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March 11, 2022

**Via Electronic Mail Only (info@mofd.org)**

Board of Directors  
Moraga-Orinda Fire Protection District  
1280 Moraga Way  
Moraga, CA 94556

Re: Ordinance No. 22-02

Dear President Donner and Members of the Board:

We appreciate the opportunity to comment on proposed Ordinance No. 22-02, an ordinance adopting fuel break requirements for undeveloped parcels and certain low density large developed parcels (the Ordinance). We did not learn of this Ordinance until after your Board held its first reading of the Ordinance last month. We were surprised that no Moraga-Orinda Fire Protection District (MOFD) representative reached out to the East Bay Regional Park District (Park District)—either prior to the first reading or since then—even though it appears the Ordinance would greatly impact the Park District’s lands and resources within MOFD.

The Park District shares the same goals as MOFD to reduce the risk and spread of wildfires. The Park District complies with all applicable fire codes, including applicable provisions of the state fire code and applicable provisions of any local jurisdictions. And the Park District has worked and remains committed to working collaboratively with the MOFD to reduce the risk of wildfires. The Park District has spent much of this winter conducting its own fuel hazards reduction program on parklands throughout Alameda and Contra Costa counties, including on many areas within MOFD’s boundary.

But as described below, the Ordinance’s application to undeveloped lands within the State Responsibility Area (SRA) exceeds MOFD’s jurisdiction and state law as neither MOFD’s enabling legislation nor any delegated powers from the Department of Forestry and Fire Protection (CalFire) gives MOFD the ability to regulate these open space parklands. We therefore request that the Board *not* adopt the Ordinance.

**I. CalFire, not MOFD, has Responsibility Over Undeveloped Parklands.**

Like park districts, fire districts are created by enabling legislation that defines the scope and jurisdiction of the special district. Special districts may not exceed that legislatively granted jurisdiction. MOFD’s enabling legislation specifically excludes fire district responsibility for undeveloped lands within the SRA, including all of the Park District’s undeveloped parklands within MOFD’s boundary. While MOFD’s boundaries may encompass an SRA, “[u]pon inclusion of a state responsibility area in a district, whether by formation or annexation, the state shall retain its responsibility for fire suppression and prevention on timbered, brush, and grass-covered lands.” Health & Safety Code § 13811. A fire district is responsible for fire suppression and prevention only for structures within the SRA. *Id.* The areas purportedly regulated by the Ordinance within the SRA are the responsibility of

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the state because they are structure-less, timbered, brush, and grass covered undeveloped lands. Thus, these lands are not the responsibility of MOFD.

While a *county* may assume responsibility for fire prevention and suppression of all fires on all lands in the county, including lands within SRAs, Contra Costa County has assumed no such responsibility here. *See* Pub. Res. Code § 4129. In fact, only six counties in California have taken on this responsibility: Kern, Los Angeles, Marin, Orange, Santa Barbara and Ventura.<sup>1</sup> These counties assumed responsibility by county ordinance with the concurrence of the Director of Forestry and Fire Protection (CalFire Director). Pub. Res. Code § 4129. And then each entered a contract with CalFire, not exceeding three years. *Id.* § 4133.

Currently, the state funds 68 fire stations, 82 fire engines, 12 bulldozers, 10 fire prevention officers, and positions within the 6 emergency command centers of the six counties.”<sup>2</sup> Only when a county enters this contract, may the county exercise “all the duty, power, authority, and responsibility for the prevention and suppression of all fires on all land in the county.” *Id.* § 4129. Contra Costa County has no such contract. Therefore, neither Contra Costa County nor MOFD have the “duty, power, authority, and responsibility for the prevention and suppression” of fires in the SRA. MOFD, thus, has no authority to impose this Ordinance on undeveloped parcels within the SRA.

