

## LEGISLATIVE PLAN FOR SETTING OF FIRE SAFETY NON-BUILDING ACCESS STANDARDS WITHIN AN SRA

The question has been raised as to whether the County or the 13 Fire Districts ("Fire") has the responsibility and authority to set road access standards within the unincorporated areas of El Dorado County designated as a State Responsibility Area (SRA). ***This paper concludes the County alone has the power to adopt access road requirements within an SRA subject to minimum Fire Safe Standards*** (Title 14, et seq., California Code of Regulations). This grant of authority to the county is consistent with the state statutory scheme that requires the State Forestry Board under authority of Public Resources Code section 4290 to set minimum access or non-building standards in SRAs and for the Board of Supervisors, rather than local fire districts, to issue and approve building permits and subdivisions as meeting these requirements.

The elected body of the County Board of Supervisors sets road standards as an exercise of the police powers delegated to the County through ARTICLE 11, section 7 of the California Constitution. In addition, the Map Act grants to counties the power to regulate the design and improvement of roads, including "fire roads" (Government Code section 66410 et. seq.).

A recent bill passed by the legislature illustrates the state statutory scheme providing that counties set road standards within an SRA subject to the minimum requirements Title 14. AB 666 would have required the Board of Forestry to consider adopting regulations requiring a minimum of two separate access roads for a subdivision located in an SRA and the county to make specific findings before approving a tentative or parcel map in an SRA. The Governor vetoed this as well as a predecessor bill because "CalFire should not be placed in the position of having to act as a land use agency. Rather that responsibility rests with local governments and local officials." *Although both bills were ultimately vetoed* by the governor, it is significant to note that the amendments and proposed regulations were incorporated into the Subdivision Map Act and Public Resource Code §4290 (Title 14), *not the California Fire Code*.

Fire Districts do not have a comparable grant of authority to regulate road access. Fire Districts are included in the 3,600 special districts in California. The Fire Protection District Law of 1987 governs all 386 fire districts in the state. There are 13 Fire Districts in El Dorado County. Unlike counties, Fire Districts have not been delegated police powers and the Map Act authority to set "fire road" standards is limited to cities and counties.

The 2007 California Fire Code, a part of the California Building Standards Code, is based on the 2006 International Fire Code as the "model code". The State Fire Marshall reviews the "model code" language and determines whether to adopt, amend and adopt, or not adopt each provision contained in the model code. Only those provisions of the 2006 model code actually adopted, or adopted with amendments in California become the "2007 California Fire Code" which is required to be adopted by each jurisdiction. The 2007 California Fire Code is expressly limited to "building standards":

*"California Fire Code Section 101.6 Non-building standards, orders and regulations. Requirements contained in the California Fire Code, or in any other referenced standard, code or document, which are not building standards as defined in Section 18909, Health and Safety Code, shall not be construed as part of the provisions of this code. For non-building standards, orders, and regulations, see other titles of the California Code of Regulations." (i.e. Title 14 for minimum access standards within an SRA and Title 19 for access standards to special occupancies (hospitals, government, selected commercial)).*

In other words, the 2007 Fire Code adopted by the State of California does not set access standards. In fact, the 2007 Fire Code specifically states non-building standards (access) are found in other titles such as Title 14 which sets minimum access standards for an SRA.

A Fire District does not have the authority to impose more stringent building standards within a county, much less non-building access standards, unless the Board of Supervisors agrees (Health and Safety Code section 13869.7(c)).

There is no comparable grant of authority for a Fire District to even consider setting road standards within a county. Even if the Board of Supervisors agreed, there would be an issue of whether the Board had the right to delegate the authority to set road standards to 13 special districts.

Since El Dorado County has the sole power to set road standards within the State Responsibility Area (SRA) subject to Title 14 (and Title 16 for special occupancies), how did we get in this regulatory thicket where Fire Districts have set road standards by Fire Code Amendment?

### **The Unique El Dorado County Experience with Fire District "Fire Access Road Amendments"**

At a recent Board of Supervisor fire workshop, Supervisor Briggs asked the key question at least four times: "Who sets the fire road access standards? Does the BOS have the authority? Did we ever have the authority? Did we give up the authority?" After a few hours of testimony and no clear answer, the BOS directed the issues to EDAC for review.

Considering the Board has always had the authority to set access standards, we must review the events that led to the fire workshop and the questions.

