to allow roads constructed between 1960-1991 to be exempt, but roads constructed between 1880-1960 would have to comply with the new roads standards. We haven't found support for this interpretation. It would lead to arbitrary results for legal parcels.

For example, if a home owner wanted to tear down an old 1900 home on a legal parcel served by an old road and build a modern house on the same lot, the new interpretation would make it cost prohibitive. To modernize that old home, the property owner would first have to pay the staggering costs to pay the neighbors for easement rights to pave, grade a new 2 lane 20 foot road outside their parcel boundaries for the benefit of the whole neighborhood. We haven't found any Attorney General Opinion, statute or legislative history that would support this outcome.

The problem of conditioning development on improvements that require acquisition of property interests has been recognized by the Legislature in other contexts. Government Code section 66462.5 provides (essentially) that a subdivision map condition requiring "offsite improvements on land in which neither the subdivider nor the local agency has sufficient title or interest" must be waived if the local agency refuses to use eminent domain to acquire the property. This statute was enacted in 1982 to "correct a perceived abuse of power" by the government. Hill v. City of Clovis (2000) 80 Ca.App.4<sup>th</sup> 438.

#### **1991 Board of Forestry Rulemaking History.**

This same interpretation is reflected in the 1991 Board of Forestry Rulemaking history. Please see January 29, 1991 Board of Forestry rulemaking history letter from Bob Paulus to Region Chiefs and Ranger Unit Chiefs, pp. 47-52. The Board of Forestry's 1991 rulemaking history explains that the new road width standards only apply to newly constructed roads. The letter explains that the regulations do not apply to existing roads providing service to existing parcels. Where a parcel is not accessed by a road or easement for an approved unconstructed road, then the new road standards apply. Two lane roads for all developed parcels in the state responsibility area is "just not practical" and these regulations apply to roads and existing parcels where there is no access to that parcel. The letter states that an individual property owner applying for a building permit or ministerial permit would be very unlikely to be solely responsible for financing modern upgrades to a public or private road outside of parcel boundaries.

#### **1993 Attorney General Opinion**

In 1993, the Attorney General responded to an inquiry from Amador County Counsel's Office about whether perimeter and access requirements for the fire safe standards apply for projects in the pipeline right after the new statute was passed. 76 Ops. Cal. Atty. Gen. 19, 22 (1993). The Attorney General clarified that a construction project in the pipeline still must comply with the State's fire safe standards even if it takes place on a legal parcel that existed prior to 1991. The Attorney General was interpreting a pipeline

provision for those who had applied for a building permit or a parcel or tentative map prior to 1991 but had not constructed the perimeter and access yet. “These exceptions were apparently designed by the Legislature to exempt construction and development activity already in the ‘pipeline’ as of January 1, 1991.” This opinion does not address or discuss the issue of access roads outside of a parcel’s boundaries that existed prior to 1991. The opinion does not state that all permit applicants must solely finance the cost to upgrade their neighborhood access roads outside parcel boundaries.

### **1995 Attorney General Opinion**

In 1995, the Attorney General provided additional helpful advice about how the fire safe standards apply to ministerial permits such as a single family home building permit. The California Building Standards Commission asked the Attorney General if a city or county could condition a building permit on the installation of a paved driveway from the property line to the residence for emergency vehicle access. 78 Ops. Cal. Atty. Gen. 53 (1995). The Attorney General considered the Board of Forestry’s fire safe standards in 14 C.C.R. §1270. The Attorney General explained the regulation of land development is a traditional subject for the exercise of the constitutional police power by a city or county. The Attorney General explained that the exercise of the police power is subject to the limitations imposed by the state and federal constitution. *Id.* at 54-55. The Attorney General also explained that the general rule is that a builder must comply with the laws which are in effect at the time a building permit is issued. The Attorney General assured the California Building Standards Commission that “the local standard must be reasonable.” The Attorney General concluded that it was reasonable for a city or a county to require a paved driveway from the property line to the residence for emergency vehicle access for building permits.

### **2010 Attorney General Letter to Board of Forestry**

Several years after that, the Attorney General opined again on this matter. On March 2, 2010, the Attorney General wrote a letter to the Board of Forestry Regulations Coordinator Chris Zimny to help prepare for an update to the regulations. The Attorney General explained that there were many issues about how section 4290 applies to the reconstruction of buildings burned in a fire.

