June 22, 2021

VIA E-MAIL: PublicComments@BOF.ca.gov

Board of Forestry and Fire Protection
Attn: Edith Hannigan
Land Use Planning Program Manager
P.O. Box 944246 Sacramento, CA 94244-2460

RE: Comments on "DRAFT State Minimum Fire Safe Regulations, 2021"

Dear Ms. Hannigan:

The California Building Industry Association (CBIA) and the other organizations listed below appreciate the opportunity to comment on the Draft State Minimum Fire Safe Regulations, 2021 (Draft). Together, we represent industries that provide housing so desperately needed for Californians, jobs and contribute significant tax and fee revenue that result from the economic activity of our growing economy.

CBIA represents approximately 3,000 member companies that employ more than 100,000 people. Our members are responsible for more than 80% of all the new homes built and sold in California annually. Our membership includes homebuilders, land developers, contractors, design professionals, and planners, among others.

Our combined experience over decades has proven that large master-planned communities of 500 or more homes and other non-residential structures provide the best protection from wildfires and achieve it at a scale that other construction may not provide. Master-planned communities create mixed-use, large-scale urbanized areas and have included more than 20,000 new homes and millions of square feet of non-residential uses in a single project. They operate as new towns and cities. These well-planned and well-designed communities provide fire protection through grading, vegetation management, defensible space, setbacks, fuel breaks and other community design features that are maintained by the community and are strategically located around the perimeter of the development. In addition, the buildings constructed within these communities complied with the latest fire-resistant building codes, including indoor fire-sprinklers among others. Master-planned communities often add new fire and emergency response resources, like fire stations, in parts of the state where they did not previously exist. These significant assets benefit not only the community but the entire region. These master-planned communities have a proven track record of surviving wildfires without suffering structure loss or damage.

We are concerned that the Draft does not account for or otherwise recognize the tremendous fire safety benefits that accrue from the comprehensive analysis and planning that underlie development of master-planned communities[1]. As indicated in the examples above, the design and features of master-planned communities can minimize the devastating effects of wildland fire events. We appreciate that the Draft is intended to promote fire safety; however, adopting a "one-size-fits-all" approach fails to recognize that, in the context of fostering fire safety, the development of an individual lot is far different from the development of a large-scale mixed use / multi-phase project comprised of many homes and thousands of square feet of commercial and industrial facilities.

The Draft also treats all hazard zones in the SRA as if they were all Very High Fire Hazard Zones, even where they are only moderate or high fire hazard zones. This one-size-fits-all approach should be rationalized so that, like LRAs, the Draft's requirements only apply to Very High Fire Hazard Severity Zones within the SRA.

At the outset, the Draft sets forth requirements that apply at two points in the land use entitlement process: (1) approval of a tentative map, and (2) approval of an individual building permit. There are many approvals that a developer must obtain before these stages – especially approvals that incorporate community-scale wildfire risk reduction standards. If the approval of a master-planned community provides wildfire protection consistent with the SRA Fire Safe Regulations (the Draft is the successor to the SRA Fire Safe Regulations), or the master-planned community meets the standards of the Draft, then it would be redundant to apply the Draft to each subsequent subdivision approval or individual building permit issuance within the master

[1] Master-planned communities are designed with community risk reductions around the perimeter of the entire community that may contain 500 to 22,000 homes and there may be 5 to 250 subdivision maps within that community.

planned community. California's land use entitlement is extremely complex. Therefore, the Draft should not approach wildfire protection as a one-size fits all regulation.

The build-out of master-planned communities needs to be treated differently. Imposing requirements on a lot-by-lot basis -- rather than on a larger scale -- not only exacerbates the housing crisis by leaving the lot unbuildable and in its unmanaged vegetative state, but it also increases wildfire risks to the broader community. A new structure built according to the latest code and defensible space requirements is considerably less likely to burn than unmanaged vegetation. Wildfire smoke also produces health risks for people occupying much more distant areas and significantly increases California's greenhouse gas emissions[2].

The following comments are intended to highlight certain shortcomings in the approach that is presented in the Draft, and to offer constructive feedback / suggestions for resolving them.

Grandfathering

The complex and serial nature of California's land use approval process raises additional concerns when applied to road and access requirements. Of immediate note, there are urban subdivisions for which the road improvements were completed just this month. While they met the requirements of the SRA Fire Safe Regulations, and received support from the local fire authority, they will not meet the requirements of the Draft. The local fire authority supports the project and believes that the roads, as constructed, do not limit access or present any problems for their fire apparatus. Yet when the Draft goes into effect, it will immediately become applicable to home construction on each of the lots within the subdivision. We assert that if a subdivision is approved under either the SRA Fire Safe Regulations or the State Minimum Fire Safe Regulations, the version of these regulations in effect when the tentative map application was submitted should be the version that applies to building construction on lots within the subdivision. The same should be true of master-planned communities: if they comply with either the SRA Fire Safe Regulations or the State Minimum Fire Safe Regulations at the time of entitlement, subsequent approvals should not be subject to a version different from those in effect when the community was approved.