The California Building Standards Code consists of 12 parts, including the Building Code, Plumbing Code and Fire Code, among others. The 2007 California Fire Code is based on the 2006 International Fire Code as the "model code". Not all of the model code provisions are adopted in California. Those provisions of the 2006 model code that are adopted in California along with California amendments become the "California Fire Code". The California Fire Code, 2007 Edition does not include non-building or access standards found in Chapter 5 and Appendix D of the model code. In fact, the California Fire Code section 101.6 specifically states,

*"Requirements contained in the California Fire Code, or in any other referenced standard, code or document, which are not building standards as defined in Section 18909, Health and Safety Code, shall not be construed as part of the provisions of this code. For non-building standards, orders, and regulations, see other titles of the California Code of Regulations. ("Other titles" refers to Title 14 Fire Safe Regulations and Title 19 for special occupancies.)*

In short, the California Fire Code, 2007 Edition, does not include fire road or access standards.

The State requires each county to enforce the California Fire Code, 2007 Edition (which does not include access standards). If a county did not take any action to affirmatively adopt the 2007 Fire Code was deemed adopted on January 1, 2008. About 1/3 of California jurisdictions took no action and the Fire Code was automatically operative on January 1, 2008.

The 13 Fire Districts in El Dorado County adopted the 2007 Fire Code and added local amendments regulating access. These Fire Codes with the access road amendments were presented to the Board of Supervisors for approval on February 22, 2008. This item was not accompanied by a staff report. The Board of Supervisors "ratified the 2007 Fire Code as adopted by the individual fire districts". In addition, the BOS delegated the enforcement to the Fire Districts rather than the County Building Official.

A review of the February 22, 2008 action indicates the Fire Districts and County believed this "ratification" to be consistent pursuant to Health and Safety Code section 13869.7. However, this section requires that any fire protection district that proposes to adopt an ordinance which includes building standards more stringent than those included in the Fire Code must both seek Board of Supervisor approval and the Board must delegate enforcement to the Fire Districts or the County Building Official for single family residential only. H&S section 13869.7 does not authorize the Fire Districts to adopt ordinances relating to non-building standards (access) nor empower the County to grant such authority to the Fire Districts.

## **Effect of Fire Access Amendments**

The Fire District amendments are not consistent with the state statutory scheme for SRAs that access standards (non-building standards) be treated in Title 14 and the County's subdivision ordinances and building standards are addressed in Title 24. The Fire District amendments to the 2007 Fire Code (Title 24) have attempted to incorporate non-building standards access requirements into the building standards code. The result has been confusion and conflict. Examples include the following:

First, the Fire Code amendments place the fire districts in paramount position to the Board of Supervisors, in direct conflict with the statutory scheme regarding setting and enforcement of access standards within an SRA. The Fire Code amendments make the Fire Code the operative document and each of 13 fire officials the arbiter for application and exceptions. Appeals from such decisions go to the 13 fire district boards. This contrasts to the state statutory scheme which empowers the Board of Supervisors to both set standards and to act as the appeals board (Title 14).

Second, Fire Code amendments allow a balkanized road system, set by 13 Fire Districts rather than the Board of Supervisors.

Third, Fire Districts do not approve subdivisions or issue building permits and do not set access standards. Fire Districts review plans to see if they conform to standards set by the Board of Supervisors and may make recommendations related to fire safety. Since the Fire Districts do not have the power to issue or approve subdivisions or building permits, how do they propose to enforce these edicts?

Fourth, after one BOS workshop and 2 EDAC workshops, there is little disagreement the Fire Code amendments, when read literally, would prohibit new construction on many existing legal parcels and prevent the division of land otherwise allowed by Title 14 Fire Safe Standards. Fire Districts respond they will be judicious in their new power. Although well meaning, these interpretations and exceptions to reach a desired result are inappropriate. Where two regulations conflict with one another, the general rule of construction is that the more restrictive regulations should apply. One does not look to the less restrictive regulation in a different Title to make exceptions to an unworkable, poorly drafted non-building standard that has been incorporated into the building standards (Fire) code.