State law confirms that, except when one of these contracts exists, CalFire has the responsibility for preventing fires and assessing fire hazards on undeveloped land within an SRA. *See* Pub. Res. Code §§ 4170 et seq. In an SRA, it is the CalFire Director who has the authority to abate a fire hazard public nuisance. *Id.* § 4171-4172. This article of the Public Resources Code also provides requirements for notices and hearings regarding a public nuisance and allows the CalFire Director to order property owners to abate public nuisances. *Id.* §§ 4174-4176. And it ultimately provides that CalFire can abate any nuisance not abated by the property owner. *Id.* § 4177. Within the SRA, it is CalFire, not MOFD, who has authority for fire prevention and the issuance of citations.

## **II. CalFire Has Not Delegated MOFD the Authority to Adopt This Ordinance under Public Resources Code section 4290.**

Section 2(d) of the Ordinance asserts that “[o]n October 27, 2021, [CalFire] delegated to [MOFD] the authority to inspect and enforce the Fire Safe Regulations promulgated under Section 4290. These standards for fuel breaks on undeveloped parcels and large, low-density parcels are consistent with that delegation and with the provisions of Public Resources Code Section 4290(c).” The CalFire letter, however, grants no authority to require 30- to 100-foot fuel breaks on undeveloped parklands.

The standards for fuel breaks that the CalFire letter delegates are found in the “SRA/VHFHSZ Fire Safe Regulations” at Title 14 California Code of Regulations (CCR) sections 1270.00-1276.04. These are minimum fire safety standards for defensible space applicable to “the perimeters and access to all residential, commercial, and industrial building construction” within the SRA and within very high fire hazard severity zones within Local Responsibility Areas (LRA). Pub. Res. Code § 4290(a). These regulations do not and cannot extend to undeveloped parcels—these regulations were “prepared and adopted for the purpose of establishing minimum

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<sup>1</sup> *Contract Counties*, Cal Fire <https://www.fire.ca.gov/programs/fire-protection/cooperative-efforts/> (last accessed March 9, 2022).

<sup>2</sup> *Contract Counties*, *supra*.

wildfire protection standards in conjunction with building, construction and development.” 14 CCR § 1270.01. And per Title 14 CCR section 1270.02, these regulations apply exclusively to “perimeters and access to” building construction, siting of manufactured buildings, tentative and parcel maps, and building permit applications where “conditions relating to the perimeters and access to the buildings were not imposed as part of the approval of the parcel or tentative map.”

While Section 4290(c) directs the State Fire Board to “update regulations for fuel breaks and greenbelts near communities” this is meant “to provide greater fire safety for the perimeters to all residential, commercial, and industrial *building construction*” within the SRA and within very high fire hazard severity zones within the LRA. (Emphasis added.) This direction applies to development and construction, not to undeveloped areas without any development planned. Thus, this reference to fuel breaks does not grant MOFD the authority to enact an ordinance regulating undeveloped parcels. The Ordinance is thus neither “consistent with [the CalFire] delegation” or “with the provisions of Public Resources Code Section 4290(c).” Ordinance § 2(d).

### **III. MOFD’s Jurisdiction within the SRA Is Limited to Structures.**

Public Resources Code section 4117 also does not provide MOFD the authority to regulate undeveloped land within the SRA. As discussed above and pursuant to MOFD’s enabling legislation, CalFire retains responsibility and jurisdiction for “fire suppression and prevention on timbered, brush, and grass-covered lands” in the SRA. Health & Safety Code § 13811. MOFD is responsible for “fire suppression and prevention for structures in the” SRA. *Id.* Public Resources Code section 4117 simply recognizes that local agencies may adopt “fire prevention restrictions or regulations” that are “more restrictive than state statutes in order to meet local fire hazard conditions.” It does not allow MOFD to adopt fire prevention regulations that go beyond the authority it is granted in its enabling legislation. For example, MOFD may adopt stricter fire prevention regulations for structures, which would apply in the SRA, but it has no jurisdiction over the Park District’s undeveloped parcels within the SRA.

