Public Comments/Correspondence

Ordinance 23-04
Adopting Requirements for Fuel Breaks on Parcels in Both the State Responsibility and Local Responsibility Areas within the Fire District, Adopting Findings of Fact, and Repealing Ordinance 22-02

Date	Person	Comments
01/18/2023 First Reading	Marc Evans	Public Comment supporting the recommendation
01/18/2023 First Reading	Jonathan Goodwin	Public Comment inquiring if the 100-foot fuel breaks applied to public agencies
02/15/2023 Second Reading	Jonathan Goodwin	Written Correspondence
02/15/2023 Second Reading	Jonathan Goodwin	Written Correspondence
02/15/2023 Second Reading	Jonathan Goodwin	Public Comment opposing the Ordinance and commented on the legality of requiring fuel breaks on public lands and the potential financial cost to the District
08/02/2023	Greenfire Law	Written Correspondence

From: jonathan@sojourningsoul.net
To: Holbrook, Marcia
Subject: MOFD Proposed Ordinance 23-04
Date: Thursday, February 9, 2023 9:05:35 AM

To: Moraga-Orinda Fire District Board of Directors
Subject: Proposed MOFD Ordinance 23-04

I expect that MOFD Board members will vote again to approve this ordinance on the second reading at your February 15th, 2023 meeting. Prior to doing so, however, I believe you should discuss the financial impact on the District of defending this piece of dubious legality if and when it goes to court.

In sum, because there appears to be no instance in California regulations of imposing mandatory fuel breaks on public lands, I fail to see how MOFD can arrogate this privilege unto itself. Moreover, the idea that while falling under State regulations, the District can impose its own regulations upon State agencies (CalTrans, for example) flies in the face of all standards of the chain-of -command.

Another problem you should recognize is that by requiring fuel breaks wherever a public agency boundary may exist, you are clearly violating your own Community Wildfire Protection Plan (CWPP) Section 3.7.

> *These approaches must also align with established habitat management plans and fire management and conservation plans in effect on EBMUD and EBRPD lands. The intended end state is the creation and maintenance of a varied fuel mosaic which mimics the historic natural state and will not support high intensity fire.*

What you will vote to approve is not a fuel mosaic (which would be more effective than a fuel break, if you read the available research) and you would be operating contrary to--not in alignment with--existing agency habitat conservation and fire management plans. In fact, the alignment of District planning with existing plans of other agencies should have been done several years ago as part of the District's CWPP.

As I have shared with the MOFD Board on several occasions, it's relatively easy to get a grant for fuel reduction and to do the work, rather, it's the maintenance of the clearing which is most difficult to effectuate. If this fire district's policy is to hammer agencies with code compliance, can you fairly expect to get co-operation with maintenance in the years to come? Does the Board expect that uncompromising demands which violate principles in its own guiding document will lead to willing agency partnerships? I don't believe so. Will district residents be any safer if public agencies refuse to collaborate with MOFD after a legal blood letting? No.

My primary concern here, Board members, is that it simply makes no sense to dictate that a public agency spend its money wherever their often arbitrary property lines happen to be drawn. What would be vastly more productive would be to assess areas on an individual basis to determine where money could be committed to maintain fuels treatment projects which would directly reduce wildfire intensity (such as mosaic patterns of land management) or improve clearance around public access areas to improve ingress and egress or reduce opportunities for structure ignition. Simply put, what we need is collaborative and sustainable fuels management planning brought about--where other agencies are treated, not as criminals, but as partners--far more than we need mandated arbitrary fuel breaks.

