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Prohibition Over Prevention: How California's Land Development Ban Will Hinder Solutions to the Wildfire Crisis

Tyler O'Connell

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Prohibition Over Prevention: How California’s Land Development Ban Will Hinder Solutions to the Wildfire Crisis

Tyler O’Connell*

Code Section Affected

Government Code § 51182.5 (amended).
SB 474 (Stern); 2020 STAT. CH. 159.

TABLE OF CONTENTS

I. INTRODUCTION.....	344
II. LEGAL BACKGROUND	346
A. <i>Carving up California: The Overlapping Nature of Wildfire Regulation</i>	347
B. <i>California’s Administrative Apparatus for Wildfire Management: The Board of Forestry & Cal Fire</i>	348
C. <i>The Tension Between State and Local Governments in Managing The Threat of Wildfire</i>	348
D. <i>Problems with Prohibition: The Takings Clause and Land Use Regulation</i>	350
1. <i>Village of Euclid v. Ambler Realty Co.</i>	350
2. <i>Penn Central Transportation Co. v. City of New York</i>	351
3. <i>Lucas v. South Carolina Coastal Council</i>	351
E. <i>Fire Prevention: Alternative Approaches That California Has Considered</i>	351
III. SB 474	352
IV. ANALYSIS	352
A. <i>The Police Power: How SB 474 Would Have Undermined Local Agency Autonomy and Prevented Nuanced Solutions</i>	353
B. <i>Another Problem with Prohibition: The Takings Clause</i>	356
1. <i>The Euclid Test: A Rational Connection</i>	356
2. <i>Regulatory Takings: The Penn Central Test</i>	357

* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2022; B.A. History, California State University, Chico 2014. To my fiancée, you help me keep my head when all about me are losing theirs. I am grateful to the Law Review editors for their persistence and attention to detail throughout the publication process. Finally, I would like to thank my friend Christopher “Cheetah” Tchudi for sharing his story of surmounting the challenges of the 2018 Camp Fire. My heart goes out to the many impacted Californians who continue to persevere in the face of the ever-mounting challenges posed by wildfires.

3. The Lucas Test: “Loss of all Economically Beneficial Use”	359
C. The Reality: What A Dose of Prevention May Be Worth in an Era of Suppression	361
D. Practical Considerations: Other Measures Can Have Real Positive Effect for Individual Californians Facing Wildfire Risk....	363
1. The Failed AB 1516—Fire Prevention: Defensible Space and Fuels Reduction Management	364
2. The Abandoned SB 739—Fire Prevention: Defensible Space and Home Hardening Training	365
V. CONCLUSION.....	365

I. INTRODUCTION

Around 6 a.m. on November 8, 2018, Christopher Tchudi awoke to the smell of smoke and the sound of helicopters overhead.¹ Careening toward his property—TurkeyTail Farms—in Yankee Hill, California was the state’s deadliest and most destructive wildfire in recorded history: the 2018 Camp Fire.² Due to the threat of wildfire in recent years, Christopher had become accustomed to evacuating his farm on short notice.³ Yet that morning he hesitated to leave his forty acres of oak-dotted grassland given the distance from which the fire seemed to be burning.⁴ Wind gusts in the nearby canyon soon reached sixty miles per hour, spreading the flames at a rate covering eighty football fields of land area per minute.⁵ The Butte County Sheriff soon arrived at TurkeyTail Farms and told Christopher to pack what he could as quickly as possible and evacuate.⁶ Christopher heeded the warning and escaped safely with most of his animals.⁷ Upon his return, Christopher found embers had landed on his unfinished tar paper roof and completely destroyed his home.⁸

1. Telephone Interview with Christopher Tchudi, Local Farmer, TurkeyTail Farms (May 25, 2020) (notes on file with the *University of the Pacific Law Review*).

2. See *Facts + Statistics: Wildfires*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-wildfires> (last visited June 13, 2020, 12:42 PM) (on file with the *University of the Pacific Law Review*) (tallying eighty-five lives lost, over 18,000 structures destroyed—including the vast majority of the entire town of Paradise, California—and between \$8.5–\$10.5 billion in insured losses).

3. See Tchudi, *supra* note 1 (stating that on three prior occasions Christopher had prepped his farm for evacuation due to approaching wildfires).

4. *Id.*

5. Priyanka Boghani, *Camp Fire: By the Numbers*, PBS: FRONTLINE (Oct. 29, 2019), <https://www.pbs.org/wgbh/frontline/article/camp-fire-by-the-numbers/> (on file with the *University of the Pacific Law Review*); see generally NAT’L FOOTBALL LEAGUE, RULE 1: THE FIELD (2011), available at http://static.nfl.com/static/content/public/image/rulebook/pdfs/4_Rule1_The_Field.pdf (on file with the *University of the Pacific Law Review*) (describing how an American NFL football field is “a rectangular field, 360 feet in length and 160 feet in width”—equaling an area 57,600 feet square—including endzones).