Applying new standards retroactively would render many thousands of approved (or even developed) lots unbuildable despite prior review for fire safety and large investments in planning, engineering and infrastructure. The loss of otherwise approved and buildable lots, many in suburban locations, is especially egregious in the midst of the current housing crisis where availability of lots is a key constraint.

Roads and Access - Flexibility

The Draft should account for variability in development. The Draft's road and access requirements are overbroad and overly restrictive. For example, although perimeter roads and thoroughfares in master-planned communities could fully accommodate large fire apparatus and

[2] The California Air Resources Board's preliminary draft estimate for GHG emissions from California's 2020 wildfires is 112 Million Metric Tons. See, page 9, https://ww3.arb.ca.gov/cc/inventory/pubs/ca_ghg_wildfire_forestmanagement.pdf

emergency access, the same standards should not be imposed on interior neighborhood roads that are not central to emergency access and response. Since master-planned communities will have a community-wide fire protection plan, the local Fire Authority should be given the ability to exercise flexibility and professional judgment to determine / conclude whether any road, access or secondary route substantially complies with the requirements of the Draft.

In addition, the Scope of the Draft (Section 1270.03(e)) should also be limited to acknowledge other constraints on roads as follows:

(e) These regulations shall not apply to Roads used ~~solely~~ almost exclusively for Agriculture, mining, open space management, natural resources or endangered species habitat management, or the management of timberland and harvesting of forest products.

New and Existing Road Requirements Outside of the Perimeter

Articles 2 of the Draft imposes numerous requirements to improve roads outside the perimeter or provide access to the building or development. Section 1273(d) provides:

> Notwithstanding any other provision of this Subchapter, Building construction is prohibited where Access is provided by a Road that does not meet the minimum requirements in section 1273.12.

This language, as well as all other provisions within the Subchapter that apply requirements to roads outside of the perimeter, would require the applicant to comply with an unconstitutional condition that places a burden beyond the applicant's fair share and lacks a reasonable relationship to the impact flowing from a development. The provisions of Article 2 require that developers must construct road improvements to serve other developments/buildings. Here the developer must give up a property interest as a condition of approval: the developer must complete or construct road improvements or will face denial of its building construction. The unconstitutionality of such a requirement is exacerbated where the improvements to access or roads are required outside the proposed project and provide benefits to existing users of the roads or where existing road users cause or contribute to a road's failure to meet the requirements of the Draft. These requirements include, but are not limited to:

1. Purpose and scope;
2. Road and clear widths;
3. Curb radii;
4. Horizontal and vertical curves;
5. Traffic volumes;
6. Road surfaces and weight minimums;
7. Bridges;
8. Road grades and vertical clearances;
9. Road turnouts and turnarounds;
10. Standards for existing roads; and
11. Secondary routes for existing roads.

The doctrine of unconstitutional exactions was deemed to be already "well-settled" more than 25 years ago, when the U.S. Supreme Court explained it, and applied it in the context of land use exactions, in *Dolan v. City of Tigard* (1994) 512 U.S. 374, 385: "[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." The doctrine applies equally to exactions of property and to monetary exactions such as fees in-lieu of property exactions, and is violated where, as here, governmental approvals are withheld or denied because of noncompliance with an unconstitutional exaction requirement. (*Koontz v. St. Johns River Water Mgt. Dist.* (2013) 570 U.S. 595, 606.)

In California, the Third District Court of Appeal struck down policies that require a developer to complete or construct road improvements as a condition of discretionary approval as an unconstitutional exaction because the requirement went beyond the traffic impact resulting from an individual project. *Alliance for Responsible Planning v. Taylor,* (2021) 63 Cal.App.5th 1072. Unfortunately, the road and access related requirements contained in the Draft suffer from the same inadequacies. The Draft requires that for existing roads, rights-of-way, roadside clearance, street width, grade, turn radii, associated fuel breaks, turnouts and many other improvements may be required, or the permit or approval shall be denied. Those new and higher standards provide benefits to existing road users who also cause the need for these improvements. Yet the cost for these improvements disproportionately falls on the last applicant seeking a permit. These requirements should be limited to fair share mitigation of traffic impacts resulting from the individual project only, if they have any hope of being constitutionally valid.[3]

The existing length of dead-end roads should be retained

California has the most complicated land use approval process in the nation. That means that there are a number of projects in the planning pipeline that have received some level of approval (e.g., general plan amendment or zoning) for master-planned communities. Those approvals have been granted in reliance on the existing SRA Fire Safe Regulations although a subdivision map application has not yet been submitted for some areas. The Draft however changes the length of dead-end roads which would cut-off access to those parcels. The regulated community should not be punished for abiding by existing regulations. Therefore, we respectfully request that section 1273.08 (a)(3) and (4) and be maintained as it exists in the existing SRA Fire Safe Regulation. For the same reason, the proposed addition of subdivision (d) should be deleted.