Fifth, Fire Code amendments require a 20 foot Fire Apparatus Access Road from a fire station to every building hereafter constructed - unless the applicable fire official says otherwise. Title 14 Section 1270.02 does not apply to "existing roads", pre 1991 activity and other exceptions. The local amendments pertaining to Fire Apparatus Access Roads do not include these exemptions. Thus the local amendments are considerably more restrictive than the Title 14 requirements. Any construction of a house accessed by any road(s) that are not at least 20 feet wide all the way from the fire station to the house fails to meet the requirement unless the Fire Department approves an exception. In other words, the law is no construction, even on existing legal parcels, unless the fire department agrees.

The same rule may be used to defeat any parcel splits on property not accessed by a 20 foot road all the way from the fire station. The attached map illustrates public streets less than 20 feet. In addition to these streets, there is a spider web of private roads less than 20 feet. In addition, Fire District local amendments have increased the 20 feet to as much as 40 feet if parking is allowed. A map depicting roads less than 28 feet would greatly expand the list of roads that do not meet the Fire District amendments if on-street parking is required. New construction off these roads is precluded unless the fire district within the road systems agrees to accept the construction.

Sixth, the local Fire District amendments to street widths to accommodate parking result in wider roads than necessary to accommodate other uses. For example, since parking is not allowed on streets less than 30' (and even then on one side) a 28' wide road in a residential neighborhood with parking prohibited is too wide, and will result in excessive speeds through the neighborhood. Additionally, the footprint of development is expanded, increasing environmental effects and costs. Because of the topography in the foothills, the increased grading required to build

wider roads is often much greater than just the nominal increase in the paved surface (i.e. 4' of increased paving might extend grading 20' or more as you chase the slopes up and downhill).

### **Attorney General Opinions Relating to Fire Districts/County Authority**

If there remains an issue as to whether or to what extent Fire Districts have the independent authority to enact and enforce non-building access standards within an SRA, then the issue should be presented to the Attorney General for opinion and/or legal action may be initiated seeking a judicial declaration as to the powers of Fire Districts to set road standards.

The Attorney General has already addressed related issues in Attorney General Opinion 88-904 – September 14, 1989 where the question was “May a fire protection district adopt a fire prevention code or regulations setting forth building standards relating to fire and panic safety that are stricter than those contained in the State Building Standards Code”. The opinion found a fire district did not have the power to pass an ordinance setting building standards more stringent than the Fire Code, “Unlike cities and counties, fire protection districts are not granted broad police power authority by the state Constitution. (Cf., Moore v. Municipal Court (1959) 170 Cal.App.2d 548, 555; 68 Ops.Cal.Atty. Gen. 225, 229 fn. 3.) They are creatures of statute, which serves to define their powers and duties. (Cf., 68 Ops.Cal.Atty.Gen. at 228; 25 Ops. Cal.Atty.Gen. 234, 235 (1955); 10 Ops.Cal.Atty.Gen. 47, 48 (1947).) Further, the Attorney General discussed the broad power granted all special districts, including fire districts, and found the power to adopt ordinances is limited by more specific laws.

In reaction to this Opinion, the legislature adopted Health and Safety Code Section 13869.7 which allows fire districts to adopt ordinances increasing building standards, and giving the Board of Supervisors authority to ratify, modify, or deny those more restrictive ordinances.

Attorney General Opinion 94-708 – March 7, 1995 opined, “As a condition of issuing a building permit for construction of a single-family residence, a city or county may require by ordinance the installation of a paved driveway from the property line to the residence for emergency vehicle access”. The Opinion found a City or County could make such a requirement and such a road would be a non-building standard.

### **What is the Relationship between Fire Districts and County with regard to Road Standards?**

1. Subdivision maps within an SRA must meet the minimum Title 14 Fire Safe Regulations. The Fire Safe Regulations allow the County to approve deviations from the standards that would achieve the ‘same practical effect’. The County must submit projects in SRAs to CalFire for comments. The County may allow the Fire Districts to sign off on that the standards have been met. However, this does not allow the Fire Districts to set the standards or require Fire District approval of the subdivision.