In that 2010 letter to the Board of Forestry, the Attorney General had been asked if a local government must – or even could -- condition a rebuilding permit on upgrading road widths. The Attorney General did not opine on that point because the Attorney General explained it was up to the local jurisdiction to decide how construction permits should be granted. The Attorney General explained it was a local government decision to attach conditions for permits for reconstruction after a fire and the local governments must base that decision upon all state statutes that govern these decisions. The Attorney General cited its previous 1995 decision in which it opined it was a reasonable exercise of local police power to require a driveway upgrade from the property line.

### **2013 Rulemaking History**

In 2013, the Board of Forestry followed the advice of this 2010 Attorney General letter. Please see the Notice of Proposed Rulemaking Published December 23, 2011, “Specific Purpose of the Regulation for Section 1270.02” page 2. It deleted the exemption for existing roads and streets because it was redundant, existing roads were outside the

scope of Public Resources Code section 4290, and so the exemption did not need to be repeated. In addition, the Board of Forestry’s road width requirements were changed in 2013 to require two lane, 20 foot wide roads. Yet, the 2013 Rulemaking notice process did not state that the regulations were meant to apply the new two lane 20 foot road widths retroactively to all public and private roads. That would have been contrary to the 2005 and 2010 advice given by the Attorney General. Instead, the 2013 Board of Forestry Rulemaking Notice stated it was within the realm of the local permitting jurisdiction to determine their constitutional and statutory legal constraints and their ability to impose conditions of development outside of a parcel’s boundaries.

**SRA Fire Safe Regulations Update 2014, Final Statement of Reasons** The rulemaking records for the 2014 revisions to the SRA fire safe regulations describe the 2013 regulations as “minor amendments” and stating that the 2014 road rule changes then under consideration “would not apply to existing infrastructure, in other words existing infrastructure would not have to be brought into conformance.”

[https://web.archive.org/web/20170201075738/http://www.bof.fire.ca.gov/regulations/proposed\\_rule\\_packages/sra\\_fire\\_safe\\_regulations\\_update\\_2014/hearing\\_15\\_1\\_1270\\_fire\\_safe\\_regulations\\_update\\_2014\\_fsor\\_092914\\_2.pdf](https://web.archive.org/web/20170201075738/http://www.bof.fire.ca.gov/regulations/proposed_rule_packages/sra_fire_safe_regulations_update_2014/hearing_15_1_1270_fire_safe_regulations_update_2014_fsor_092914_2.pdf)

Comment L3-1 from Staci Heaton, Regulatory Affairs Advocate, Rural County Representatives of California: “Changes to road width, roadway surfacing materials, requirements regarding road signs, size and shape of roadway turnarounds, turnouts, and bridges all could potentially increase costs to local governments. Even if these regulations were to be applied only to new developments, counties would likely be tasked with the maintenance and repair of these roads – larger roadways, specialty surfacing, increased strength and bracing in bridges all are likely to increase the costs of maintaining these roads. Moreover, substantive changes to these regulations could increase county liability for any existing roads or structures that do not meet standards even if the jurisdiction is not formally required to meet them.

**Board’s Response:** “This regulation applies when landowners in the SRA voluntarily decide to develop their property **and would not apply to existing infrastructure.** Additionally, the Board finds the adopted regulation will have no significant effect upon housing costs.”

**2017 Board of Forestry certification of the County of Sonoma’s exemptions for pre-1991 roads.** The Board specifically certified the road width standards in Sonoma County at that time as meeting or exceeding State standards because Sonoma County applies that standard proactively for new road construction. The Board of Forestry did not request County of Sonoma remove its exemptions. To the contrary, the Board of Forestry staff asked the County of Sonoma to modify its exemptions to align with the statute’s effective date to exempt roads that existed pre-1991. We did so.

### **2020 Rulemaking Package Response to Comments**

Comment W3-5, Board response to Mike Muelrath, 2020 Rulemaking

In the Notice of Rulemaking of the 2020 regulations, the Board of Forestry responded to comments about the impacts to existing roads as follows: “**existing roads** over a mile in length **are considered ‘existing nonconforming’** and do not necessarily preclude development along the parcels that they serve.