6. Tchudi, *supra* note 1.

7. *Id.*

8. *Id.*

TurkeyTail Farms is in a region the California Department of Forestry and Fire Protection (“Cal Fire”) deems a “high-risk fire hazard severity zone.”⁹ These regions are also home to the wildland-urban interface (“WUI”), “the area where structures and other human development meet or intermingle with undeveloped wildland.”¹⁰ The WUI is among the most difficult land to protect against and suppress wildfire.¹¹ Fire risk in California has ignited in recent years—growing five-fold since the 1970s.¹² As of 2019, California is home to over two-million properties at high-to-extreme risk of wildfire and ranks first in the nation for at-risk properties.¹³ The Camp Fire was the most destructive and deadliest of these wildfires to date, almost completely destroying the town of Paradise, California.¹⁴

The shocking imagery of wildfire destruction to Californian’s homes and properties, like TurkeyTail Farms, has increased pressure on the California Legislature to devise solutions.¹⁵ In recent years, California lawmakers have entertained many different ideas to solve this wildfire crisis.¹⁶ The most recent attempt—SB 474—sought to mitigate this substantial risk with a broad, top-down approach.¹⁷ The bill, had it passed, would have instituted a ban on all residential

9. See Cal. State Geoportal, *California Fire Hazard Severity Zone Viewer*, CA.GOV, <https://gis.data.ca.gov/app/CALFIRE-Forestry::california-fire-hazard-severity-zone-viewer> (last visited May 31, 2020, 9:34 AM) (on file with the *University of the Pacific Law Review*) (deeming this region high-risk is based upon several factors which Cal Fire considers, such as: fuel, slope, and fire weather).

10. BUTTE CTY., BUTTE COUNTY COMMUNITY WILDFIRE PROTECTION PLAN 15 (2015-2020 ed. 2015); Kimiko Barrett, *Reducing Wildfire Risk in the Wildland-Urban Interface: Policy, Trends, and Solutions*, 55 IDAHO L. REV. 3, 15 (2019).

11. See JENNIFER GIAMBATTISTA, A PRIMER: CALIFORNIA’S WILDLAND FIRE PROTECTION SYSTEM 13–14 (Legislative Analyst’s Office, 2005), available at https://lao.ca.gov/2005/fire_protection/051205_fire_protection.pdf (on file with the *University of the Pacific Law Review*) (listing factors which complicate fire prevention and suppression, such as: (1) dry conditions; (2) high winds; (3) sparse population; and (4) development presence which hinders prescribed burning).

12. See Robinson Meyer, *California’s Wildfire’s are 500 Percent Larger Due to Climate Change*, ATLANTIC (July 16, 2019), <https://www.theatlantic.com/science/archive/2019/07/climate-change-500-percent-increase-california-wildfires/594016/> (on file with the *University of the Pacific Law Review*) (noting that “[s]ince 1972, California’s annual burned area has increased more than five[-]fold”).

13. See INS. INFO. INST., *supra* note 2 (listing the number of at risk properties within the “Top 10 States at High To Extreme Wildfire Risk:” (1) California: 2,019,800; (2) Texas: 717,800; (3) Colorado: 371,100; (4) Arizona: 237,900; (5) Idaho: 175,000; (6) Washington: 160,500; (7) Oklahoma: 153,400; (8) Oregon: 151,400; (9) Montana: 137,800; (10) Utah: 136,000).

14. Boghani, *supra* note 5.

15. See Annie Lowrey, *California is Becoming Unlivable: The State is Plagued by Two Major Issues: Wildfires and Lack of Affordable Housing: Each Problem Exacerbates The Other*, ATLANTIC (Oct. 30, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/can-california-save-itself/601135/> (on file with the *University of the Pacific Law Review*) (highlighting that the high housing cost crisis drives WUI development, which in conjunction with climate change, increases wildfire’s impact on humans).

16. See CAL. GOV’T CODE § 51189 (amended by SB 190) (requiring the Office of the State Fire Marshal to create a state-sponsored fund to assist with defensible space creation on private lands); AB 3164, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended May 4, 2020 but not enacted) (aiming to create a “wildland-urban interface wildfire risk model” to educate Californians); *infra* Section IV.D (discussing the failed bills AB 1516 and SB 739).

17. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (banning all “residential . . . commercial, retail, or industrial” development on high fire risk land throughout the state).

and commercial development across large areas of the state.¹⁸ But the ban reached too far into local government’s zone of responsibility and, more importantly, violates fundamental private property rights.¹⁹ Further, SB 474 ignored the reality that different regions of the state have different levels of wildfire preparedness, capacity for compliance, and development needs.²⁰ While SB 474 reflected a legitimate fear of wildfire, it lacked a clear vision for comprehensive solutions and would have created more problems than it solved.²¹

II. LEGAL BACKGROUND

Property and wildland fire protection in California is dependent upon the efforts of multiple agencies—often with overlapping authority.²² Utilizing both statutory and regulatory authority, California has assembled a patchwork methodology for combating wildfires and often taps local resources.²³ State authorities create generally applicable minimum firesafe standards that cities and counties are free to supplement with more specific and rigorous local fire codes.²⁴ Yet both the U.S. and California Constitutions limit the reach of a state or local agency authority to employ certain land use regulations.²⁵ Moreover, individual property owners have specific statutory obligations to maintain their land in ways that limit the risk of wildfire.²⁶

Section A highlights California’s tiered-land categorization system between federal, state, and local authorities.²⁷ Section B identifies the two main California state agencies the Legislature tasked with administering state-managed wildfire policy.²⁸ Section C discusses the role of local agencies in establishing their own wildfire management policies—despite ever-increasing state government

18. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (“a new development shall not be created or approved in a very high fire hazard severity zone or a state responsibility area.”).

19. See *infra* Sections IV.A–B (arguing there are considerable federalism and Takings Clause implications of such a sweeping land development prohibition).

20. See *infra* Sections IV.C–D (discussing the inherently local nature of different regions of the state in measuring wildfire preparedness).

21. See *infra* Sections IV.A–D (asserting constitutional and practical reasons why a land development ban would be unwise and potentially ineffectual).

22. GIAMBATTISTA, *supra* note 11, at 5.

23. See *id.* (“This integration is authorized by statute and is guided by interagency agreements under which [Cal Fire] provides services to local and/or federal agencies, and vice versa” all “in order to avoid duplication of firefighting resources and to allow the closest available resources to respond to a fire, regardless of jurisdiction”).

24. See CAL. GOV’T CODE § 51175(c) (West 2020) (“[I]t is not the intent of the Legislature in enacting this chapter to limit or restrict the authority of a local agency to impose more restrictive fire and public safety requirements, as otherwise authorized by law.”).

25. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 633 (Carolina Acad. Press, 4th ed. 2016) (“At some point, regulation may so restrict an owner’s rights as to become a taking—thus requiring payment of compensation.”); see also CAL. CONST. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”).

26. CAL. PUB. RES. CODE § 4291 (West 2020).

27. *Infra* Section II.A.

28. *Infra* Section II.B.

encroachment.²⁹ Section D outlines Fifth Amendment implications of a development prohibition on private land by discussing the pivotal Supreme Court cases at issue.³⁰ Section E discusses recent, promising legislative attempts to manage California's wildfire policy.³¹

A. Carving up California: The Overlapping Nature of Wildfire Regulation

California does not have a single, statewide wildfire policy.³² Instead, a mix of federal, state, and local authorities categorize and regulate all land within the state.³³ Respectively, these areas are federal responsibility areas, state responsibility areas ("SRAs"), and local responsibility areas ("LRAs").³⁴ California contains roughly 101 million acres of land.³⁵

Federal agencies own, manage, and regulate nearly half of California's land mass—roughly forty-eight million acres.³⁶ Given the mix of federal agencies that regulate these lands, the wildfire policies vary considerably.³⁷ Generally, federal agencies manage wildfire policy solely within their landholding's borders, leaving the State of California to manage its own landholdings.³⁸

The state government administers wildfire policy for the SRAs, which comprise roughly thirty-one million acres of predominantly privately owned, high-risk land.³⁹ Local authorities regulate California's remaining twenty-two million acres as LRAs.⁴⁰ Both SRAs and LRAs contain "high-risk" lands, but the state can only assume control over a high-risk region within an LRA with the local government's approval.⁴¹

29. *Infra* Section II.C.

30. *Infra* Section II.D.

31. *Infra* Section II.E.

32. See TAYLOR O. MILLER ET AL., CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 80.03 THE ROLE OF GOVERNMENT 1, 2 (2020) (outlining the multiplicity of agency authority over California's wildlands, including, the federal, state, and local agencies operating within California's borders).

33. See GIAMBATTISTA, *supra* note 11, at 1 (highlighting the fragmented nature of California land categorization).

34. *Id.* at 2.

35. *Id.* at 1.

36. See *id.* at 3 (discussing the various federal agencies which manage wildfire policy on their respective landholdings in California: the United States Forest Service; the Bureau of Land Management; Fish and Wildlife Service; Bureau of Indian Affairs; the Department of Defense; the U.S. Army Corps of Engineers; and the U.S. Bureau of Reclamation).

