DATE: October 12, 2021

TO: Fire Marshal's Office – Appeal Hearing Officer (Chief Estrada)

FROM: Miriam Al Saadi and Adil Allawi, Saratoga, CA 95070

SUBJECT: Appeal of CAL Fire Exception Denial for PLN20-141-APL1 – Exception to the SRA/VHFHSZ Fire Safe Regulations related to site access for a new single-family residence and associated improvements.

Dear Chief Estrada,

We hereby request that you grant our Appeal of CAL Fire Exception Denial for PLN20-141-APL1 in relation to the SRA/VHFHSZ Fire Safe Regulations ("Regulations") concerning fire safe access to our property ("Appeal"). We are only asking to rebuild a single-family home on an existing building site. Approving the Project is consistent with the Regulations and will provide us with fair and equitable treatment relative to other projects approved in our neighborhood since 1991.

There are three main reasons why our appeal should be upheld.

1. The local conditions of our property together with our proposed AMMR meet and exceed the practical requirements of the regulation.

The Fire Safe Regulations allow for exceptions that meet the same practical effect as the written standards. However, in his January 28, 2021 decision (Page 3&4 of 5 in Attachment D to the Staff Report), Chief Hernandez from CAL Fire did not justify his denial to grant us an exception with any criteria other than the width of the road. Chief Hernandez's decision was arbitrary and contrary to Section §1270.06 of the Fire Safe Regulations because he failed to fulfill his obligation to consider facts other than the road width and to determine if they would have the same practical effect as compliance with the roadway width requirements in the Regulation. Chief Hernandez failed to actually conduct the AMMR (Alternate Means and Methods Request) inquiry required by Section §1270.06.

Chief Hernadez's blanket refusal to consider local conditions or our AMMR (Attachment G to the Staff Report) was not consistent with past determinations by CAL Fire and the requirement of Section §1270.06 of the Regulations to allow for exceptions.

While access conditions to our property don't match the exact letter of the Regulations for road width, the location of the property and other local conditions, such as the proximity to a major access route, the low density of properties, the availability of an alternative escape route and fire hydrants can provide the same practical effect intended by the Fire Safe Regulations as defined in Section §1271.00:

"Same Practical Effect: As used in this subchapter, means an exception or alternative with the capability of applying accepted wildland fire suppression strategies and tactics, and provisions for fire fighter safety, including:
(a) access for emergency wildland fire equipment,
(b) safe civilian evacuation,
(c) signing that avoids delays in emergency equipment response,
(d) available and accessible water to effectively attack wildfire or defend a structure from wildfire, and
(e) fuel modification sufficient for civilian and fire fighter safety."

The following criteria should now be considered by the Appeal Hearing Officer in assessing our property:

- The property is located in an established residential neighborhood and not in a rural, undeveloped area.

- The property was occupied by a single-family house for the majority of the last 75 years. The first building permit was issued in the 1950s and the last in 1996.

- The construction of our new house will incorporate the best practices in fire safety design.

- The property is only around 500 ft from a complying road and 1300 ft from CA Route 9, a major state highway. In the event of an evacuation, we can literally walk to safety in 5 minutes.

- The area around Canon Drive is extremely low density, consisting of single-family homes that are on plots 1 acre or greater. There are no more than 16 single family homes that use that section of Canon Drive for access.

- The property has two independent access routes via Canon Drive from the North and South.

- According to the Santa Clara County Community Wildfire Protection Plan[i] prepared for Santa Clara Fire Department in January 2019 our property lies in a low-risk area. (Figure 8.4.)

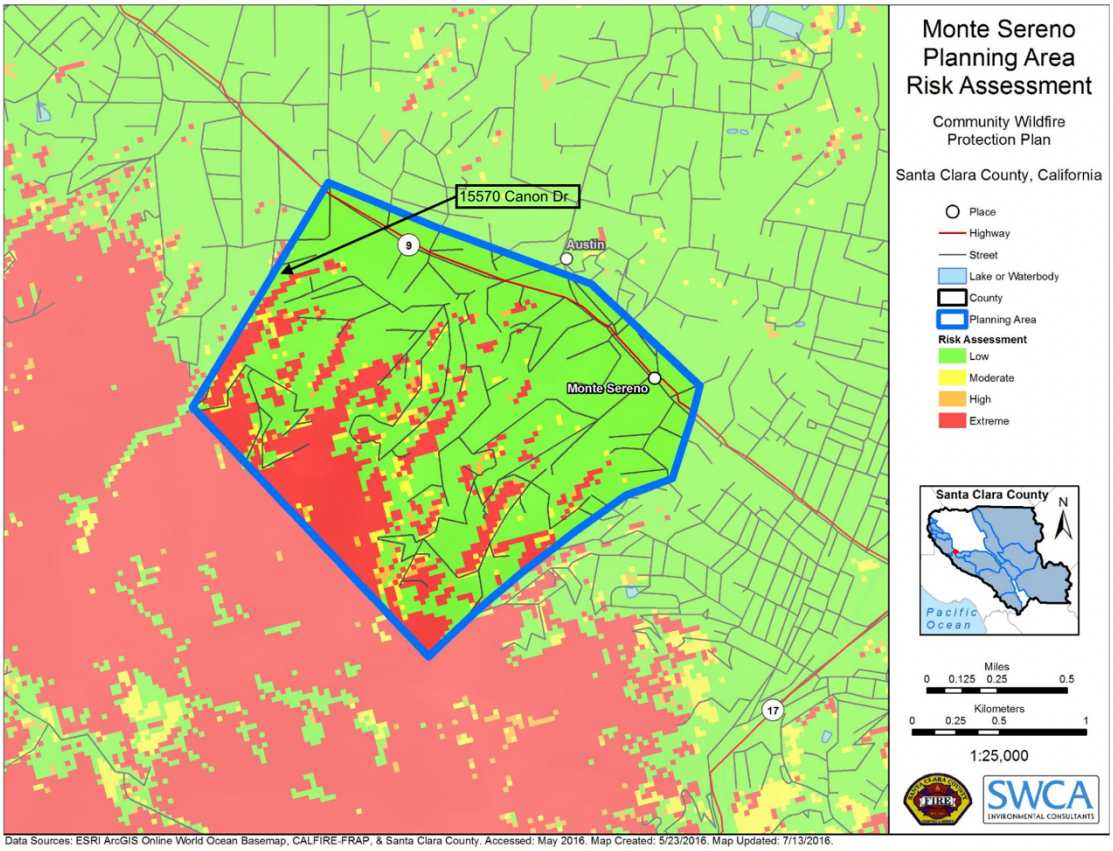

Figure 8.4. Composite Fire Risk/Hazard Assessment for the Monte Sereno planning area.