The past thirty years of Legislative history, rulemaking packages and Attorney General opinions makes it clear that Section 4290 did not intend to require a property owner to have to solely finance the upgrade of an old neighborhood road outside of parcel boundaries and across her neighbors’ properties at hundreds of thousands of dollars cost simply to obtain a building permit for a house.

2. **Question:** 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 section 4290 as also exempting “legal parcels” prior to 1991 or the Subdivision Map Act.

**Response:** The 1993 Attorney General Opinion did not exempt legal parcels prior to 1991 or the Subdivision Map Act. This Attorney General Opinion made it clear that the fire safe standards apply to new construction on legal parcels that were being developed after January 1, 1991. However, there is nothing in the opinion that states the fire safe standards require all building permit applicants to upgrade and modernize 20 foot wide roads outside their parcel boundaries simply to build a single family dwelling unit.

When the California Building Standards Commission raised this inquiry with the Attorney General in 1995, the Attorney General opined that a building permit could not be conditioned with unreasonable conditions. The Attorney General opined it was reasonable to require a building permit applicant to construct access improvements within the parcel’s boundaries. 78 Ops. Cal. Atty. Gen. 53 (1995).

Several years after that, the Attorney General opined again on this matter. On March 2, 2010, the Attorney General wrote a letter to the Board of Forestry Regulations Coordinator Chris Zimny to help prepare for an update to the regulations. The Attorney General explained that there were many issues about how section 4290 applies to the reconstruction of buildings burned in a fire. In that 2010 letter to the Board of Forestry, the Attorney General had been asked if a local government must – or even could -- condition a rebuilding permit on upgrading road widths. The Attorney General did not opine on that point because the Attorney General explained it was up to the local jurisdiction to decide how construction permits should be granted. The Attorney General explained it was a local government decision to attach conditions for permits for reconstruction after a fire and the local governments must base that decision upon all state statutes that govern these decisions. The Attorney General cited its previous 1995 decision in which it opined it was a reasonable exercise of local police power to require a driveway upgrade from the property line.

3. **Question:** Please provide the legal basis and analysis for the position that the 1993 Attorney General Opinion construes the 1991 exemption language in section 4290, or other language in section 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.

**Response:** The 1993 Attorney General opinion does not elaborate on what a building permit applicant would have to do construct access roads outside a parcel’s boundaries. However, the Attorney General Opinion in 1995 does. When the California Building Standards Commission raised this inquiry with the Attorney General in 1995, the Attorney General opined that a building permit could not be conditioned with unreasonable conditions. The Attorney General opined it was reasonable to require a building permit applicant to construct access improvements within the parcel’s boundaries. 78 Ops. Cal. Atty. Gen. 53 (1995).

Several years after that, the Attorney General opined again on this matter. On March 2, 2010, the Attorney General wrote a letter to the Board of Forestry Regulations Coordinator Chris Zimny to help prepare for an update to the regulations. The Attorney General explained that there were many issues about how section 4290 applies to the reconstruction of buildings burned in a fire. In that 2010 letter to the Board of Forestry, the Attorney General had been asked if a local government must – or even could -- condition a rebuilding permit on upgrading road widths. The Attorney General did not opine on that point because the Attorney General explained it was up to the local jurisdiction to decide how construction permits should be granted. The Attorney General explained it was a local government decision to attach conditions for permits for reconstruction after a fire and the local governments must base that decision upon all state statutes that govern these decisions. The Attorney General cited its previous 1995 decision in which it opined it was a reasonable exercise of local police power to require a driveway upgrade from the property line.

4. **Question:** Please explain how the language in Section 13-25(f), that a road provides year-round unobstructed access, meets the minimum standards in regulation section 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 Section 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 need even appear to meet the minimum standard. Similarly, please explain how the language in Section 13-25(f), that a road provides year-round unobstructed access, meets the minimum standard in regulation section 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.

**Response:**

The County of Sonoma requires all road construction to follow modern standards that have already received certification from the Board of Forestry as meeting or exceeding standards. The exemption is not a construction standard for our new roads. The exemption is a requirement for reasonable fire engine access on pre-1991 roads outside of a parcel’s boundaries.



This exemption was certified by the Board of Forestry in 2017. The Board of Forestry did not ask the County to eliminate it. To the contrary, the Board of Forestry staff asked us to revise it in the next round of certification to better reflect the scope of Public Resources Code Section 4290. In 2017, Board of Forestry staff asked Sonoma County to revise its exemption from pre-1992 to pre-1991 roads to reflect the scope of the statutory intent. We did so.