37. See *id.* at 4 (noting that some agencies pursue a suppression strategy almost entirely, while others permit burns to increase resource values).

38. *Id.*

39. *Id.* at 1.

40. *Id.*

41. See CAL. GOV'T CODE §§ 51178–51179 (West 2020) (outlining the interplay between state and local authorities whereby the State Director of Forestry and Fire Protection identifies areas which ought to be "very high fire hazard severity zones" and recommends their inclusion into the state's regulatory framework. But this inclusion is dependent upon local agency approval, disapproval, or modification).

2021 / Land Development Ban Will Hinder Solutions to the Wildfire Crisis

B. California's Administrative Apparatus for Wildfire Management: The Board of Forestry & Cal Fire

In general, two state agencies promulgate and administer California wildfire policy: The Board of Forestry and Fire Protection (“Board”) and Cal Fire.⁴² The Board sets general wildfire policy and development standards for the SRAs.⁴³ Further, the Board plays a role—secondary to local governments—in deciding which land becomes an SRA.⁴⁴

Cal Fire conducts prescribed burns, vegetation management, insect and disease control, and—most importantly—fire suppression.⁴⁵ In response to the escalating severity of wildfires, Cal Fire has consistently allocated increasing amounts of emergency funding toward suppression costs.⁴⁶ Meanwhile, Cal Fire’s annual expenditures toward preemptory fire preparedness have consistently decreased.⁴⁷

C. The Tension Between State and Local Governments in Managing The Threat of Wildfire

The California Constitution empowers local governments with broad authority.⁴⁸ The Legislature has recognized the Board’s limited wildfire policy

42. Mark V. Thornton, *General History of Cal Fire*, CAL FIRE (June 15, 2020), <https://www.fire.ca.gov/about-us/history/> (on file with the *University of the Pacific Law Review*).

43. See generally CAL. CODE REGS. tit. 14, ch. 7 (2016) (outlining the Board’s minimum firesafe standards for: (1) defensible space requirements; (2) signing and building numbering; (3) emergency water access; and (4) fuel modification); MILLER ET AL., *supra* note 32, at 2.

44. See CAL. PUB. RES. CODE § 4125 (West 2020) (“The board shall include within state responsibility areas all of the following lands: (a) Lands covered wholly or in part by forests or by trees producing or capable of producing forest products. (b) Lands covered wholly or in part by timber, brush, undergrowth, or grass, whether of commercial value or not, which protect the soil from excessive erosion, retard runoff of water or accelerate water percolation, if such lands are sources of water which is available for irrigation or for domestic or industrial use. (c) Lands in areas which are principally used or useful for range or forage purposes, which are contiguous to the lands described in subdivisions (a) and (b).”).

Id.; see also GOV’T § 51179 (West 2020) (requiring local agency acquiescence when the state seeks to assume control over “high-risk” lands).

45. MILLER ET AL., *supra* note 32, at 3.

46. See generally CAL. DEP’T OF FORESTRY & FIRE PROTECTION, EMERGENCY FUND FIRE SUPPRESSION EXPENDITURES (2019), available at <https://www.fire.ca.gov/media/8641/suppressioncostsonepage1.pdf> (on file with the *University of the Pacific Law Review*) (showing massive increases in emergency fire suppression expenditures year after year); see generally GIAMBATTISTA, *supra* note 11, at 15 (“When a fire escapes ‘initial attack,’ the cost of fire suppression can rise quickly. This is because these fires often require large numbers of personnel and equipment, aviation support, lodging and meal costs, and overtime.”).

47. See GIAMBATTISTA, *supra* note 11, at 9 (showing fire prevention expenditures in 2004–2005 as less than five percent of Cal Fire’s total expenditures); see also Jim Miller, *Why Isn’t California Spending Millions in Fire Prevention Money?*, TRIBUNE NEWS SERV. (Oct. 5, 2015), <https://www.governing.com/topics/transportation-infrastructure/millions-of-dollars-in-california-fire-prevention-money-goes-unspent2.html> (on file with the *University of the Pacific Law Review*) (discussing tens of millions of dollars left unspent from Cal Fire’s fire prevention fund in 2015).