From studying the history of our own property, looking at documentation relating to other projects, and talking to other property owners, it has become clear to us that CAL Fire has changed its policy from considering and granting exceptions to the 1991 Regulations to one of blanket refusal to consider mitigations proposed by property owners. Such blanket denials are inconsistent with the mandate of the Regulations to look at these matters on a "case-by-case basis" considering the specific "material facts" of each AMMR. The specific proposals we included in our AMMR were drafted with the consultation of the Santa Clara Fire Marshal's Office with the aim to improve fire access and safety not only for our own property but for the whole immediate neighborhood. We included everything the Santa Clara County Fire Protection Engineer recommended into our project to mitigate the road width.

According to County Staff, CAL Fire staff was asked to provide the required documentation outlining the effects of our requested exception on wildfire protection. So far, we have not seen documentation to that effect and question whether we will have enough time to respond to any comments made by CAL Fire. Section §1270.06(d) says that "[b]efore the local jurisdiction makes a determination on an appeal, the inspection authority . . . shall provide to that local

jurisdiction" the documentation outlining the effects of the requested exception of wildfire protection. The Appellate Hearing Officer is prohibited by the Regulation, and Due Process, from making a decision on this Appeal unless CAL Fire provides this information to the Appeal Hearing Officer and the Appellant in time for review and consideration before the start of hearing.

Once CAL Fire provides the documentation required by Section §1270.06(d), the Appeal Hearing Officer will have an obligation to consider the above material facts of this Appeal. Contrary to page 7 of the Staff Report, there is nothing in Section §1270.06 that directs the Appeal Hearing Officer to defer to the CAL Fire as the technical expert. Instead, the Appeal Hearing Officer must consider all the above material facts and circumstances of the AMMR.

2. To suddenly place an unachievable condition on our property that expects us to provide extensive road improvements without any room for a remedy is not fair and equitable treatment.

In addition to allowing a previous building permit to be issued for our property in 1996, we also found that, as recently as July 2020, CAL Fire approved exceptions to the same Fire Safe Regulations that they are now denying us (Attachment 1). To suddenly and unexpectedly deny us the same fair and equitable treatment will place an impossible burden on our property that would render it unusable and valueless. As we described in our AMMR, there are several constrains that prevent us from widening our road, even if we wanted to.

The County recognized this dilemma and commented on it on numerous occasions. Jeffrey V. Smith, County Executive in his letter to the Board of Forestry, dated June 3, 2021, wrote:

> *"Although the existing regulations have applied to lands within the SRA for 30 years, those regulations have not been consistently applied to rural road networks or development projects within SRAs across the State. The primary reason for this is that they are too onerous and infeasible"*.

Furthermore, in the May 27, 2021, HLUET Staff Report from the Santa Clara Planning Department it said:

> *"As the 1991 BOF standards were not strictly enforced until recently, the applicants for approximately 20 projects that were previously approved but are now seeking extensions, minor modifications, or who are applying for Building Permits associated with previous Planning approvals, are now being informed by CAL-FIRE that road access to their parcel must be improved to meet the regulations. The road access improvement requirement applies from the development site, along a public or private road, to a road that meets the BOF standards. The change in strictness of CAL-FIRE's review has resulted in requests*

for exceptions and appeals to the County, and raises concerns regarding equity and the validity of existing land use approvals."

From numerous communications between CAL Fire and many property owners, it is clear that the effective policy by CAL Fire now is to pass on the responsibility of exceptions to the local jurisdiction by ruling on the specific wording of the Regulations and not even to consider the particular facts of the project, as the Regulations require and intend. CAL Fire expects the County to actively exercise its authority on this and other appeals and appears to expect that many of its initial decisions will be reversed.

The County Staff should not now make a recommendation on whether there is a valid reason to overturn CAL Fire's determination, as they are not experts on Fire Safe Regulations. In proposing that the County adopt the Ordinance granting the Fire Marshal the responsibility to be the Appellate Hearing Officer on exception requests, County Planning staff repeatedly explained that this was a technical fire issue that should be left to technical fire experts not to planners or the Planning Commission. County planning staff have, however, repeatedly pre-empted, and arguably pre-judged, the appeal process by communicating to property owners that they would not go against CAL Fire's determination, and now recommend that even the County Fire Marshal acting as the Hearing Officer should rely on CAL Fire's initial determination. By doing this Planning Staff would render the exception and appeal section of the Regulations meaningless. The Regulations do not contemplate that County Appeal Hearing Officer will defer entirely to the initial CAL Fire determination.

3. The SRA Fire Safe Regulations do not apply since our property was a legal lot prior to 1991 (grandfather clause).

The County Staff only informed us on October 5th, 2021, of their determination that the 1960 125M12 Final Parcel Map, which we submitted more than 6 months ago, did not include our parcel, and therefore does not satisfy Section §1270.02 of the Fire Safe Regulation. We do not agree with their assessment that the parcel is not "grandfathered in". Unfortunately, we feel we do not have sufficient time before the appeal hearing to counter their assessment to the fullest, but we would still like to comment on this point for the record.

Our property was originally formed from two parcels that were legally created in 1921 together with Canon Drive. The Parcel map "pM54" from 1921 shows this (Attachment 2). Over the decades that followed the property was occupied by a house built with permits issued by Santa Clara County. There are historical records available that include building permits and aerial photos (Attachment E to the Staff Report). A building permit "BP 1953-33362" from 1953 refers to the two parcels as one site (Attachment 3). Later, the Santa Clara Planning Department required the parcels to be voluntarily merged into the current parcel as a condition of the existing building site approval. The merger did not create new parcels, it merged and redrew existing parcels. This is not a post 1991 building site and the exclusion in the Regulations should be applied.

Further comments for the record

a. We have previously raised and now restate that the County will commit a taking of our property under the Fifth Amendment of the United States Constitution and Article I, Section 19 of the California Constitution.

