



June 14, 2021

Dear Chair Askew and Members of the Board,

Tomorrow, your staff asks that you "Approve and Authorize the Chair of the Board of Supervisors to sign and transmit a letter to the State Board of Forestry providing the County's comments on the draft amendments to the State Minimum Fire Safe Regulations." Critically, the letter your staff has drafted is incomplete. It endorses numerous changes to CalFire's proposed regulations but it does not actually provide those changes. Even worse, the draft comment letter seeks to weaken the proposed regulations; slow down their adoption with procedural hurdles; invite developers to sue the County for applying the regulations (think Paraiso Springs); and give the County more discretion to make exceptions, making it more vulnerable to future litigation and litigation expenses.

We urge you vote against sending such a letter to CalFire for the reasons provided below. We recommend you ask staff to address these issues prior to their submittal of a new draft for your consideration.

Background

County Staff proposes that the Board of Supervisors comment on the proposed State Minimum Fire Safe Regulations, for which CalFire has set a hearing on June 22, 2021. The purpose of the new regulations includes responding to the SB 901 mandate to update the regulations more frequently to reflect evolving fire safety understandings, provide increased clarity, and to include certain additional regulations. Unfortunately, County staff's review is highly problematic.

The County's proposed revisions to the draft regulations are not provided for review.

You are being asked to vote on something you haven't had a chance to read! The staff's draft comment letter states the the County has worked with the Rural County Representatives of California to propose revisions to CalFire's proposed new regulations and that the County endorses "the changes that are provided through RCRC, which are also attached to this letter (Exhibit 1)." The rest of the proposed letter purports to comment on the changes proposed and explained by RCRC. Unfortunately, the proposed RCRC changes are not provided in the agenda packet and are not even available on the RCRC website. (See RCRC letter to CalFire, Feb. 18, 2021, referencing but not attaching the RCRC's proposed revisions and explanations, available at https://www.rcrcnet.org/sites/default/files/useruploads/Resources/Fire/2021_2022_Letters/Proposed_Revisions_to_State_Minimum_Fire_Safe_Regulations_Joint_Ltr_to_BOF_02182021.pdf.)

The Supervisors cannot provide an informed endorsement of changes and explanations that they have not seen. Nor can the public understand and comment on what their elected representatives are proposing. The Board should not vote on this matter until staff provides the Board and the public with the actual changes they are supposed to be endorsing.

Property rights and takings arguments are premature and irresponsible.

The staff's draft letter repeatedly invokes the specter of takings litigation against the County, which the letter argues would stem from "onerous" and "infeasible" safety conditions for new development. The letter argues that the regulations should be relaxed and the local authority to grant exceptions should be enlarged in order to minimize the takings claim risk to the County. The draftletter endorses changes to the exceptions provisions (the provisions in the regulations for alternative means of compliance), arguing that the changes are intended to "recognize feasibility and property rights in the exception process." The Board should not make these arguments on this record.

First, the proposed changes to the exceptions provisions are not provided in the agenda packet.

Second, it is fiscally irresponsible for a public agency to invite takings litigation by advertising that such litigation would be warranted.

Third, there could be no facial takings claim triggered by the State's adoption of the regulations; and, if there were, the State would be the defendant, not the County. The only conceivable takings claim against the County would be an as-applied takings claim related to a specific, future project.

Fourth, such an as-applied regulatory takings claim depends on specific facts related to a specific development proposal, which are simply not before the County at this time and about which it is irresponsible to speculate. A future successful as-applied takings claim depends on the developer showing either (1) the regulations serve no legitimate purpose, (2) there is no nexus between the project and the conditions, or (3) there is not even rough proportionality between the conditions and the project. There is no question that the regulations serve an important and legitimate purpose and that they apply only when there is a nexus, i.e., when someone seeks to develop in the very high fire risk area that CalFire has mapped. So the only future issue would be the rough proportionality of the conditions, which does not require any "precise mathematical inquiry." (*Dolan v. City of Tigard* (1994) 512 U.S. 374 .)

Fifth, if the County is really concerned about takings claims, and is not simply using this as a cover to permit more risky development, then the County should not be seeking more flexibility in granting exceptions. The more discretion the County has in granting exceptions, the easier it would be for a developer to argue that it is the County's denial of an exception, rather than the State regulations themselves, that is responsible for a taking.

Meeting at least the more lenient standards for existing roads is essential to fire safety and public health.