48. See CAL. CONST. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”).

mandate, which does not include “[l]ands within the exterior boundaries of any city.”⁴⁹ Therefore, if local agencies in the SRAs meet minimum Board standards for firesafe development, those agencies may regulate above those standards.⁵⁰ Within city boundaries, local agencies have even broader control over their zoning and fire regulation—as long as local laws do not conflict with general state laws.⁵¹ Such a conflict exists if the local regulation “duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication.”⁵²

California statutes and local ordinances acknowledge local power to regulate wildfire policy.⁵³ Yet the same statutes that acknowledge local regulatory power also outline the encroaching nature of state authority into wildfire policy.⁵⁴ Despite these efforts toward preemption, localities have historically maintained considerable latitude when administering most aspects of wildfire preparedness in their jurisdictions.⁵⁵ The state merely sets broadly written minimum safeguards to provide a regulatory foundation for fire preparedness across the state.⁵⁶ Yet when specific needs arise, local governments regulate more precisely to manage the details.⁵⁷

49. See CAL. PUB. RES. CODE § 4127(b) (West 2020) (declaring “[l]ands within the exterior boundaries of any city, except a city and county with a population of less than 25,000” as outside the Board’s authority).

50. CAL. CODE REGS tit. 14, § 1270.04 (2016).

51. Christine Dietrick, *Land Use 101: A Field Guide*, CITY OF SAN LUIS OBISPO 2 (2015), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/Land-Use-101-Webinar-Paper.aspx> (on file with the *University of the Pacific Law Review*).

52. *Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 236 (2006).

53. See CAL. GOV’T CODE § 51179 (West 2020) (allowing for local agencies to refute, override a lack of, or accept Director of Forestry recommendations on land classification relating to designations for “high-risk” areas); see also PUB. RES. § 4291 (allowing for local agencies to provide stronger regulatory measures than the minimum safeguards created by the Board).

54. See GOV’T § 51179 (providing for authority vested in the Director of the Board of Forestry to recommend land within a local agency’s purview to be categorized as “high-risk” and therefore subject to state regulation); see also PUB. RES. § 4291 (allowing the Director of the Board of Forestry to “vary the requirements” for both building codes and vegetation removal within LRAs).

55. See Edith Hannigan, *Using Pre-Disaster Community Capacity to Address Land Use Post-Wildfire*, 55 IDAHO L. REV. 29, 49 (2019) (noting the three primary local agency regulatory hurdles for landowners in building on parcels at risk of fire: (1) “permitting fees; (2) debris removal; and (3) navigating the governmental systems to accomplish rebuilding”).

56. See Sameer Ponshe, *Municipal Wildfire Management in California: A Local Response to Global Climate Change*, 32 PACE ENVTL L. REV. 600, 630 (2015) (“While the [S]tate of California promulgates its own building code, municipalities are authorized to enact more restrictive building standards so long as they can establish that ‘modifications or changes are reasonably necessary because of local climatic, geological or topographical conditions.’”) (quoting CAL. HEALTH & SAFETY CODE § 17958.7 (West 2020)).

57. See BUTTE CTY., *supra* note 10 (highlighting how minimum state standards are essential, yet going on to describe the specific needs of fire preparedness for Butte County residents, including: (1) preventing soil erosion; (2) maintaining water quality; (3) protecting timberlands valued at around \$2.5 billion; (4) safeguarding hydroelectric power facilities; and (5) prescribed burning); see also Ponshe, *supra* note 56, at 611–26 (outlining several examples of differing municipal fire code regulations, based on differing needs, from various localities in California).

D. Problems with Prohibition: The Takings Clause and Land Use Regulation

The Fifth Amendment to the U.S. Constitution provides that the state shall not take “private property . . . for public use without just compensation.”⁵⁸ While the Takings Clause initially applied only to the federal government, ratification of the Fourteenth Amendment and key Supreme Court rulings incorporated the Takings Clause to state and local governments.⁵⁹ Governmental takings of tangible, private property are uncommon in the U.S.⁶⁰ However, land use regulation has become quite common.⁶¹ In the past century, the Supreme Court has responded to these trends by issuing several key holdings on American Takings Law.⁶² Subsection 1 addresses the foundational zoning decision, *Euclid*, which identifies the acceptable goals of such regulation.⁶³ Subsection 2 discusses *Penn Central* and its balancing test for determining if a government has engaged in a taking.⁶⁴ Finally, subsection 3 details the *Lucas* holding that inhibition of economic use of property may constitute a taking.⁶⁵

I. Village of Euclid v. Ambler Realty Co.

Euclid is the Supreme Court’s seminal regulatory takings case.⁶⁶ The Court held that zoning laws are valid unless they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁶⁷ Courts now refer to this test as the *rational basis test*, which gives strong deference to a state or local government’s regulation.⁶⁸

58. U.S. CONST. amend. V.

59. See SPRANKLING, *supra* note 25, at 696 (highlighting the Fifth Amendment’s Takings Clause as applicable to the state and local governments) (citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (incorporating the 5th Amendment’s Takings Clause to the states via the Due Process clause of the 14th Amendment)).