Our standards for roads constructed after the statute took effect are as follows:

Section 13-34 Two way roads.

In addition to meeting the applicable standards in the preceding sections, all two-way roads shall have a right-of-way of not less than twenty-five feet and shall be constructed to provide a roadway with a minimum of two ten foot traffic lanes providing two way traffic flow.

Exceptions: When permitted in a subdivision's conditions of approval and approved by the county departments, as identified in the subdivisions conditions of approval, the subdivision may have a two way road of not less than twelve feet with two foot shoulders on each side and turnouts and turnarounds. Spacing of the turnarounds and turnouts shall be as set forth in the subdivision's conditions of approval. If the subdivision's conditions of approval do not set forth spacing requirements, then turnarounds shall be at a minimum internal of one thousand three hundred and twenty feet. Turnouts shall be a minimum of five hundred feet and shall not be located inside of horizontal curves without approval from the fire code official. The Fire Code Official is authorized to request installation of turnarounds and turnouts as part of a development approval at locations necessary to provide two way traffic flow. A minimum of six feet clear space shall be provided per Chapter 25 of the Sonoma County Subdivision Ordinance.

Any road or driveway structure required to have a turnaround may have either a hammerhead/T, a stub out, or terminus bulb. All turnarounds shall have a minimum turning radius of forty feet bulbs shall be forty feet from the center point of the bulb, hammerhead/T and stub out shall have entry and exit curves of no less than a forty feet radius. If a hammerhead/T is used, the top of the T shall be a minimum of sixty feet in length. If a stub is used, then the length of the turnaround shall be forty feet as measured from the roadway or driveway edge. The minimum width of either a hammerhead/T or a stub out shall be equivalent to the roadway or driveway entering the turnaround.

Any road or driveway structure required to have a turnout shall have a turnout that is a minimum of twenty two feet wide, including the roadway and the turnout and thirty feet long with a minimum taper of twenty-five feet on each end. The length of the turnout shall be measured along the roadway or driveway centerline.

Section 13-35 one-way roads provides: "In addition to meeting the applicable standards in the preceding sections, all one-way roads shall comply with the following requirements:

- a. All one-way roads shall have a right-of-way of not less than twenty five feet and shall be constructed to provide a roadway with a minimum of one twelve foot

traffic lane and 1 foot shoulders on each side providing one-way traffic flow. The Fire Code Official is authorized to request the installation of turnouts as part of a development approval at locations necessary to provide two-way traffic flow.

- b. All one way roads shall connect to two way roads at both ends, and shall provide access to an area zoned for no more than ten dwelling units.
- c. All one way roads exceeding five hundred feet in length shall have a turnout constructed at approximately the midpoint of the road. Any one way road exceeding one thousand feet in length shall also have turnouts constructed approximately every five hundred feet along the entire length of the road.
- d. No one way road shall exceed two thousand six hundred forty feet in length.
- e. Any road or driveway structure required to have a turnout shall have a turnout that is a minimum of twenty two feet wide, including the roadway and the turnout and thirty feet long with a minimum taper of twenty five feet on each end. The length of the turnout shall be measured along the roadway or driveway centerline.

As explained above, Public Resources Code section 4290 does not apply retroactively to roads that existed before it took effect that served areas of development that had been approved before January 1, 1991. Public Resource Code 4290 is a minimum construction standard that applies to all residences, commercial and industrial projects. There is nothing we have found in the legislative history, the series of Attorney General opinions or the rulemaking history that indicates a single family home building permit applicant would have to purchase easements from their neighbors and solely pay to transform an old access road outside parcel boundaries into a new modern 20 foot 2 lane road with shoulders and striping outside of their parcel boundaries to support the whole neighborhood.

However, Sonoma County goes above and beyond the minimum State standards for access roads that were developed to serve legal parcels prior to January 1, 1991. Section 13-25(f) applies to those pre-1991 roads. Sonoma County requires proof of year round unobstructed fire engine access on those old access roads. Moreover, Sonoma County requires modern road standards for any portion of the road that needs to be extended, reconstructed or improved pursuant to a development approval.