In response to another applicant's explanation of the County's takings exposure (Attachment 4), County Staff asserted that "*The Fire Safe Regulations have been in effect for 30 years, and the applicable County regulations have also been in effect for decades. Therefore, compliance with these regulatory requirements should have been incorporated into the property owner's investment-back expectations*." (Attachment 5)

We had a reasonable investment backed expectation under the *Penn. Central Transp. Co v. New York City* (1978) 438 US 104, 98 S Ct 2646 when we bought our property. At the time of our property purchase in February 2020 our research on the County's Interactive Property Assessment website[ii] showed that the property had building site approval (Attachment 6). We also subsequently found that the Fire Safe Regulations Section §1270.02(c) (2) did not apply to projects like ours[iii]. Therefore, there was no way for us to know that our property would be found to be non-compliant. If our appeal is denied we believe we will have a valid takings claim under *Penn. Central Transp. Co v. New York City* (1978) 438 US 104, 98 S Ct 2646.

Further, if our Appeal is denied by the County, it would also be a taking under *Lucas v. South Carolina Coastal Council* (1992) 505 US 1003, 112 S Ct 2886 because it would, at least temporarily, deprive us of any economically viable use of our property.

If the Appeal Hearing Officer denies the Appeal, the County action will require us to widen Canon Drive as a condition to building our home. This would be an illegal exaction involving the acquisition and dedication of property that is not roughly proportional to the impact of our project on the existing fire access, in violation of *Dolan v. City of Tigard* (1994) 512 US 374, 114 S Ct 2309 and related cases.

b. We do not agree with the County Staff assertion in their Report "*that a request for an exception to the "standards in 14 CCR §1270.06" of the Fire Safe Regulations and Public Resources Code Section 4290 is not a "variance" request under Planning and Zoning laws and should not be considered akin"*. In our opinion the purpose of granting exceptions is to balance fire safety with legal property rights. The exception exists for the same legal reason that variances exist in county and city zoning codes. Even CAL Fire in their letters use the wording "Variance to CCR, Title 14 Fire Safe Regulations" (Attachment 1). Further, when discussing how to set up this new Fire Safe Regulation appeal process in their letter to the Board of Supervisors dated August 31, 2021, County Staff used the wording *"…consistent with other appeal provisions established in the Ordinance Code and Zoning Ordinance*" but choose here not to recognize the "*similarities"* between exceptions to the Fire Safe Regulations and variances to Land Use Regulations.

c. All of the prior correspondence we have submitted to the County and CAL Fire or received from the County and CAL Fire regarding this Appeal is hereby incorporated by this reference as if restated and set forth herein.

[i] https://www.sccfd.org/santa-clara-county-community-wildfire-protection-plan

[ii] https://sccplanning.maps.arcgis.com/apps/webappviewer/index.html?id=fb3af8ce73b6407c939e1ac5f092bb30

[iii] While the material for our Design Review Application was being prepared, Section §1270.02 Scope of the Fire Safe Regulations provided:

(a) These regulations shall apply to:
(2) application for a building permit for new construction, not relating to an existing structure;

Section §1271.00 Definitions provides:
Structure: That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

We explained in our letter dated March 10, 2021, that here is an existing structure on our property that we had integrated into our design. This structure is a wall from a previous building that was permitted on our property. As per the above definition, this wall can be described as "piece of work artificially built up". The Staff Report refers to a "dog kennel" as the existing structure. That is incorrect, it is a wall.

We did not agree with Chief Hernandez's determination that the Regulations did apply as we feel he misunderstood what we were referring to. Even though on a couple of occasions County Staff and Chief Hernandez quoted the version of the Fire Safe Regulations that included the wording "not relating to an existing structure", we subsequently discovered that they were wrong to do so because the wording "not relating to an existing structure" was removed from §1270.02(c) (2) in July 2020 in an emergency update to the Fire Safe Regulations. Therefore, we could not list this argument in our appeal.

Attachment 1

DEPARTMENT OF FORESTRY AND FIRE PROTECTION
15670 Monterey St
Morgan Hill Ca 95037
408)779-2121
Website: www.fire.ca.gov

Peter Carlino
Lea & Braze Engineering
Hayward Ca 94545

Variance to CCR,Title 14 SRA Fire Safe Regulations Approval July 7, 2020
16390 Stevens Canyon Rd File # 19-0187 APN 503-05-009

Dear Peter,

The request for variance is approved based on the following items.

1. The section of driveway over 16 % grade will be surfaced with grooved concrete.
2. An additional 5000 gallons of fire suppression water will be provided.

Jake Hess
Unit Chief
Santa Clara Unit
CAL Fire

Cc Alex Goff
SCU File

SHEET No 1 OF THE HUME RANCH MAP No 2 in 2 SHEETS

MAP No 2

OF THE

W.S. Clayton, J.R. Chace, E. Shillingsburg and J.P. Dorrance Subdivisions of part of the

GLEN UNA RANCH

in Sections 7, 13 and 18 T.8 S. R.1 W. & R.2 W. M.D.M.

MAP No 2 being in Sections 7, 18 T.8 S. R.1 W. and Section 13 T.8 S. R.2 W. M.D.M.

FOR

Wm. A. Clayton & Co.

Scale 4 chs: 1"

BY

Chas. Herrmann of Herrmann Bros. Surveyors & C.E.'s San Jose, Cal.

Var. 18° E

T.8 S. R.2 W. R.1 W.

Sec. 13 | Sec. 18

LOT 32 18.28 A. | LOT 26 3.648 A. | LOT 17 3.111 A. | LOT 18 3.126 A. | LOT 25 16.20 A.

LOT 27 4.623 A. | LOT 19 5.099 A.

LOT 28 6.062 A. | LOT 20 3.179 A. | LOT 24 1.20 A.

LOT 31 | LOT 21 2.803 A.

LOT 29 7.40 A. | LOT 22 3.395 A.

LOT 30 6.05 A. | LOT 23 3.407 A.

LOT 34 3.40 A. | LOT 42 11.60 A. | LOT 36 7.475 A. | LOT 37 5.05 A.

LOT 39 FG.1 | FG.2 | FG.3 | FG.4 | LOT 38 7.07 A.

LOT 40 7.52 | LOT 41 5.32 A. | 11.00 A. to center of creek | 13.07 A. | FG.5 | FG.6

LOT 43 15.19 A.