60. See Kemberly M. Watt, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-Kelo Northwest*, 43 IDAHO L. REV. 539, 539–40 (2007) (citing American polling data from 2005 indicating “that over sixty percent of registered voters want to limit the power of eminent domain” and “[t]wenty six states have passed legislation to limit the power of eminent domain”).

61. See A STANDARD STATE ZONING ENABLING ACT 6 (ADVISORY COMM. ON ZONING 1923) (“Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare.”).

62. See SPRANKLING, *supra* note 25, at 696–711, 714–19 (outlining the early era of Supreme Court regulatory takings jurisprudence, through its evolution in the mid-20th century, into the modern era).

63. *Infra* Subsection II.D.1.

64. *Infra* Subsection II.D.2.

65. *Infra* Subsection II.D.3.

66. SPRANKLING, *supra* note 25, at 633.

67. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

68. JOHN G. SPRANKLING & RAYMOND COLLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 814 (4th ed. 2018).

2. Penn Central Transportation Co. v. City of New York

In *Penn Central*, the Court determined if New York City's regulation inhibiting Penn Central from modernizing a historic landmark was a taking.⁶⁹ To determine whether a land use regulation constitutes a taking, the Court created a factored balancing test.⁷⁰ The first factor is the economic impact on the claimant.⁷¹ The second factor is the relevant regulation's interfering effect upon a claimant's "investment-backed expectations."⁷² Finally, the Court identified the nature of the governmental intrusion as the third factor of the inquiry.⁷³

3. Lucas v. South Carolina Coastal Council

In *Lucas*, the petitioner paid almost one million dollars for two residential lots on the Isle of the Palms in Charleston County, South Carolina.⁷⁴ The South Carolina General Assembly subsequently enacted the Beachfront Management Act that prohibited "erecting any permanent habitable structures" on parcels near beaches experiencing erosion.⁷⁵ The Court created a bright line rule, finding a taking "where the government has deprived a landowner of all economically beneficial uses" of land.⁷⁶

E. Fire Prevention: Alternative Approaches That California Has Considered

In recent years, despite offering tangible assistance to local agencies and individuals, several legislative attempts to increase fire preparedness have failed.⁷⁷ Assembly Bill 1516 sought to "make various changes to vegetation clearance requirements" and implement a state-run "pilot volunteer training program" to assess properties' fire preparedness.⁷⁸ The Legislature passed this bill, but it failed upon Governor Gavin Newsom's subsequent veto.⁷⁹

69. Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 104 (1978).

70. *Id.* at 124.

71. *Id.*

72. *Id.*

73. *Id.*

74. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006 (1992).

75. *Id.*

76. *Id.* at 1018.

77. See CAL. GOV'T CODE § 51189 (amended by SB 190) (requiring the Office of the State Fire Marshal to create a state-sponsored fund to assist with defensible space creation on private lands); see also AB 3164, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended May 4, 2020 but not enacted) (aiming to create a "wildland-urban interface wildfire risk model" to educate Californians); *infra* Section IV.D (discussing the anticipated impacts of both AB 1516 and SB 739, respectively).

78. Hearing on SB 739 Before the S. Rules Comm., 2020 Leg., 2019–2020 Sess. (Cal. 2020) [hereinafter SB 739 Rules Hearing] (on file with the *University of the Pacific Law Review*).

79. *Id.*

Another recent approach to fire preparedness was Senate Bill 739.⁸⁰ This bill focused entirely on fire prevention training.⁸¹ The training program’s chief goal was to “support and augment” defensible space and increase “home hardening assessment and education efforts.”⁸² Further, this bill sought to “empower communities to protect themselves” and save “Cal Fire time and money” by outsourcing fire preparedness inspections to volunteer citizens.⁸³

III. SB 474

SB 474 sought to ban land development within all SRAs and high-risk fire zones within LRAs.⁸⁴ The bill declared that “development within a zone of high fire danger . . . is a matter of statewide concern and is not a municipal affair.”⁸⁵ This prohibition would have broadly applied to an individual’s creation of new structures and also local agencies’ approval of such projects.⁸⁶ SB 474 had uniform applicability to all cities and charter cities within California that administer high-risk land.⁸⁷ SB 474 also would have prohibited development for residential, commercial, retail, and industrial building projects.⁸⁸ As a “state-mandated local program,” this law would have imposed enforcement responsibilities upon local governments.⁸⁹

IV. ANALYSIS

The Legislature’s attempt at a development ban was a response to ever-increasing wildfire risk.⁹⁰ Californians continue to flock to the WUI, increasing

80. See SB 739, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on Jan. 15, 2020, but not enacted) (aiming to establish a pilot training and awareness program for fire preparedness).

81. SB 739 Rules Hearing, *supra* note 78.

82. *Id.*

83. *Id.*

84. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (“a new development shall not be created or approved in a very high fire hazard severity zone or a state responsibility area.”).