Fuel modification, road and access rules should not impact sensitive habitat.

The proposed fuel modification, road and access requirements do not include any exceptions for conflicts with biological or regulatory mitigation requirements (e.g., endangered species habitat). The regulations should provide alternative compliance options where fuel breaks, road and access or other requirements would conflict with endangered species habitat, wildlife preserves, or other areas governed by existing biological or regulatory requirements.

[3] See also, California Government Code sections 11349(d) and 11349.1(4).

Fuel Breaks should not be applied when approving Building construction within master-planned communities

For master-planned communities, fuel breaks should be imposed at the community-wide level, not at the parcel-level. Fuel breaks should be around the perimeter of the community protecting the community as a whole and not focused on interior areas or interior buildings.

Additionally, where required fuel breaks would interfere with endangered or protected species habitat, regulatory or biological preservation areas, or other areas containing high value wildlife habitat, local jurisdictions should be authorized to approve alternative methods of wildfire protection to avoid impacting such resources.

Ridgeline protection measures should be considered after mass grading.

The Draft mandates that local agencies identify and preserve strategic ridgelines for fire safety reasons. This measure should be narrowly applied where ridgeline protection is the only feasible fire safety measure and where new housing construction would not be impacted. We respectfully request that such ridgelines be determined *after mass grading* for approved projects and areas designated for development. It would be meaningless to identify ridgeline protections before mass grading because the slopes/ridges may be fundamentally altered or eliminated by grading and the grading itself is one way to reduce wildfire risk. Also, we believe that fuel breaks, greenbelts, greenways, open space and roads (as explained below) should be expressly allowed on strategic ridgelines. Additionally, while we agree that when identifying strategic ridgelines pursuant to Section 1276.02 the ability to support effective fire suppression is an important factor, we believe that item (6) "Other factors…" could sweep in interests unrelated to fire safety and should be deleted.

Water Supply

Existing law already has comprehensive -- and complex -- requirements to demonstrate that projects of 500 homes or more have adequate water supply. In order to avoid unnecessary duplication, we believe that master-planned communities for which a local jurisdiction has determined the adequacy of water supply following the completion of a water supply assessment (see, Water Code section 10910 et seq.) should be exempt from Article 5 of the Draft.

Setbacks

We believe an additional exception should be included in Section 1276.01 (b) to include master-planned communities that incorporate community-wide fire protection measures that reduce the risk of structure-to-structure ignition for structures within the master-planned community.

Definition of Hazardous Land Use

Our concern with the definition of Hazardous Land Use found in Section 1270.01(v) is its inclusion of power-generation and distribution facilities. New homes are legally required to include either rooftop photovoltaic energy systems or obtain power from a community solar facility. These are power generation facilities. Both community solar and rooftop systems,

include pad-mounted transformers that are part of the distribution facilities. In addition, new utility substations are built in conjunction with new towns or cities as contemplated in master-planned communities. These power-generation and distribution facilities are constructed so that their transmission lines are buried underground, and substations allow for grid management (loss of power on a smaller and more specific scale) in a way that is safer than maintaining the old facilities. Therefore, we believe that photovoltaic energy systems, their associated pad-mounted transformers and new substations should be excluded from the definition of Hazardous Land Use.

Curing Circular Definitions

Many of the definitions appearing in the Draft contain words that include defined terms that send the reader to other defined terms that include other defined terms that eventually return the reader to the term at which the process all began. Perhaps the best way to illustrate this is with an example. (All words that are defined are capitalized.)

Section 1276.02(b) and (c), prohibit new Buildings on Undeveloped Ridgelines. However, suppose a developer wanted to know whether a road could be built on an Undeveloped Ridgeline. Is a road a "Building"? This is relevant to the determination of whether the Ridgeline is strategic since a road provides the ridgeline with the "ability to support effective fire suppression". See, 1276.02(a)(4) and (5).

A "Building" is defined as "any Structure used or intended for supporting or sheltering any use or Occupancy, except those classified as Utility and Miscellaneous Group U." A "Structure" is "that which is built or constructed, a Building [this sends one back to Building] of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." A road is a piece of work artificially built up and is also composed of parts joined together in some definite manner. So, a road seems to be a structure. So, does it support any use or Occupancy?

Occupancy is defined as "the purpose for which a Building, or part thereof, is used or intended to be used." Back to where we started (Building). If a road is a structure, then it's a building and its use is to accommodate vehicles.