If you look at the guidance documents for creating a CWPP (as I did when I co-chaired the committee that created the first CWPP for Contra Costa County), you'll see that the the word "Community" in the title was chosen for a reason. All emphasis is upon collaboration,

Agenda Item 9.3
Public Comment #01

From: jonathan[redacted]
To: Holbrook, Marcia
Subject: Further Comments on Proposed Ordinance 23-04
Date: Wednesday, February 15, 2023 8:33:38 AM

MOFD Board Members:

I took the trouble of viewing the video of the fire chief's presentation at last month's Board meeting concerning proposed ordinance 23-04 and did find that, although in the written staff report he does not say he feels MOFD's authority does not extend to CalTrans, he did say so at the meeting. However, have you, gentlemen, ever perused the State Fire Code or Public Resources Code? There I can find no indication that a local agency has any authority to tell a regional agency what to do on its own property, unless we're talking about a parcel containing an inhabited structure. I say this because I would suppose that a responsible Board member would want to know that he is acting in alignment with State law when voting for a given agenda item. Just how sure are you that MOFD has any such power, given a seeming lack of it being bestowed in the State codes?

Additionally, I might note that, although the fire chief offers an exemption for protected species, there is no exemption for habitat conservation for species which are not protected. By the way, I am not aware of any MOFD employee having a background in public lands management, whereas our regional public resource agencies have been doing such work for decades. Perhaps their wisdom should be respected by those of us unqualified to judge these matters?

The main point I wish to make here is something related to this, namely, our fire district has lately taken the notion that inter-agency fuels mitigation planning should be a punitive process, using code enforcement as a cudgel, rather than one which truly engages sister agencies as equals. To this point, I thought it might be instructive to offer a sketch of what such a thing might look like. While I don't expect that current District leadership will adopt such an approach, it might benefit the Board to know of this so that some member might suggest it to a succeeding regime.

1. The Fire Management Plans of all agencies owning property in MOFD would be included in an updated version of the District's CWPP.
2. This fire district and applicable agencies would discuss areas of mutual concern and discuss possible fuels mitigation projects which specifically would further protect life, property & the environment and be financially sustainable.
3. These projects would be approved by the relevant boards, thus ensuring some degree of accountability.

You know, the era of MOFD receiving multi-million dollar fuels reduction grants is likely drawing to a close and the time will come when more humble solutions will be sought. Something as simple and practical as the above should be given due consideration in due course.

~Jonathan Goodwin
Canyon, Calif.

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August 2, 2023

By email only

Fire Chief Dave Winnacker
Dwinnacker@mofd.org
President John Jex
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Moraga-Orinda Fire District
1280 Moraga Way
Moraga, CA 94556

RE: Demand for Compliance with the California Environmental Quality Act
Fuel Break Ordinance No. 23-04

Dear President Jex and Fire Chief Winnacker:

I am writing on behalf of Orinda resident, Anita K. Pearson, who on June 7, 2023, was served with a "Pre-Citation Notification" demanding that she comply with Moraga-Orinda Fire District Ordinance No. 23-04 ("Fuel Break Ordinance" or "Ordinance") by creating a 100-foot fuel break around the entire perimeter of her family's 9.5 acre property located at 629 Miner Road in Orinda.

The Pre-Citation Notification listed the requirements of Fuel Break Ordinance, which directs that all owners, lessees, or persons controlling parcels greater than one acre must create and maintain a fuel break that complies with the following criteria:

(A) Annual grasses cut to less than 3".
(B) Removal of all Hazardous Vegetation.
(C) Removal of non-irrigated brush.
(D) Removal of all Combustible Material.
(E) Removal of dead, diseased, or dying trees.
(F) Maintain trees to remove Ladder Fuels so that foliage, twigs, or branches are greater than 6 feet above the ground.

(MOFD Notification, June 7, 2023.) The Notification then goes on to state that:

> Fuel mitigation and defensible space work shall be conducted in a manner that the activities will not result in the taking of endangered, rare or threatened plant or

> animal species or cause significant erosion and sedimentation of surface waters in accordance with California Environmental Quality Guidelines Section 15304.

(sic) (*Id.*) No further guidance or assistance is offered concerning how to prevent the taking of sensitive plants or animals, or even how residents will know how to identify whether such species or sensitive natural plant communities are present on one's property. Nor is any guidance offered concerning best practices for preventing erosion control and sedimentation, such as guidelines for riparian buffer zones, or how to determine if clearing a site could induce erosion or landslides. The Notification does, however, threaten to impose significant fines if compliance is not documented within 30 days.