85. *Id.*

86. See *id.* (“a new development shall not be created or approved in a very high fire hazard severity zone or a state responsibility area.”).

87. *Id.*; see LEAGUE OF CAL. CITIES, CHARTER CITIES: A QUICK SUMMARY FOR THE PRESS AND RESEARCHERS (2007), <https://www.cacities.org/Resources-Documents/Resources-Section/Charter-Cities/Charter-Cities-A-Quick-Summary-for-the-Press-and-R> (“The California Constitution gives cities the power to become charter cities. The benefit of becoming a charter city is that charter cities have supreme authority over ‘municipal affairs.’ In other words, a charter city’s law concerning a municipal affair will trump a state law governing the same topic.”) (quoting CAL. CONST. art. XI, § 5(a)) (on file with the *University of the Pacific Law Review*).

88. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

89. *Id.*

90. See Meyer, *supra* note 12 (“The past decade has seen half of [California’s] 10 largest wildfires and seven of its 10 most destructive fires, including [the 2018] Camp Fire, the state’s deadliest wildfire ever.”).

suppression demand on Cal Fire in such high-risk regions.⁹¹ But a “broad swath” ban undermines both local agency autonomy and basic property rights—inhibiting otherwise lawful uses of land.⁹² Also, SB 474 would have further exacerbated California’s budgetary shortfalls by likely imposing regulatory takings that would have required the state to pay “just compensation” to private landowners.⁹³ Finally, California wildfire policy is diffuse by design, and this ban did not account for nuance, inhibited creative solutions, and would have left many Californian’s problems unaddressed.⁹⁴

Section A explains the manner in which SB 474 would have upended local agency power to develop flexible wildfire policy.⁹⁵ Section B outlines the U.S. Supreme Court’s Takings Clause jurisprudence and liability SB 474 would have created for the State of California.⁹⁶ Section C addresses the reality of California’s wildfire protection scheme—one that is suppression-minded above all else—and the benefits of becoming more prevention-minded.⁹⁷ Finally, Section D describes the multi-faceted nature of wildfire preparedness and how other bills sought to address the complexity of the current crisis.⁹⁸

A. The Police Power: How SB 474 Would Have Undermined Local Agency Autonomy and Prevented Nuanced Solutions

Deeply ingrained in the American political tradition is the notion of federalism—the provision of limited autonomy to smaller geographical locales of the nation for handling regional matters.⁹⁹ Alexander Hamilton pragmatically noted that “the variety of more minute interests . . . will necessarily fall under the superintendence of local administrations.”¹⁰⁰ The U.S. Constitution’s Tenth Amendment reflects this theoretical framework, leaving the resolution of regional matters to state and local governments.¹⁰¹ The California Constitution furthers this

91. See CAL. DEP’T OF FORESTRY & FIRE PROTECTION, *supra* note 46 (showing the scale of increases in Cal Fire’s emergency fire suppression expenditures since 1979).

92. SB 739 Rules Hearing, *supra* note 78.

93. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

94. See *infra* Part IV (discussing several practical shortfalls to a broad development ban).

95. *Infra* Section IV.A.

96. *Infra* Section IV.B.

97. *Infra* Section IV.C.

98. *Infra* Section IV.D.

99. MALCOM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 69 (2008).

100. See THE FEDERALIST NO. 17 (Alexander Hamilton).

It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each [s]tate would be apt to feel a stronger bias towards their local governments than towards the government of the Union.

Id.

101. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor

concept of reducing power to the most local level possible.¹⁰² Such local regulatory schemes—which courts have termed the police power—are “an indispensable prerogative of sovereignty and one that is not to be lightly limited.”¹⁰³

California gives its municipalities “the maximum degree of control” to regulate their own regional zoning matters.¹⁰⁴ Supplementing minimum state standards, most local agencies have already laid a foundation for fire preparedness.¹⁰⁵ If these local regulatory codes are to exist at all, they must be more stringent than the minimum state standards.¹⁰⁶ Yet these codes, admittedly, have not prevented the current wildfire crisis.¹⁰⁷

Under the paradigm SB 474 sought to create, any local attempt to regulate construction in high-risk zones would have been inherently less stringent than an all-out ban.¹⁰⁸ Thus, state preemption in this area would have inhibited any local wildfire policy development related to zoning and building—essential elements to wildfire preparedness.¹⁰⁹ Further, the state would have assumed responsibility for all building and zoning decisions in new areas—increasing state costs.¹¹⁰

The ban would have unquestionably applied to the initial construction of virtually any structure.¹¹¹ The bill even sought to prevent a landowner from placing

prohibited by it to the states, are reserved to the states respectively, or to the people.”).

102. See CAL. CONST. art. XI, § 5.

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws . . . City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

Id.