GLENUNA DRIVE | CANON DRIVE | CHACE AVENUE 40 ft. wide | BAINTER AV. 40 ft. wide | OLD RANCH ROAD | MAIN RAVINE | SAN TOMAS AQUINO CREEK | CANON DRIVE RAVINE | BAINTER AV. RAVINE

F. H. Rowe | Mrs. H. H. Cool | F. W. KROCH | MAX M. COHN Lot 5, Sec 18

Reservoir | Pipe | Iron Post | Fence Post | Ware House | Laundry | Connection R.R. Co. Station 31-32

Course table of Ravine S. South Boundary of Lot 30

	Course	Distance
1	N.6°W.	0.97 ch
2	S.85½°W.	0.96 "
3	S.66½°W.	0.98 "
4	N.75½°W.	0.73 "
5	S.82½°W.	1.06 "
6	N.62°W.	0.[illegible] "
7	N.68¼°W.	1.70 "
8	N.59°W.	0.95 "
9	N.84°W.	1.30 "
10	S.52½°W.	0.82 "
11	S.79½°W.	0.47 "
12	S.78½°W.	0.52 "
13	S.54½°W.	0.93 "

Course table of Ravine bet. courses 30 & 31

	Course	Distance
1	N.67°E.	0.62 ch
2	N.84°E.	1.35 "
3	S.84°48'E.	1.38 "
4	N.58°52'E.	1.20 "
5	S.86°40'E.	1.00 "
6	N.41°08'E.	1.0[illegible] "

Course table of Centre line of GLEN UNA DRIVE from S. to N.

	Course	Distance
1	S.45°27'W.	1.65 chs
2	S.57°15'W.	2.62 "
3	N.71°45'W.	1.562 "
4	N.86°37'W.	1.48 "
5	N.35°37'W.	0.627 "
6	N.63°15'E.	1.217 "
7	N.28°32'E.	1.422 "
8	N.21°22'E.	2.49 "
9	N.5°8'E.	1.244 "
10	N.58°8'W.	0.95 "
11	N.28°0'E.	0.697 "
12	N.71°2'E.	1.234 "
13	N.21°4'E.	1.825 "
14	N.4°16'E.	1.07 "
15	N.31°40'E	1.923 "

Course table of line between lots 36 & 37

No	Course	Distance
1	S.76°E.	0.65ch
2	N.63°W.	0.27 "
3	N.30°E.	1.32 "
4	S.38°E.	1.20 "
5	S.11°W.	1.89 "
6	S.16°W.	1.05 "
7	S.9°W.	1.36 "
8	S.57½°W.	0.72 "
9	S.26°W.	2.13 "
10	S.45¼°W.	0.59 "
11	S.66½°W.	1.10 "
12	S.67°W.	0.70 "
13	S.20°W.	1.20 "

Course table of 20ft. right of way through lands of Mrs. H.H. Cool from Inlet 2 of Fg. 6 to pipe end.

	Courses	Distance
1	S.59½°W.	1.629 chains
2	S.36°38'W.	1.316 "
3	S.26°19'W.	1.677 "
4	S.21°26'W.	1.741 "
5	S.26°26'W.	1.563 "
6	S.22°11'W.	3.227 "
7	S.24°3'W.	2.079 "
8	S.14°58'W.	1.056 "
9	S.7°18'W.	2.162 "
10	S.4°43'W.	0.946 "
11	S.1°48'W.	0.84 "

Course table of centre line of the BAINTER AV. from the ¼ sec. line running East & West through the center of Sec 18 to its terminus.

	Course	Distance		Course	Distance
1	S.29°6'W.	0.55½ chains	23	S.74½°E.	2.18½ chains.
2	S.6°36'W.	2.00 "	26	S.80¼°E.	0.76 "
3	S.45°49'W.	4.23 "	27	S.61¼°E.	0.63 "
4	S.69°4'W.	4.00 "	28	S.0°15'W.	0.47 "
5	S.22°21'W.	0.70 "	29	S.17°50'W.	1.76 "
6	N.76°31'E.	5.50 "	30	S.9°20'E	0.76½ to FG.6
7	N.58°E.	2.65 "	31	N.73°20'E	1.80 "
8	N.80°13'E	2.60 "	32	S.66°58'E.	1.80 "
9	S.73°37'E.	3.00 "	33	N.83°46'E.	1.45 "
10	S.3°17'E.	1.60 "	34	N.57°E.	2.30 "
11	N.23°19'E.	1.30 "	35	N.86½°E.	0.56 "
12	N.58°47'W.	1.51 "	36	S.64¼°E.	0.60 "
13	N.29°23'W.	0.86 "	37	S.47½°E.	0.55 "
14	N.25½°E.	1.00 "	38	S.59½°E.	1.85 "
15	N.38°5'E.	3.22 "	39	S.25½°W.	4.00 "
16	N.2¾°E.	1.25½ "	40	S.43°W.	1.56 "
17	N.46°2'E.	1.45 "	41	N.84¼°E	2.90 "
18	N.16°2'E	2.96½ to cor. bet. lots 39 and 40	42	N.5½°E.	2.25 "
19	S.74°E.	1.00 "	43	N.66°10'E.	1.00 "
20	S.30¼°E.	2.18 "	44	S.36°W.	4.90 "
21	S.81½°E.	2.[illegible] "	45	S.81°10'E.	1.29 "
22	S.0°45'E	0.63½ "	46	N.53¼°E.	3.00 "
23	S.3°W.	0.88½ "	47	N.68½°E.	4.00 "
24	S.19°W.	1.34 "	48	N.39½°E.	0.93 "

Course table of centre line of Re-vine forming the N.W. bdy of Lot 43 from FG.6 to pipe.

	Course	Distance
1	N.39°40'E.	1.28 chains.
2	N.47½°E.	0.80 "
3	N.71°E.	1.08 "
4	N.67°40'E.	1.93 "
5	N.46½°E.	1.06 "
6	N.29¾°E.	1.93 "
7	N.37°7'E.	1.10 "
8	N.45½°E.	1.35 "
9	N.61°E.	0.90 to FG.5
10	N.60½°E.	1.00 "
11	N.63½°E.	1.00 "
12	N.68°E.	1.80 "
13	N.81°E.	0.54 "
14	N.87°E.	1.57 "
15	N.30°E.	0.90 "
16	N.88°E.	1.00 "
17	S.50½°E.	0.47 "
18	N.83°E.	0.56 "
19	N.58°E.	1.00 "
20	N.44¾°E.	0.90 "

Certified to be a correct MAP of SURVEYS made for W. S. Clayton et al, in March & September 1920

by Chas. Herrmann

SURVEYOR AND C.E. SAN JOSE, CAL.