Ms. Pearson and other residents are extremely concerned by the Notification and by the Ordinance's unreasonable demand that she and other residents undertake to destroy many acres of native plants and wildlife habitat adjoining their property lines.[1] The property in question includes multiple small parcels that Ms. Pearson has devoted many years to maintaining as a conservation area for native plants and wildlife. The directive to remove "all hazardous vegetation," which is not explained in the Notification, is defined by the Ordinance as "including but not limited to seasonal and recurrent grasses, weeds, stubble, brush, dry leaves, dry needles, dead, dying, or diseased trees, … bark, mulch, non-irrigated brush, ... or any other vegetation identified by the Fire Code Official [or their designee]." (Ord. 23-04, § 3.) As confirmed by the discussion during the February 15, 2023, Board hearing, this list includes virtually all native vegetation and ground cover, excepting mature healthy trees, which would effectively result in denuding large swaths of wildlife habitat in areas that are largely undeveloped and remote from buildings. As such, the Ordinance will not only significantly impair Ms. Pearson's use and enjoyment of her property, but appears to have been enacted with no regard for the significant environmental impacts that will result from such draconian measures.[2]

Indeed, the Ordinance makes little effort to ensure habitat protection. While the Ordinance purports to restrict actions that would harm listed species or water quality, it delegates all compliance to individual landowners, with no training, who are subject to serious penalties if they fail to clear their land. The Ordinance does not identify exceptions or exemptions for environmentally sensitive species, or direct landowners to resources to assist compliance, instead dismissing any concerns about impacts to native habitat as a non-issue. The District appears to have made no effort to estimate the number of acres or quality of habitat that will be impacted, or to identify the sensitive species that are likely to occur in these areas. For example, no effort was made to minimize potentially significant adverse effects on California red-legged frogs, Alameda whipsnake, pallid manzanita, sensitive natural plant communities,[3] or any other biological resources that are likely to be impacted by the Ordinance's requirements. This complete disregard for native species is particularly alarming given that the Ordinance is likely to affect more than 500 parcels and impact over a thousand acres of lands—yet the District appears to

[1] The Ordinance also imposes a significant financial burden on Ms. Pearson and other residents, who report that cost estimates in the range of $15,000 to $20,000 per property—just for the first year—are not uncommon.

[2] Because adjoining properties are each required to maintain 100-foot perimeter clearings, the Ordinance actually requires 200-foot clearings to be constructed along each property boundary.

[3] Sensitive natural communities are required to be inventoried and mitigated for as part of CEQA. *See* CDFW, Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities (March 20, 2018), available at: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline.

have failed to conduct any analysis of potentially significant environmental impacts of its vegetation clearance policy, in clear violation of the California Environmental Quality Act (CEQA).[4] This neglect occurred in spite of UC Berkeley, East Bay Regional Parks District and East Bay Municipal Utilities District informing the District that even the reduced level of fuel break clearance required by the predecessor iteration of this policy, Ordinance No. 22-02, would result in unacceptable levels of environmental destruction in violation of the CEQA obligations of those entities.

To confirm that the District wholly ignored CEQA, on July 10, 2023, my office inquired with the District to determine whether it had at least claimed an exemption for the Ordinance. In response, the District's outside counsel acknowledged that the District never adopted a notice of exemption but claimed that the holding in *Robinson v. City & County of San Francisco* (2012) 208 Cal. App. 4th 950, allowed the District to proceed with implementing the Ordinance. According to District counsel, the *Robinson* court absolves an agency from filing a *written* notice of exemption. Though the court declared a writing unnecessary, the court found that—in every instance—the lead agency in that case had issued a CEQA exemption certificate before on-the-ground activity commenced. (*Id.* at 960.) In so holding, the *Robinson* court upheld CEQA's clear statutory requirement that public agencies at least "conduct a preliminary review to determine whether CEQA applies to a proposed project" as a "first tier" of project evaluation. (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 704.) "[A categorical] exemption can be relied on only if a factual evaluation of the agency's proposed activity reveals that it applies." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386.) "[T]he agency invoking the [categorical] exemption has the burden of demonstrating" that substantial evidence supports its factual finding that the project fell within the exemption. (*Id.*)