### **IV. The Ordinance Does Not Allow for Modifications to Minimize Impacts to Protected Species as Required by State and Federal Law.**

The Park District faces complex resource management issues and permitting requirements on its parklands. As one example, in recognition of the critical fire risk management work the Park District does, FEMA awarded over \$6.9 million to fund the Park District’s implementation of its Wildfire Hazard Reduction and Resource Management Plan (Fire Plan) as part of FEMA’s Hazardous Fire Risk Reduction Project for the East Bay Hills. All of the Park District’s fire management work in this area, including areas within the MOFD, is subject to the biological opinion prepared for the FEMA project. That biological opinion contains over 70 pages of specific requirements and measures to avoid and minimize adverse effects on California red-legged frogs, Alameda whipsnakes, pallid manzanita, and other biological resources that make compliance with all of the Ordinance’s requirements impossible.

While the Ordinance allows for modifications to its requirements, modifications may only be granted at the discretion of the Fire Chief and only if he or she finds, among other requirements, that “such modification does not lessen health, life, and fire safety requirements.” Because protecting special status species and preventing erosion or sedimentation of surface waters necessarily requires reducing or removing the fuel break requirement, this finding could not be made. Thus, the Park District could not comply with both the

Ordinance and the biological opinion governing the Park District’s fire management efforts within MOFD, further highlighting why the Ordinance should not apply to open-space parklands on undeveloped lands within the SRA.

**V. The Park District Is Not Subject to the Checkerboard of Varying Local Ordinances.**

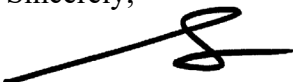
The Park District manages 73 parks across 125,186 acres in two counties and 33 cities. Its lands fall within the bounds of 14 fire districts and municipal fire departments, as well. For that reason, the First District Court of Appeal recently recognized that the Park District has “extremely broad and all-inclusive powers over the lands” that the Park District owns and that subjecting the Park District to local ordinances that conflict with that authority would create a “‘cross-county or cross-jurisdictional ‘checkerboard’ problem,’ with serious practical and policy considerations.” *Save Lafayette Trees v. East Bay Regional Park District* (2021) 66 Cal.App.5th 21, 45, 48. This checkerboard problem would severely impair the Park District’s management of its lands by requiring it to comply with multiple and varied requirements and timelines for managing its parklands. Management of Park District resources is not just the traditional function of the Park District, it is also the Park District’s fundamental purpose. Thus, the Park District’s enabling legislation preempts any local ordinance that attempts to regulate the Park District’s management of its resources, as the enabling legislation has delegated that responsibility to the Park District, subject, of course, to state laws or regulation by CalFire. *Id.* at 44-49; Pub. Resources Code § 5541.

Given this stewardship responsibility, the Park District maintains its own fire department and manages its fire risk under its Fire Plan, which provides sound, long-term strategies for reducing fuel loads and managing vegetation within the Park District’s parks. The Fire Plan seeks to minimize the risk of Diablo wind-driven catastrophic wildfire along the wildland-urban interface while ensuring the protection and enhancement of ecological values and resources within its jurisdiction. This Fire Plan considers the Park District’s resources, including special status species and the parklands’ unique environmental features, and provides several types of fuel treatment methods and plans for fuel treatment across its parks to prioritize and schedule fuel treatment actions.

As the Court recognized, “to allow a local jurisdiction to ‘dictate’ how a regional park district is to manage its own lands and resources would render unworkable any district-wide plans”—just like the Fire Plan. *Save Lafayette Trees*, 66 Cal.App.5th at 48. The Legislature, by providing for regional park districts to encompass more than one local jurisdiction, did not intend for each local jurisdiction “to enact legislation controlling activities of a district” because were this to happen “it is obvious there would be confusion as to rules and regulations” that apply to the park district. *Id.* at 48. Therefore, MOFD’s ordinance purporting to regulate the Park District’s undeveloped lands impermissibly seeks to dictate how the Park District manages its lands.

In conclusion, adoption of the Ordinance would exceed MOFD’s jurisdiction and violate state law. We urge you to reject the Ordinance as drafted and direct staff to modify it to exclude undeveloped parcels within the SRA and application to the Park District. The Park District remains committed to working with MOFD to reduce fire risk within the East Bay hills.

Sincerely,



Sabrina Landreth  
General Manager