Vol - "P" - MAPS

Attachment 2

THE HUME RANCH MAP No 2 IN 2 SHEETS. SHEET 2

(53)

Certificate

This is to certify that H.B. Finch-Shaw, B.McH. McGehee and G.W. McGehee her husband, Fannie McH. Lattimore, a widow, Glen Hill Farming Company, a corporation, James H. Doolittle and Susie M. Doolittle, his wife, J.B. Howell and G.F. Howell, his wife, Wm. Ohlandt and Isabel Ohlandt, his wife, Elizabeth Farwell, unmarried, Howard Farwell, unmarried, James A. Clayton & Co. Trustee, are the owners of the tract of land as shown on the accompanying map, that said tract has been laid out into lots and subdivided according to their instructions and that they hereby consent to have said map filed for record, in the office of the County Recorder of Santa Clara County, that they hereby dedicate the roads and avenues as shown on said map to the public use forever and that they are the only persons, whose consent is necessary to pass a clear title to said lots.

Dated San Jose, the 22nd day of January, 1921.

James A. Clayton & Co.
By F.O. Reed — PRESIDENT
W.S. Clayton — SECRETARY.
Fanny McH. Lattimore
G.W. McGehee
B. McH. McGehee
H.B. Finch Shaw
Wm Ohlandt

Elizabeth Farwell
Howard Farwell
James H. Doolittle
Glen Hill Farming Company
By C. Stutsman — PRESIDENT
A.C. Alexander — SECRETARY
Susie M. Doolittle
Isabelle Ohlandt
J.B. Howell. G.F. Howell

State of California }
County of Santa Clara } S.S.

On this 22nd day of January in the year one thousand nine hunderd and twenty one, before me W. Allen Hope a Notary Public, in and for Santa Clara County, State of California, appeared H.B. Finch-Shaw, B.McH. McGehee and G.W. McGehee her husband, Fannie M.H. Lattimore a widow, James H. Doolittle and Susie M. Doolittle, his wife, J.B. Howell and G.F. Howell his wife, Wm Ohlandt and Isabel Ohlandt his wife, Elizabeth Farwell, unmarried, Howard Farwell, unmarried, all known to me to be the same persons, whose names are subscribed to the within instrument and they duly acknowledged to me that they executed the same.

There also appeared before me C. Stutsman and A.C. Alexander, president and secretary respectively of the Glen Hill Farming Company and they duly acknowledged to me that such Company executed the same.

There also appeared before me F.O. Reed and W.S. Clayton, president and secretary respectively of the James A. Clayton and Company and they duly acknowledged to me that such Company executed the same as such Trustee.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office in the County of Santa Clara, State of California, the day and year in this certificate first above written.

W. Allen Hope
Notary Public, in and for Santa Clara County, State of California.

To the Board of Trustees of the Town of Los Gatos, California.

I J.M. Church Walker Town Engineer of the Town of Los Gatos, hereby state that I have examined the accompanying map or plat of the former Hume ranch made by Chas. Herrmann, Surveyor & C.E. and recommend that said map be approved by You.

Dated Los Gatos Jan. 17 1921

J.M. Church Walker
Town Engineer of the Town of Los Gatos, California.

To the Board of Supervisors of Santa Clara County, California.

The Board of Trustees of the Town of Los Gatos, California hereby states, that it has examined the annexed map or plat of the former Hume Ranch made by Chas. Herrmann, Surveyor & C.E. and has considered the report of the Town Engineer of the Town of Los Gatos in reference thereto and said Board of Trustees hereby recommends to You that said map be approved.

Dated Los Gatos January 17 1921

L.D. Mart
L.H. Killingsworth
A.W. Gertridge
J. Walter Crider
A.L. Erickson

State of California }
County of Santa Clara } S.S.

I, Irving L. Ryder, County Surveyor of Santa Clara County, State of California do hereby certify, that I have carefully examined each and every lot and Block shown on the accompanying map of the former Hume ranch, as to its value for residence or commercial uses and find them adapted for both of said purposes and I therefore recommend to the Board of Supervisors of Santa Clara County, California, that said map or plat be adopted by You.

Dated San Jose Jan. 22, 1921.

Irving L. Ryder
County Surveyor of the County of Santa Clara, California.

State of California }
County of Santa Clara } S.S.

I, C.Y. Pitman, County Assessor of Santa Clara County, California, do hereby certify, that I have carefully examined each and every lot shown on the annexed map, of the former Hume ranch as to its value for residence or commercial uses and find them adapted for both of said purposes and I therefore recommend to the Board of Supervisors of Santa Clara County, California, that said map be approved by You.

Dated San Jose January 22nd 1921

C.Y. Pitman
County Assessor of Santa Clara County, California.

State of California }
County of Santa Clara } S.S.

I, F.A. Schilling, County Auditor of the County of Santa Clara, State of California, do hereby certify, that there are no liens for unpaid State, County or other taxes except taxes not yet payable against the tract or Subdivision of land delineated upon the accompanying map or any part thereof.

In Witness Whereof I have hereunto set my hand and affixed my official seal on this 22nd day of January 1921.

F.A. Schilling
County Auditor of Santa Clara County, California.
by A.M. Lubiotti
Deputy.

State of California }
County of Santa Clara } S.S.

The accompanying map having been presented to the Board of Supervisors of the County of Santa Clara on the 7th day of February A.D. 1921, it is hereby ordered by said Board, that said map be and the same is hereby approved. It is further ordered by said Board, that all roads or avenues as shown on said map be not accepted as Public highways.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Board of Supervisors this 7th day of February A.D. 1921

Henry A. Pfister
Clerk of the Board of Supervisors of Santa Clara County, California.
by Eugene M. Dorn
Deputy.

Filed for record at the request of J.A. Clayton Co
Feb 9 A.D. 1921
at 30 min. past 2 o'clock P.M. and Recorded in Vol. P of Maps page 53 & 54 Santa Clara County Records.
J.E. Wallis, Recorder

5.00

Attachment 3

SANTA CLARA COUNTY
Building Inspection Department
CYpress 4-2277 — CYpress 5-1050

BUILDING PERMIT

No B 33362

Lot 24 + Ptn 25 Block Tract

Location

Street Canon Dr., L.G.

APN# 516-49-1, 8, 9

Setbacks ft.
Front 30'
Side (20) (20)
Rear 25'

Zone R-1-B-4

Date 5-22-1953

Is hereby granted in accordance with application to

(Build) / Remodel / Add to / Move

1 Story 1 Family Residence and
No.
or
Other Type Structure

Occupancy

Owner L. Wilcox

Contractor SELF

Valuation 16000, = $35 fee

RECEIPT for Thirty-five — Dollars
as inspection fee is hereby acknowledged.