The new regulations provide different and less restrictive standards for improvements to existing roads when those roads serve new development. CalFire explained in its Initial Statement of Reasons that the more lenient standards are was intended as an accommodation:

It is necessary to set different standards for existing versus new roads, as existing roads face different limitations related to fire safety. Existing easements or ownership patterns, topography and terrain, or environmental constraints may limit the ability of an Existing Road to meet the standards for New Roads in this Subchapter. However, there are standards for Existing Roads that would provide for fire safety that could be applied to Existing Roads under such constraints.

(CalFire, ISR, p. 32, available at https://bof.fire.ca.gov/media/gm3ghql0/2-state-minimum-fire-safe-regulations-initial-statement-of-reasons_revised-04152021_ada.pdf.)

Despite CalFire's concession to the constraints on improving existing roads, the staff's draft letter references unspecified additional concerns about "onerous, and typically infeasible, improvements" that might be required for safety. Again, the letter references changes to the regulations that have not been provided in the agenda packet or explained to the Supervisors or the public.

Contrary to the staff's draft letter, it is unlikely that CalFire staff told the County staff that the existing road standards in the regulations are not intended to require improvements to off-site roads as a condition for development. The proposed new section 1273.12 clearly imposes minimum width and surfacing requirements on existing roads "to allow for adequate Fire Apparatus access along the Road, a suitable surface that provides traction, and additional width to allow Fire Apparatus and civilian vehicles to safely pass each other." (CalFire, ISR, p. 32.) And section 1273(d) clearly provides that building is barred where those existing roads standards are not met:

Notwithstanding any other provision in this Subchapter, Building construction is prohibited where Access is provided by a Road that does not meet the minimum requirements in § 1273.12 (Standards for Existing Roads).

(proposed section 1273(d).) It makes no sense to permit increased density and intensity in fire hazard areas without meeting at least the relaxed standards provided for existing roads.

CalFire has justified its new dead-end road standard and will not apply it to existing non-conforming uses.

The draft letter seeks to retain the existing standard that would allow development at the end of a one-mile dead end road "so as to not cause properties and infrastructure developed under the current regulations to become non-conforming to the new regulations." This makes no sense for two reasons.

First, CalFire has provided substantial evidence that the one-mile dead-end road standard is unsafe and that a shorter standard is typical throughout the country, and therefore feasible:

Survey information received from the Fire Chiefs Working Group noted concerns for the maximum lengths of the Dead-end Roads and suggesting shortening the maximum allowable

lengths for Dead-end Roads would provide for greater fire safety than the current standards. Additionally, when completing an on-line search for the maximum length of a Dead-end Road allowed throughout the country, it was difficult to identify any standard that allowed roads longer than ½ mile in length, and most agencies' maximum allowable lengths were less.

(CalFire, ISR, p. 28.)

Second, even if an existing use becomes non-conforming, there is nothing in the proposed regulations that would require that it be required to conform. Like any non-conforming use, an existing use that does not meet the dead-end road requirement could continue as long as it was not changed in character or intensity.

In effect, the draft letter seeks to eviscerate the new dead-end road standard for all uses, new and existing, so as not to label an existing use "non-conforming," a label that would have no effect on that use. Why would the Board support this?

CEQA is not required to adopt the new regulations.

The staff's draft letter argues that CalFire must prepare a CEQA review before adopting its new regulations, claiming to have "identified that these regulations would result in physical changes to the environment and may have a significant effect on the environment." The changes are not identified, other than the claim that the regulations "may lead to additional road construction." Not only is that claim speculative, but the nature and location of those possible additional roads cannot be ascertained sufficiently to support any meaningful environmental analysis. That analysis will come later, as necessary, when and if new roads are required as a condition of development. There is simply nothing here to evaluate.

The demand for CEQA review without any clear sense of the potential location or nature of impacts appears to be a cynical effort to halt or slow the adoption of new regulations. At any rate, there is certainly nothing in the agenda packet to justify the demand for CEQA review.

Another round of public comments is not required.

The staff's draft letter argues that another round of public review should be provided for revisions to the regulations. This too appears to be a cynical effort to impose more procedural delay. The forthcoming fire season promises to be among the worst in recorded history. As reported this weekend in the Los Angeles Times [*A dry state is about to heat up:*](#)

Climate experts have also been sounding the alarm about how the combination of extreme heat and dryness can create bone-dry vegetation that acts as fuel for wildfires. Last year was the state's worst wildfire season on record, and 2021 is already primed for another severe season.

What's more, heat can make firefighting that much more difficult, so if blazes do ignite, fire crews will have to contend with dangerous conditions.

Did we learn nothing from last summer's terrible fires? It is time to get on with it, not shuffle more paper.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. DeLapa". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "DeLapa".

Michael D. DeLapa
Executive Director

See Attachment 1