Indeed, every CEQA case analyzing this issue recognizes CEQA's mandate that a preliminary environmental review is required before an exemption determination can be made. (*See Davidon Homes v. City of San Jose* (1997) 54 Cal. App. 4th 106, 117.) In *Davidon*, the Court of Appeals observed:

> There is no indication that any preliminary environmental review was conducted before the exemption decision was made. The agency produced no evidence to support its decision and we find no mention of CEQA in the various staff reports. A determination which has the effect of dispensing with further environmental review at the earliest possible stage requires something more. We conclude the agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.

(*Id.*) Similarly, here, the staff reports, draft and final Ordinance and recordings of the discussion at both Board hearings have no mention of a CEQA exemption. It appears that the District failed to conduct any threshold analysis of whether the Ordinance qualified for a CEQA exemption and certainly never made any determination that a specific CEQA exemption applied before charging ahead with its harmful vegetation clearing policy. Paradoxically, District counsel's letter asserts

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[4] There is also no evidence that the District identified alternatives or analyzed the cost of compliance that the Ordinance imposes upon individual property owners, lessees, or managers.

that the Class 7 and 8 exemptions apply to the Ordinance, though no mention of a CEQA is made in the Ordinance itself, while the Pre-Citation Notice claims exemption under Class 4.

Furthermore, even if the District had procedurally complied with CEQA and declared the Ordinance exempt, the only potentially applicable CEQA exemptions are the Class 4, 7, and 8 Categorical Exemptions—but none of these apply to this specific Ordinance. (*See* CEQA Guidelines, §§ 15304(i), 15307, and 15308.)

With respect to Class 4 Categorical Exemptions, the Ordinance requires the creation of a 100-foot perimeter, which dramatically *exceeds* the level of fuel management allowed by a Class 4 Exemption, which covers:

> Fuel management activities within 30 feet of structures to reduce the volume of flammable vegetation, provided that the activities will not result in the taking of endangered, rare, or threatened plant or animal species or significant erosion and sedimentation of surface waters. This exemption shall apply to fuel management activities within 100 feet of a structure if the public agency having fire protection responsibility for the area has determined that 100-feet of fuel clearance is required due to extra hazardous fire conditions.

(CEQA Guidelines, § 15304(i).) In contrast, the Ordinance requires vegetation to be cleared within 100-feet of the entire property boundary—not around a structure—which significantly increases the area of habitat loss by pushing individual homeowners to clear a much larger area, all around the edges of their property, and to clear away virtually all vegetation—even where no structures are present.[5]

The Ordinance also provides no means of ensuring that such clearings "will not result in the taking of endangered, rare, or threatened plant or animal species or significant erosion and sedimentation of surface waters." (Ord. 23-04, § 4(c).) The recitation of this desired outcome does not magically achieve this purpose. "Mitigation measures are not mere expressions of hope." (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal. App. 4th 149, 1508.) The District itself must "ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Id.* (citation omitted).) The District has not taken any steps to uphold its own obligation to enforce the environmental protections. Instead, the District treats listed species, erosion, and sedimentation as special exception from liability that owners have the burden to claim, rather than circumstances that the District must in every instance affirmatively ascertain and avoid.

Moreover, unlike clearings around structures where human activity is already present, creating clearings along property lines will disrupt many areas that were previously secluded from human activity and thus more likely to be favored by wildlife.

[5] To put this in perspective, an acre is 43,560 sq. ft. Under the Ordinance, a 5-acre parcel (217,800 sq. ft.) measuring 600 ft. x 363 ft. would be required to clear an area of 152,600 sq. ft., which 3.5 acres—or 70% of the entire property. In contrast, the Class 4 Exemption describes a 100-ft clearing around a building or structure, which, estimated as a circle of 100 ft. radius, amounts to 31,400 sq. ft. (or 14.4% of the property). (This difference also has a major impact on costs, as local estimates for weed-eating alone range from $0.20 to $1.50 per sq. ft., depending on the slope.)