Santa Clara County Building Inspection Department
By [signature]

ELECTRICAL, PLUMBING AND GAS PERMITS
ARE REQUIRED IN ADDITION TO THIS PERMIT

No B 33362

5M 6-52 53437

INSPECTION RECORD

	DATE	INSPECTOR
TEMPORARY POLE		
FOUNDATION FORMS	6-10-53	DC
Pour No Concrete Until Above Has Been Signed		
BOND BEAM (CONC. BLK.)		
ROUGH PLBG. PARTIAL	6-17-53	RK
ROUGH PLBG. COMPLETE	8-26-53	RK
GAS PRESSURE	8-26-53	RK
ROUGH FRAME 8-12-53 E.A See Sign (INCLUDES FLUES, ROOF & SIDING)	7-22-53	E.A SEE REPORT
Do Not Wire Until Above Has Been Signed		
ROUGH WIRING 8-26-53 E.S	6-18-53	E.S / Cond in slab
Cover No Walls Until Above Has Been Signed		
STUCCO WIRE & LATH		
BUILDING COMPLETE	10-5-53	E.S.
PLUMBING FIXTURES		
GAS APPLIANCES		
ELECTRICAL FIXTURES	10-5-53	E.S.

No Utilities Will Be Cleared Until
(Building Complete) Has Been Approved

Attachment 4

BERLINER COHEN LLP

ANDREW L. FABER
PEGGY L. SPRINGGAY
SAMUEL L. FARB
JAMES P. CASHMAN
STEVEN J. CASAD
NANCY J. JOHNSON
JEROLD A. REITON
JONATHAN D. WOLF
KATHLEEN K. SIPLE
KEVIN F. KELLEY
MARK MAKIEWICZ
JOLIE HOUSTON
BRIAN L. SHETLER
HARRY A. LOPEZ

CHARLES W. VOLPE
CHRISTINE H. LONG
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SUSAN E. BISHOP
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MICHAEL B. IJAMS
KIMBERLY G. FLORES
DAWN C. SWEATT
TYLER A. SHEWEY
JAMES F. LANDRUM, JR.
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SANFORD A. BERLINER (d. 2020)
SAMUEL J. COHEN

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STEVEN L. HALLGRIMSON
FRANK R. UBHAUS
RALPH J. SWANSON

NANCY L. BRANDT
LESLIE KALIM McHUGH
BRADLEY HEBERT

April 16, 2021

VIA ELECTRONIC AND U.S. MAIL
Colleen A. Tsuchimoto, Sr. Planner
Santa Clara County
Department of Planning and Development
70 West Hedding Street, 7th Floor
San Jose, CA 95110-1705

Re: Incomplete Letter to Manny Bagnas dated February 22, 2021, PLN18-8580 (Building Site Approval), 16501 Sanborn Road

Dear Ms. Tsuchimoto:

I am writing on behalf of applicants Manny and Marilyn Bagnas in response to the above referenced incomplete letter, which is enclosed for your reference. The letter pertains to the applicants' proposal to construct a single-family home on the subject property. The purpose of this letter is to address Comment No. 7 from CalFire in the incomplete letter, which states that as a condition of their proposed development project, the applicants are required to widen Sanborn Road from Highway 9 to their property. This comment is problematic for the following reasons:

(1) Widening Sanborn Road would be infeasible;

(2) Prejudging the project and imposing conditions of approval is beyond the scope of the application review process;

(3) The requirement to widen Sanborn Road would constitute a taking;

(4) The CalFire regulations cited in the incomplete letter do not require offsite improvements; and

(5) Even if CalFire regulations required construction of offsite improvements, the applicants would be entitled to request an exception that should be considered as part of the review of the development project, and not at the application stage.

Each of these issues is discussed in greater detail below.

I. Widening Sanborn Road Would be Infeasible

As an initial matter, widening Sanborn Road from Highway 9 to the subject property would be infeasible. The distance from Highway 9 to the property is approximately two miles, and the applicants do not own any right-of-way along the route. In addition to the fact that a two mile road-widening project would be cost prohibitive as a condition to construct a single-family home, the applicants do not have the ability to compel private property owners to sell right-of-way to them. In some places, it also is physically impossible to widen the road due to the location of watercourses and hillsides.

II. Comment No. 7 Is Premature

Comment No. 7 does not identify a submittal requirement that is missing from the applicants' application. Instead, it states a condition of project approval. Insofar as the road-widening is infeasible, Comment No. 7 is also tantamount to a denial of the project. This is improper, particularly at the application stage.

Applications for land use entitlements for development projects are governed by the Permit Streamlining Act, Government Code Section 65920, et seq. Government Code Section 65943 provides a process for reviewing applications for completeness, and Sections 65940 and 65941 require each local agency to prepare a list of submittal requirements to be used to determine completeness. The purpose of the process is not to prejudge a development project, but rather is to determine whether the applicant has provided the materials the local agency needs for its review of the project application.

Here, it is entirely unclear what the applicants are expected to provide in response to Comment No. 7. Comment No. 7 does not identify an item on an application submittal checklist that the applicants have failed to provide to the County. Instead, it states an infeasible condition of project approval.

The time to consider the merits of the project and to impose conditions of approval comes after the application is deemed complete. Even if the requirement to widen Sanborn Road were an appropriate condition of approval, consideration of the application should not be held up pending satisfaction of that requirement. The applicants are entitled to a fair process in the consideration of their development proposal, and that process should not be delayed or prevented from moving forward when the County will have the opportunity to impose conditions later as part of its approval of the development project.

III. The Requirement to Widen Sanborn Road Would Constitute a Taking

Under three different legal doctrines, the requirement to widen Sanborn Road would constitute a taking without just compensation in violation of the Fifth Amendment to the United States Constitution. First, the requirement is disproportionate to the impacts of the applicants' proposed single-family development project, and therefore violates the essential nexus and rough proportionality test announced by the United States Supreme Court in *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Dolan*"). Second, the requirement constitutes a per se taking as described by the United States Supreme Court in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 ("*Lucas*"). Finally, applying the test announced by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104 ("*Penn Central*"), the requirement constitutes a regulatory taking.

A. Unconstitutional Condition

In *Dolan*, a convenience store owner applied for a permit to expand the store. As a condition of its approval of the project, the city required the owner to dedicate land and to develop a pedestrian and bicycle pathway along an adjacent creek to relieve traffic congestion. The United States Supreme Court explained that normally a requirement for a property owner to dedicate private property to the public constitutes a per se taking that requires just compensation. The court further explained that compensation may not be required when a property owner voluntarily seeks approval of a development project and the dedication is required as a condition of project approval. However, in this case there must be an essential nexus between the dedication requirement and the potential deleterious impacts of the project, and the dedication requirement must be roughly proportional to those impacts. Otherwise, the dedication requirement is extortionate, and constitutes a taking.