2. Building permits are issued and approved by the County. The Fire Districts may be assigned responsibilities that relate to enforcement of the Building Standards Codes (Plumbing, Fire). These codes are limited to building standards. Recently, the State amended Title 24 to require increased building standards for new buildings located in any Fire Hazard Severity Zone within State Responsibility Areas. These increased building standards are found in Chapter 7 and Chapter 47 of the Fire Code and are referred to as the “Wildland-Urban Interface” or (“WUI”) standards. The County may determine to designate either the Chief Building Official or Fire Code Official as responsible for enforcement of the building standards codes for R-3 occupancies (primarily) single family residential building permit applications. EDC has designated the Fire Districts, which subjects Mom/Pop applicants to a process involving different fire departments. Designation of the Chief Building Official or a County Fire Marshall would result in more uniform and consistent interpretation and would make the building permit process more user friendly. Commercial/industrial and most Multi-Family are still subject to enforcement by the fire official.

3. It is good practice for Fire Districts to review all proposed maps and building permits to ensure that the plans comply with all applicable fire codes and regulations. It may also be a good practice for the Fire Districts to sign off after review. However, this review or checklist against existing regulations is not a bootstrap authorization to enact more stringent regulations.

### **Liability Concerns do not Support Fire Districts Setting Access Standards**

Some have advanced the idea that if Fire Districts set the access standards then the Fire Districts, and not the county, would be responsible for damages caused by allegedly inadequate fire access roads. This is not a valid argument to support Fire Districts setting access standards.

Government Code 850 immunizes public entities from liability for injuries caused in fighting fires: "Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service." Subsequent sections of the same code immunize public entities from liability for "any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities[,]" (Gov. Code, § 850.2), or for "any injury resulting from the condition of fire protection or firefighting equipment or facilities or . . . for any injury caused in fighting fires." (Gov. Code, § 850.4.) The statutes preclude an action against a public entity for "failure to arrive at a fire in a timely manner" "even when that failure is caused by the firefighters' negligence or willful misconduct. (*San Francisco v. Superior Court* (1984) 160 C.A. 3d 837,838-839.) This broad grant of immunity means that public entities owe no duty to persons or property damaged by fire. (See, *People ex rel. Grijalva v. Superior Court* (United Water Conservation Dist. (2008) 159 Cal.App.4th 1072 at 1078).

Government Code section 850 and 850.2 are designed to provide immunity to a public entity from consequences which might otherwise result from its political decision to provide, or not to provide, fire protection to the public generally, and the extent to which such fire protection is in fact provided. (*Cairns v. County of Los Angeles* (1997) 62 C.A. 4<sup>th</sup> 330 at 335, citing and discussing the Cal. Law Revision Com. com. to §§ 850, 850.2.) In *Cairns*, property owners sued the City of Malibu and the County of Los Angeles for failure to keep a roadway open necessary for fire access. The homeowners alleged damage to houses would have been prevented if the access road was maintained. The city and county were found be immunized from suit, Section 850.4, and related statutes such as section 850.2, were enacted to protect the discretion of public officials in determining whether fire protection should be provided at all, and, if so, to what extent and with what facilities. The statutes recognize that these are essentially political, local policymaking decisions that should not be second-guessed by judges or juries.

### **Conclusions**

The Fire Safe Regulations found in Title 14 as modified by the County in 1992 have been followed with little confusion for 17 years, consistent with State law. The mix of Title 14 and the Fire District amendments has created a regulatory quagmire that has not been able to be understood after at least three workshops. The reason is the Title 14 Fire Safe Regulations and the Fire District amendments were not meant to be intertwined and it is futile to make sense or reconcile two sets of regulations that were not designed or intended to be reconciled. Each time a new problem is presented, the confusion is answered with a new interpretation.

The Fire Districts simply passed a "wish list" of increased access standards to the Fire Code mandated by the State and forwarded the amendments to the County for ratification. These were "ratified" by the county apparently based on assumptions they were ratifying the Fire Code, 2007 Edition. This action should be reconsidered or rescinded with the direction:

1. Title 14 Fire Safe Regulations as amended in 1992 remain in effect as they have since 1992 and are consistent with the legislative plan. The regulations adopted by County should be enforced by County in the same manner as they have for the last 17 years.

2. The Fire Code adopted by California should be adopted by El Dorado County as part of the Building Standards Code and should be enforced according to the requirements of the Code.

A Fire Ordinance should be processed by El Dorado County that incorporates Title 14 as adopted in El Dorado County and considers the more stringent non-building access requirements adopted by the Fire Districts. As part of this authorized process the County will weigh the competing interests that must be considered by the County, including fire and traffic safety, community character and environmental effects. Amador County has adopted such an ordinance that was reviewed and accepted by the State Forestry Board.