The large size of the clearings may cause habitat fragmentation, eliminate food sources and cover, and create barriers to movement that impair species' reproduction. The activities required by the Ordinance are thus significantly different and potentially more impactful than the much smaller defensible space clearings included under the Class 4 Categorical Exemption.

As to the Class 7 and 8 Categorical Exemptions, these apply only to actions that maintain, restore, enhance, or protect natural resources and the environment. (*See* CEQA Guidelines, §§ 15307, 15308.) In *Save Our Big Trees v. City of Santa Cruz*, the court wholly rejected application of Class 7 and 8 Categorical Exemptions for ordinance amendments meant to allegedly enhance "heritage" protections for some trees while eliminating protections for others because it 'removes rather than secures . . . protections.'" (241 Cal.App.4th at 712 (quoting *Mountain Lion Found. v Fish & Game Comm'n* (1997) 16 Cal. 4th 105, 125.) That is, an ordinance that enhances protections for some natural resources while eliminating protections for others does not necessarily protect the environment. Here, too, the Ordinance compels the incontrovertible destruction of many acres of natural habitat to allegedly protect other natural resources from wildfire. The Ordinance does not afford any "assurance" that each requirement of the Ordinance will result in the "maintenance, restoration, or enhancement of a natural resource" (CEQA Guidelines, § 15307), and relies on individual homeowners, through the threat of penalties and fines, to decide which resources to save and which to destroy. Worse than the realignment of protection priorities at issue in *Save Our Big Trees,* the Ordinance directly orders District homeowners to destroy their environment.

In addition, the state Fire Safe Regulations require that "Fuel Breaks shall be constructed using the most ecologically and site appropriate treatment option, such as, but not limited to, prescribed burning, manual treatment, mechanical treatment, prescribed herbivory, and targeted ground application of herbicides." (14 Cal. Code Regs. § 1276.03(f).) Ordinance 23-04 includes no consideration of ecologically and site appropriate treatment options and contains no provision requiring landowners to use these. Instead, the Ordinance imposes a one-size-fits-all treatment for all properties within the District, regardless of parcel size and location, or any ecological or site specific features or characteristics. Moreover, the public record contains no justification for the District's decision to expand the size of Fuels Breaks for parcels under 10 acres from 30 feet around the perimeter of each parcels, as required by the District's previous fire break ordinance (Ord. 22-02 (repealed)), to 100 feet under the current Ordinance.[6] (*See e.g.,* Agenda Packet and Regular Meeting Minutes, MOFD Bd. of Directors Meeting, Jan. 18, 2023.) There is also no evidence that the District considered ecological impacts or how many parcels or acres would be affected in making this decision.[7] (*Id.*)

Please accept this letter as formal notice that Ms. Pearson and her daughter, Sandy Pearson, intend to file a lawsuit in Contra Costa County Superior Court to ensure compliance with CEQA. Ms. Pearson is confident she would prevail in litigation if the District refuses to

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[6] At the Hearing on Ord. 23-04, the Fire Chief stated only that this provision was being revised because the variation in requirements for inhabited versus uninhabited parcels and the "sliding scale" was too complicated and confusing for the public. (*See* Audio Recording, MOFD Bd. of Directors Meeting, Jan. 18, 2023.)

[7] There is also no evidence that the District considered the increased financial burden this expansion would impose on the affected property owners, lessees, or managers.

immediately cease and desist further efforts to implement the Fire Break Ordinance, rescind the Fire Break Ordinance, and comply with CEQA before taking any action to approve a new Fire Break Ordinance. At a minimum, Ms. Pearson expects to the District to evaluate the potentially significant environmental impacts of clearing 100 feet of vegetation from the perimeter of every property subject to the Ordinance, which would first require that the District determine how many acres are likely to be impacted, and to identify the specific landscape features, sensitive natural plant communities and protected species that are likely to be present within these areas and in need of protection.

Thank you for your prompt attention to this issue. If you have any questions, you may contact me at the address listed herein.

Sincerely,

Jessica L. Blome
Susann Bradford
Greenfire Law, PC

cc:
Director Greg Hasler, ghasler@mofd.org
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