The *Dolan* court accepted that the store expansion project would contribute to traffic congestion and that the extension of a pedestrian and bicycle pathway could help alleviate traffic congestion, so that an essential nexus existed between the dedication requirement and the project's impacts. Nonetheless, the requirement to dedicate land and to develop the pathway was out of all proportion with the project's likely incremental impact on local traffic congestion. On that basis, the court held that the requirement was an unconstitutional condition.

Dolan's unconstitutional conditions doctrine has not been limited to the requirement to dedicate property to the public. In *Koontz v. St. Johns River Water Management District* (2013) 570 U.S. 595 ("*Koontz*"), the United States Supreme Court applied the doctrine in the context of a condition to provide offsite mitigation or to pay an in lieu fee. Long before either *Dolan* or *Koontz* were decided, the court in *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412 ("*Scrutton*") reached a similar decision in holding that a property owner could not be required to provide offsite mitigation as a condition of approval of a rezoning application. There, as a condition of approval of an application to rezone property for multifamily residential use, the county required the property owner to agree to pave an offsite street. Because any benefit of the street paving to the property owner was greatly outweighed by the benefit to the community at large, the court held

that the character of the government's action was tantamount to a taking of private property without just compensation.

Like in *Dolan*, *Koontz*, and *Scrutton*, the requirement here to widen Sanborn Road is out of all proportion with the proposed project's impacts. Sanborn Road is an existing road with several existing residences. The applicants' proposed new home, which will be built to modern fire safety standards, will not create an incrementally significant need for fire service that justifies requiring the applicants to perform the physically and legally impossible and cost prohibitive task of widening Sanborn Road. Also, like in *Scrutton*, any benefit to the applicants' property of the road-widening would be far outweighed by the benefit to the community at large. Accordingly, the requirement is an unconstitutional condition.

B. Per Se Taking

The requirement to widen Sanborn Road would also constitute a per se taking under the United States Supreme Court's analysis in *Lucas*. In that case, a South Carolina environmental law effectively prohibited landowners from developing two vacant oceanfront lots because of the potential impacts of development on adjacent public beaches. Because the law deprived the owners of all economically beneficial use of their property, the court held that the law constituted a per se taking in violation of the Fifth Amendment.

The same logic applies here. Again, it is not physically, legally, or financially feasible for the applicants to widen Sanborn Road all the way to their property. To impose such a requirement effectively renders their property undevelopable, thereby depriving them of all economically beneficial use of the property. Therefore, the road-widening requirement would constitute a per se taking and is unconstitutional as applied to the instant facts.

C. Regulatory Taking

Finally, the requirement to widen Sanborn Road would constitute a regulatory taking under the test announced by the court in *Penn Central*. In that case, the United States Supreme Court held that a regulation on the use of private property may constitute a taking in violation of the Fifth Amendment even if it does not deprive the property of all economically beneficial use if the regulation "goes too far." The court explained that whether a regulation goes too far depends upon three factors, including: (1) the economic effect on the landowner; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the governmental action.

Applying the *Penn Central* factors, the court in *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, held that downzoning a parcel from low density residential to very low density residential constituted a regulatory taking in violation of the Fifth Amendment because new restrictions on the parcel substantially lowered its value and defeated the property owner's investment-backed expectations of what they could do with their property. Additionally, the parcel was singled out for special zoning regulations because neighboring property owners wanted the land to remain open space for their benefit. In that regard, the downzoning was akin to taking a conservation easement in the property for the benefit of the

community and at the expense of the property owner. Thus, the downzoning was in the character of a taking rather than an ordinary exercise of the city's police power.[1]

Similarly, here, the cost to widen Sanborn Road would be exorbitant, so that the requirement would have a significant economic effect on the property. The road-widening requirement would also interfere with the applicants' investment-backed expectations because it would effectively make it impossible to develop their land for a single-family home, which was the purpose for which they acquired the site. The character of the requirement would be to impose on them a burden that the community as a whole should bear. Several properties along the two-mile stretch of Sanborn Road in question have already been developed with single-family homes. Those properties would all benefit from the road widening, but none of them would be required to contribute to the cost. Singling the applicants out for special burdens in this manner goes beyond an ordinary exercise of the police power and therefore constitutes an uncompensated regulatory taking in violation of the Fifth Amendment.

IV. CalFire's Regulations Do Not Require Offsite Improvements

The incomplete letter does not cite a regulation that requires the applicants to widen existing, offsite roads. The letter cites CalFire's SRA/VHFHSZ Fire Safe Regulations, California Code of Regulations, Title 14, Sections 1270.00, et seq. Section 1273.01 of these regulations, which addresses road and driveway widths, states that: "All roads shall be constructed to provide a minimum of two ten (10) foot traffic lanes, not including shoulder and striping," and further that "[a]ll driveways shall be constructed to provide a minimum of one (1) ten (10) foot traffic lane."

The key here is that roads and driveways "shall be constructed" to the specified standards. The use of the future tense indicates that the regulation applies prospectively only; in other words, only to new roads and driveways that are proposed as part of a development project. Thus, for example, if the applicants were proposing a subdivision, any roads within the subdivision would need to provide two 10-foot lanes. Similarly, a driveway for a new single-family home on a stand-alone parcel would need to comply with the regulation's requirements for driveways. But Section 1273.01 does not state anything about ***re***constructing or improving ***existing***, offsite improvements.

That CalFire's regulations were intended to apply prospectively rather than to existing improvements is implied from Section 1270.02, which applies the regulations only to new developments permitted after the regulations' 1991 effective date. Certainly, there could be fire safety benefits in requiring older developments to come into compliance with the regulations, but in what presumably was an attempt to balance fire safety with property rights, the regulations do not require such retroactive compliance. Likewise, they should not be construed to require reconstruction of roads that predate the regulations.

For these reasons, it is clear that Section 1273.01 does not require the applicants to widen Sanborn Road. Even if the regulation were ambiguous, however, under the doctrine of constitutional

[1] Importantly, a regulation may effectuate a regulatory taking even if it offers a potential public safety benefit. The inquiry is not into the legitimacy of the regulation's purpose, but into its character and effect. See *McDougal v. County of Imperial* (1991) 942 F.2d 668, 676.

avoidance, a statute should not be construed to violate the Constitution if any other possible construction remains available.[2] Here, CalFire's regulations do not clearly require the applicants to construct (or reconstruct) offsite improvements. Therefore, even if Section 1273.01 were ambiguous, to avoid the constitutional issues discussed in the previous section, the regulation should not be construed to require the widening of offsite public rights-of-way.