For discretionary approvals, the County requires more within the limits of constitutional and statutory constraints. We have submitted several examples of use permit conditions of approval that considered traffic and the number of visitors and required secondary access roads, road widths and surface strong enough to support aerial fire fighting equipment, significant emergency water supplies, and many other fire protections standards far above the minimum State standards.

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

**Response:** This is not the County’s position. Public Resources Code section 4290 applies to building construction approved after January 1, 1991. All new roads must comply. All building standards and fire code standards apply within the property boundaries. Our issue is with requiring a building permit applicant to purchase other people’s property rights outside the property boundaries and upgrade a pre-1991 access road outside of parcel boundaries to single handedly finance the neighborhood’s new modern 2 lane 20 foot road. It would add hundreds of thousands of dollars – and likely millions of dollars – to the cost of building one house. The County is explaining that staff’s new interpretation is not grounded in any APA rulemaking procedure. It would run afoul of legislative intent, Attorney General Opinions and a long series of Board of Forestry Rulemaking packages to require this as a minimum residential construction standard. Existing infrastructure that was approved development before January 1, 1991 that is outside the parcel boundaries has been clearly demonstrated to be outside the scope of Public Resources Code 4290.

6. **Question:** 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. 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. 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.

**Response:** The Attorney General letter to the Board of Forestry’s Regulations Coordinator on March 2, 2010 explains the role of the local land use authority.<sup>12</sup>

“It appears that many of the problems from the field arise out of the difficulty in interpreting how 4290 applies to the reconstruction of buildings burned in a fire. For example, can or must a local government condition a rebuilding permit on upgrading road widths to meet the Board’s standards? I don’t know the answer to that question (there are no cases or Attorney General Opinions on this point) but the problem the question raises is not a Board nor a Cal Fire problem. Neither Cal Fire nor the Board permits building construction. That authority belongs to local city and county governments and nothing in Public Resources Code section 4290 provides the Board with any authority to decide what or how construction permits should be granted. Section 4290 only requires the Board to adopt minimum fire safety standards that local governments in state responsibility areas must apply to permits as set out in 4290. Thus, whether to attach conditions to permits for reconstruction after a fire is a local government decision subject only to state law restrictions. Whether section 4290 or other statutes may restrict or allow local governments to condition a rebuilding permit on meeting the Board’s standards in other related matters is up to the local governments to decide based upon all state statutes that may authorize or restrict local government

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<sup>12</sup> Please see the 2013 rulemaking package, March 2, 2010 letter from the Attorney General to the Board of Forestry Regulations Coordinator Chris Zimny to help prepare for the next update to the fire safe regulations.

jurisdiction. Any permitting conditions or restrictions must be defended by the local government imposing those restrictions.”

For discretionary approvals, local permitting authorities have the ability to exercise their police powers through land use regulation to comply with CEQA and mitigate impacts and ensure fire safety mitigation measures. For discretionary approvals, the County of Sonoma considers the impacts of a proposed development, and within the constitutional limits of nexus and proportionality, imposes conditions of approval to mitigate impacts and protect public health and safety. For example, the County can exercise its police powers to require conditions of approval to upgrade pre-1991 roads and require secondary access roads to ensure the proposed development accommodates increased visitors and traffic in a proportionate manner that protects the public health and safety for fire engine access and civilian evacuation.<sup>13</sup>

The County has submitted several examples of use permits with conditions of approval. For example, in 2004, the County issued a use permit for a 50 room hotel with a 300 square foot retail shop, 1,455 square feet of administrative offices, two meeting rooms and a swimming pool. The resort is located on State Highway 12 – a road that already exceeds the Board of Forestry’s minimum fire safe standards. Nevertheless, the use permit’s condition of approval numbers 61-73 and 95 required the developer to construct an access road, construct numerous improvements to the driveway, emergency access turnarounds, water storage for firefighting, a recorded vegetation management plan and create a new intersection and lane widening in compliance with Caltrans Standards. The road design improvements to ensure adequate fire protection access and widening of Lawndale Road to provide a second northbound approach lane.