Perhaps the exception for Utility or Miscellaneous Group U items will help. Utility and Miscellaneous Group U is defined as "a Structure [back to Structure] of an accessory character or miscellaneous Structure[back to Structure] not classified in any specific Occupancy [back to Occupancy] permitted, constructed, equipped and maintained to conform to the requirements of Title 24, California Building Standards Code. At this point, it is at best unclear whether the term "Building" includes roads. Therefore, in connection with the issues made manifest by the foregoing example, we respectfully request that the definition of Structure expressly exempt roads.

Moreover, we respectfully urge the Board to clarify and eliminate the duplication inherent in all definitions which appear in the Draft. See, California Government section 11349.1(a).

Same Practical Effect v. Substantial Compliance

This newly added definition for "Substantial Compliance" would remove the concept of having the "same practical effect" which is currently the practice. "Same practical effect" does not limit the methodology that could be used to provide the same level of safety and security to the structures, residents and firefighters; but, we believe that "Substantial Compliance" requires that the majority of the requirements be rigidly followed. Our concern is that if a requirement were measured by its performance it should not matter how it is achieved.

For example, if there is a requirement of 100 feet of defensible space, but 100 feet is not available, the same level of protection may be provided by 80 feet of defensible space with a cement block wall. Under a strict "Substantial Compliance" standard, performance-based alternatives with a safe alternative equal to or greater than the required method could not be considered. Therefore, we believe that the "same practical effect" should be incorporated into the definition of Substantial Compliance.

Finally, the Draft provides few, if any, exceptions to several of the requirements regarding roads, access, fuel breaks, etc. The Draft's "Substantial Compliance" exception is narrow and overly restrictive. Instead, the Draft should include exceptions for local fire authorities, who have expertise in fire suppression methods in their respective areas, to determine whether these requirements are effectively satisfied, while ensuring that the intent of the new regulations are upheld.

Suggested amendment:

(11) Substantial Compliance: Nearly complete satisfaction of <u>or having the same practical effect as</u> all material requirements consistent with the purpose of the applicable State Minimum Fire Safe Regulations even though the formal requirements are not satisfied. <u>Substantial compliance shall be determined by the local Fire Authority.</u>

With respect to housing costs, the 45-day notice provides:

HOUSING COSTS (pursuant to Gov § 11346.5(a)(12))

The proposed action does not impact housing costs.

The Draft affects the development and construction of housing for approximately 32% of the state (SRA and Very High Fire Hazard Severity Zones within the current LRA). CalFire will be issuing new maps which will expand the VHFHSZ in October as they mentioned in a presentation to the Board of Forestry in April. Yet, the Board has made no attempt to quantify the increased cost of housing that will be required due to the changes in road and access requirements (at a cost of at least $1.8-7.7 million per mile in

rural areas and $2.6-54.4 million per mile in urban areas)[4], fire breaks, greenbelts, and the prohibition of building on undeveloped ridgelines (all of which decreases the amount of buildable land and thereby increases the land cost per buildable lot). Some of the design specifications for roads (e.g., curb radii, turn arounds, turn outs, etc.) will also eliminate some lots.

There are at least 500,000 lots in the planning pipeline currently that have at least submitted an application for a subdivision map. Thirty-two percent or roughly 160,000 lots are likely in an area regulated by the Draft.[5] The elimination of 32% of the lot supply will necessitate spreading the fixed cost of those lots across a smaller number of lots. Using a statewide average of $81,398 per lot for undeveloped lots[6], we estimate that the Draft will add $26,047 to the cost of each lot. Not including cost of funds, we estimate that the Draft will increase housing costs by at least $26,047 per home. In California, a $1,000 cost increase prices 12,361 California households out of the market.[7]

We believe that the regulatory package should acknowledge the significant increase to the cost of housing that will be incurred due to the Draft.

We are very grateful for the opportunity to provide these comments and appreciate the time and attention you give to our recommendations.

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[4] See, https://www.strongtowns.org/journal/2020/1/27/how-much-does-a-mile-of-road-actually-cost. These costs are in 2014 dollars and road construction costs in California have increased since then. These costs are for minor arterial lane additions or minor arterial alignments. Additionally, these costs are just construction costs and do not include the cost (including delay costs) associated with complying with California's environmental and permitting process.

[5] SRA and LRA VHFHZ areas combined represent 32% of California.

[6] The industry rule of thumb is that undeveloped lots cost 10% of the sales price and the median cost of housing in California has now reached $813,980.

[7] https://eyeonhousing.org/2021/03/nahb-2021-priced-out-estimates/

Sincerely,

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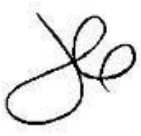

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<u>United Chamber Advocacy Network</u>
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Elk Grove Chamber of Commerce
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Roseville Area Chamber of Commerce
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