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Sent: Friday, July 7, 2023 5:51 PM
To: sbcob
Cc: Supervisor Das Williams; Lavagnino, Steve; Nelson, Bob; Hartmann, Joan; Laura Capps
Subject: Item #4 Safety Element 7.11.2023
Attachments: 94. Fire Marshal concurrence re Safety Element 7.7.2023.pdf

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Honorable Supervisors:

Late this week, I became aware that the Board of Supervisors is considering amendments to the Safety Element to address wildfire hazards at their meeting on July 11. **I am concerned that the recommendation does not adequately address the fact that the County's laudable wildfire protection policies appear to be on a collision course with State mandated housing policies, and in particular for ministerial SB 9 lot splits.** Therefore, for the reasons stated below, I am requesting that you ask P&D, Fire and County Counsel to clarify that the Development Standards referenced in proposed Policy 8.1, which are applicable to *discretionary subdivisions*, will not be interpreted or applied to prohibit *ministerial* lot splits without a finding based on the preponderance of evidence, as required by the Government Code. Said another way, without a full and fair hearing by the decision makers.

Specifically, based on the discussion below, **I am requesting the Board to clarify that proposed Policy 8.1 shall not be interpreted to preclude a finding of "same practical effect" [as that term is used in the Fire Code] as any otherwise applicable requirement in Fire's "Development Standards".** I believe that given the level of complexity in these cases that the Fire Marshal must retain the authority to make decisions on a case by case basis, and according to specific circumstances. Their "same practical effect" standard provides that opportunity. I also suggest that given the importance of the Legislature's housing mandates, any adverse determination by the Fire Department or P&D on an SB 9 lots split should be directly appealable to the Board of Supervisors, so our elected officials can take responsibility for these decisions where they burden the development of housing. As of July 7, 2023, both Fire Marshal Hazard and P&D Director Plowman have confirmed to me that they agree with my proposed interpretation, and will say so if the question is asked. [e mail attached] **So I am requesting that the question be asked and answered on the record.**

Discussion

Depending on how they are interpreted and applied by County Fire and P&D in individual cases, these new Safety Element policies could make ministerial lot splits under SB 9 impossible to approve, especially at properties in Local Responsibility Areas like *lower* Mission Canyon, which have been on the VHFHSZ maps since Arnold Schwarzenegger was Governor, but many of which do not actually have any of the physical characteristics that these maps were meant to address. Historically, maps produced by the State have not, and will likely never fully portray lot-by-lot local/or area conditions. While in the past, inclusion in a mapped hazard area could result in a project approval with special requirements set forth in the Public Resources Code like, defensible space, brush clearing, or in the Building Code-sprinklering and other enhanced building requirements, under S.B 9, mere identification of a property on a map can result in outright denial, especially in the early phase of implementation, where it is not at all clear how the Legislature intended to apply these restrictions, and the State agencies responsible,- HCD for example,- decline to interpret them. [When I posed a question of interpretation recently, HCD disclaimed any ability to interpret SB 9, and suggested that I hire a land use lawyer.]

The Board letter recites that Staff has “changed the language of Policy 1.2 to eliminate concerns that it could be interpreted as potentially reducing the number, or burden development of, housing opportunity sites within the 2023-2031 Housing Element as a result of a need to comply with Government Code §65302.8. This Government Code provision states that if the County’s Comprehensive Plan policies (e.g. Safety Element wildfire policies) operate to limit the number of housing units constructed on an annual basis, certain findings must be made to do so. The language has been changed from:

“The County shall discourage land uses that could put people at unreasonable risk in High or Very High Fire Hazard Severity Zones”, to

*“The County will consider risks from hazards when reviewing plans for development and occupancies in High or Very High Fire Hazard Severity Zones and take action **to minimize risks to occupants to the greatest extent feasible**”*

While on their face policies applicable to **discretionary** applications for subdivisions do not mandate denial, but rather compliance to the greatest extent feasible, See, e.g. Fire 1.5 Subdivision Access^[1], or “reasonable measures, in the case of the Mission Canyon Plan, my specific concern is that **Proposed Policy Fire 8.1 appears to require that “All new development in the Very High Fire Hazard Severity Zone VHFHSZ will comply with ingress/egress requirements found in applicable wildfire Development Standards, Fire Code, and the State Fire Safe Regulations.”** Depending on *which* ingress/egress requirements are determined to apply, this could mandate denial in a given case. As County Counsel will no doubt advise, “Shall” or “Will” is mandatory. Thus, the policy as written appears to be a change from current policy, which authorizes the Fire Marshal to find “same practical effect” for alternative measures.

Therefore, I request that the Board direct staff to revise the policy to change the word “will” to “should”, or provide a footnote in the plan to specify that the Fire Marshal clearly retains their current authority to make appropriate decisions on a case by case basis.

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^[1] For example, “Subdivision projects shall site access roads between new homes and wildland areas, **to the greatest extent feasible, while also minimizing disturbance to sensitive environmental resources, in order to maximize defensible space, access for fire suppression, egress for affected residents, and to reduce wildfire risk to new homes and structures.**”

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