V. Even if CalFire's Regulations Required Offsite Improvements, the Applicants Would Be Entitled to Request an Exception

Section 1270.60 of CalFire's regulations provides a process to request an exemption from standards. Thus, even if CalFire's regulations required the applicants to construct offsite improvements by widening Sanborn Road, they would be entitled to request an exception. Assuming that an exception were necessary for their project, the applicants should not be deprived of the opportunity to seek one by having their project prejudged and held up at the application stage.

For all the foregoing reasons, Comment No. 7 of the County's February 22 completeness letter fails to identify any criteria that should be used by the County in evaluating the project application for completeness. I would appreciate if a representative of the County would contact me at his or her earliest convenience to discuss these matters further. I may be reached at (408) 286-5800, or at the email address below.

BERLINER COHEN, LLP

ERIK RAMAKRISHNAN
erik.ramakrishnan@berliner.com

Cc: County Counsel
Enclosure

[2] See 58 Cal.Jur.3d, Statutes § 105.

County of Santa Clara
Department of Planning and Development
Planning Office

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April 30, 2021

Erik Ramakrishnan
Berliner Cohen, LLP
Ten Almaden Blvd., 11th Floor
San Jose, CA 95113-2233
Email: erik.ramakrishnan@berliner.com

VIA EMAIL ONLY Delivered to Attorney and Applicant(s)

Re: Incomplete Letter for Bagnas Property at 16501 Sanborn Road (PLN18-8580 Building Site Approval)

Dear Mr. Ramakrishnan:

I am writing in response to your April 16, 2021 letter regarding the referenced incomplete letter. The Department of Planning and Development (Department) provides the following response to the five issues raised in your letter.

1. Widening Sanborn Road would be infeasible.

Assuming, for argument's sake, that this assertion is true, the state SRA Fire Safe Regulations (14 Cal. Code Regs. § 1270.00 *et seq*.), do not provide any exceptions for improvements that are not feasible. Development projects are routinely required to comply with standards and regulations aimed at protecting public health, safety and the environment. Compliance with such requirements sometimes requires an applicant to acquire additional property rights from other property owners along the access route to the project site.

2. Prejudging the project and imposing conditions of approval is beyond the scope of the application review process.

The Department understands the concerns about whether these issues pertain to "completeness" of the application. The Department strives to identify and resolve potential noncompliance issues as soon as possible in the application process. However, it is the applicant's discretion whether to continue pursuing an application that may not meet all applicable legal requirements. If the applicant does not wish to address the items in the incomplete letter, please inform us and we will set the application for a public hearing.

3. The requirement to widen Sanborn Road would constitute a taking.

As explained above in response to issue 1, development projects are routinely required to comply with standards and regulations aimed at protecting public health, safety and the environment. The "nexus" and "rough proportionality" tests apply to exactions, which does not appear to be an issue here. With respect to the *Penn Central* test, our understanding is that the applicant acquired this property around 2001. The Fire Safe Regulations have been in effect for 30 years, and the applicable County regulations have also been in effect for decades. Therefore, compliance with these regulatory requirements should have been incorporated into the property owner's investment-back expectations. Unlike the *Lucas* case cited in your letter, compliance with the applicable state and County regulations does not prohibit development on the property; rather, any development must comply with applicable regulatory requirements. Sometimes this requires offsite improvements. We are not aware of any jurisprudence that prohibits a regulatory authority from requiring a development project to provide off-site improvements where such improvements are needed to address public health, safety or environment impacts associated with the proposed development.

4. <u>The CalFire regulations cited in the incomplete letter do not require offsite improvements</u>.

Your letter offers an interesting argument that the access requirements in the Fire Safe Regulations only apply to newly-constructed roads. Subsection (a) of Section 1270.02(a) (Scope) states:

These regulations shall apply to: (1) the perimeters and access to all residential, commercial, and industrial building construction within the SRA approved after January 1, 1991 except as set forth below in subsection (b.).

Subsection 1270.02(c)(2) also clearly states that affected activities include an "application for a building permit for new construction, not relating to an existing structure."

Nothing in section 1270.02 suggests that the numerous access requirements in the Fire Safe Regulations were not intended to apply to existing roads and accessways serving new construction. Such an interpretation would substantially narrow the scope of the regulations. We do not agree that with such a narrow interpretation that the references to "construction." The regulations clearly state that they "constitute the basic wildfire protection standards" (§ 1270.00), and that "[t]he future design and construction of structures, subdivisions and developments in the SRA shall provide for basic emergency access and perimeter wildfire protection measures as specified in the following articles."

We understand that the proposed amendments to the Fire Safe Regulations would distinguish new roads from existing roads. However, unless and until the Board of Forestry amends the regulations to clarify this point — or the Board issues an official guidance or interpretation on this issue — the Department does not feel comfortable interpreting the Fire Safe Regulations in such a limited manner.

Alternatively, if the Applicant believes the proposed project qualifies for any of the exceptions in 1270.02(b) the applicant should provide information to support that exception.

5. Even if CalFire regulations required construction of offsite improvements, the applicants would be entitled to request an exception that should be considered as part of the review of the development project, and not at the application stage.

We agree that the applicant has a right to request an exception from CalFire. It is the applicant's option to defer this decision to a later point in the County's consideration of the application. Please note that, because the property is in the State Response Area (SRA), CalFire is the inspection entity for purposes of determining whether the project is subject to, and complies with, the Board of Forestry's Fire Safe regulations. (14 Cal. Code Regs. § 1270.05.) A property owner who wishes to file a request for exception must file that request with CalFire. (*Id*. at § 1270.06.) If the property owner does not agree with CalFire's decision on the exception, then the property owner may file an appeal of that decision with the County.

Please contact me if you have any questions about this letter.

Sincerely,

Colleen A. Tsuchimoto

Colleen A. Tsuchimoto

Senior Planner

cc:

Planning – Leza Mikhail

Fire Marshal's Office – Alex Goff

Calfire – Marcus Hernandez

Land Development Engineering – Ed Duazo, Darrell Wong

Applicant(s): Manny and Marilyn Bagnas, Ekundayo Sowunmi
Email: [redacted], [redacted]

Attachment 6