Another example Sonoma County submitted to the Board of Forestry was the use permit conditions of approval for a new winery expansion, including construction of new buildings for production, barrel storage, public tasting and a residence. Conditions of approval ensured fire equipment access and concurrent civilian evacuation. The developer was required to construct fire apparatus roads. Facilities having a gross building area of more than 62,000 square feet were required to have at least two separate and approved fire apparatus access roads. Buildings exceeding 30 feet were required to be provided with approved fire apparatus roads capable of accommodating fire department aerial apparatus. Twenty-six feet wide roads were required for aerial fire equipment access. Twenty feet access roads were required for other fire apparatus access roads. Where a bridge was a part of a fire apparatus road, the bridge had to be constructed and maintained in accordance with AASHTO HB-17. Fire protection water supplies were required capable of supplying minimum fire flow of not less than 1,500 gallons per minute and fire hydrants had to be spaced not less than 500 feet apart along fire access routes.

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<sup>13</sup> In the Paraiso Springs development, the Attorney General did not issue a binding opinion. The Attorney General commented on a discretionary use approval CEQA environmental review and explained that the local land use authority can use its police powers to ensure adequate civilian evacuation routes and fire engine access to mitigate the impacts of a large number of visitors and traffic that would be served.

That is how the County of Sonoma exercises its police powers for land use regulation to ensure fire equipment access concurrently with civilian evacuation. We are continuing to develop new methods to improve our fire protection standards for discretionary approvals. It is a top priority to protect our community and our fire fighters.

7. **Question:** Sonoma County appears to assert that applying section 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 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 unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.

**Response:** The County is not asserting that Public Resources Code §4290 is unconstitutional. We are requesting the Board exert its authority in a manner that complies with the Legislature’s intent and avoids a constitutional problem. As demonstrated throughout the Rulemaking history and the series of Attorney General Opinions and letters, the local permitting authority is charged with determining whether it can condition development to require construction outside of parcel boundaries.<sup>14</sup>

For many years, Fifth Amendment takings challenges to land use exactions have been governed by the dual Supreme Court cases of Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994). An exaction on a construction project must be roughly proportional both in nature and extent to the impact of the proposed development. Requiring a fire survivor to increase their rebuild costs further by requiring them to pay hundreds of thousands of dollars more to buy easement rights from their neighbors and independently finance grading and paving a new neighborhood 20 foot road outside their parcel boundaries lacks proportionality to the issuance of a building permit for a single family home.

Sonoma County met all standards in 2017. The road width law hasn’t changed. The County’s exemptions haven’t changed. We have had these exemptions in our local ordinance for almost thirty years. The Board of Forestry has never informed us these exemptions were outside the scope of the statute.

To the contrary, Board of Forestry staff helped us make a slight modification to our exemptions to better align them with the scope of Section 4290. As requested by Board of Forestry staff in 2017, the County corrected its exemptions to exempt pre-1991 roads instead of pre-1992 roads. Board of Forestry staff explained the statute took effect in

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<sup>14</sup> The problem of conditioning development on improvements that require acquisition of property interests has been recognized by the Legislature in other contexts. Government Code § 66462.5 provides (essentially) that a subdivision map condition requiring “offsite improvements on land in which neither the subdivider nor the local agency has sufficient title or interest” must be waived if the local agency refuses to use eminent domain to acquire the property. This statute was enacted in 1982 to “correct a perceived abuse of power” by the government. (Hill v. City of Clovis (2000) 80 Ca.App.4<sup>th</sup> 438.)

1991 so Sonoma County's old road exemptions had to carve out the roads that existed before the statute took effect.

Now, it appears the alleged problem is we have not met the State's standards in a new implied "14 CCR 1270.02(e) Retroactivity" regulation. Yet, that regulation does not exist. It is not in the code. It has never been noticed. It is not supported by an Attorney General opinion. It has not proceeded through an APA rulemaking process. If the Board of Forestry would like to require all permit applicants to pay to reconstruct old pre-1991 access roads outside their parcel boundaries, the Board must follow APA procedures to implement this new regulation.

We think there are better ways to accomplish this goal. We all want to improve our fire engine access and civilian evacuation routes. We suggest a collaborative effort with the State Legislature, our valued State agency partners, local land use regulatory and permitting authorities, and members of the public. Our State's home owners, small business owners, environmental advocates, affordable housing advocates, environmental justice advocates, all other community interests and disaster survivors need a voice in this decision.

If the Board would like to review additional legislative history from the State Archives when the shelter in place order is lifted, please let us know.

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Best regards,

*Linda Schiltgen*

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County of Sonoma