103. *Miller v. Bd. of Pub. Works*, 234 P. 381, 383 (Cal. 1925).

104. CAL. GOV'T CODE § 65800 (West 2020).

105. See Ponkshe, *supra* note 56, at 612–26 (outlining several examples of municipal fire code regulations from various localities in California, including: (1) Chino; (2) Morgan Hill; (3) Richmond; (4) Cathedral City; (5) Arroyo Grande; and (6) Rancho Santa Margarita and noting many of these municipal efforts as “accurate and effective”).

106. See CAL. GOV'T CODE § 51175(c) (West 2020) (“It is not the intent of the Legislature in enacting this chapter to limit or restrict the authority of a local agency to impose more restrictive fire and public safety requirements, as otherwise authorized by law.”); see *id.* at 630 (“While the State of California promulgates its own building code, municipalities are authorized to enact more restrictive building standards so long as they can establish that “modifications or changes are reasonably necessary because of local climatic, geological or topographical conditions.”).

107. See Ponkshe, *supra* note 56, at 631 (calling for municipalities to “enac[t] stricter building standards . . . as the threat of wildfire rises”).

108. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (inhibiting local governments from approving any development projects).

109. See NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CTR. FOR CITY SOLUTIONS, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS, 1 (2018), available at <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> (on file with the *University of the Pacific Law Review*) (“[P]reemption that prevents cities from expanding rights, building stronger economies and promoting innovation can be counterproductive and even dangerous.”).

110. See *Id.* (“[P]reemption creates a problem, though, because it means a loss of local control for cities.”).

111. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

a mobile home on a property.¹¹² But SB 474 also seemed to apply to a property owner seeking to update an existing structure using firesafe materials—as should be the goal with all WUI homes.¹¹³ Specifically, the law prohibited any new “development,” which it defined as: “[a] project containing residential dwellings.”¹¹⁴ For example, an owner may seek to replace the roof or walls of a home with firesafe components, such as “composition, metal, or tile.”¹¹⁵ That renovation would seem to be a “project containing [a] residential dwellin[g],” which would have been potentially unlawful.¹¹⁶ Another likely scenario highlighting the problematic nature of the ban is an owner hoping to demolish an outdated, non-firesafe structure and replace it with an updated building.¹¹⁷ SB 474 not only disincentivized but prohibited a landowner from bringing a property into compliance with existing, fire-conscious building methods.¹¹⁸ Furthermore, localities would have been crippled in their capacity to oversee such improvements and development.¹¹⁹

In effect, SB 474 would have worked against its purported purpose.¹²⁰ The bill aimed to bar initial projects, reconstruction, and perhaps even some necessary retrofitting and modernization.¹²¹ Essentially, this development prohibition would have negated local government’s role in regulating any development whatsoever.¹²² Undeniably, “only the most prepared and secure development” should take place in California’s WUI.¹²³ However, merely pressing pause on an untenable status quo prevents localities from updating codes to conform with the

112. *Id.*

113. *See id.* (prohibiting all development, defined as: “[a] project containing residential dwellings, including, but not limited to, mobilehomes, accessory dwelling units, and junior accessory dwelling units, of one or more units or a subdivision of land for the purpose of constructing one or more residential dwelling units”); *Low Cost Retrofit List*, READY FOR WILDFIRE, <http://www.readyforwildfire.org/wp-content/uploads/Low-cost-Retrofit-List-Final.pdf> (last visited Jul. 14, 2020) (on file with the *University of the Pacific Law Review*) (providing an extensive list of home hardening retrofitting materials, recommendations, and tactics).

114. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

115. *Hardening Your Home*, READY FOR WILDFIRE, <https://www.readyforwildfire.org/prepare-for-wildfire/get-ready/hardening-your-home/> (last visited Jul. 14, 2020) (on file with the *University of the Pacific Law Review*).

116. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

117. *See* Dana Goodyear, *Building for Resilience in California’s Fire-Prone Future*, THE NEW YORKER (Feb. 19, 2019), <https://www.newyorker.com/culture/culture-desk/building-for-resilience-in-californias-fire-prone-future> (on file with the *University of the Pacific Law Review*) (discussing the need for Californian’s to develop more firesafe homes including unique approaches: such as: (1) metal doors; (2) water storage tanks; and (3) NASA-developed flame-retardant coatings applied to exterior walls).

118. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

119. *See id.* (prohibiting creation or approval of development projects on high risk land and stating that this is no longer a “municipal affair”).

120. *See infra* Section IV.C (emphasizing that such a sweeping prohibition leaves unaddressed physical realities on the ground that drastically increase wildfire risk).

121. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

122. *See id.* (providing that regulating development on high fire risk land is now a “statewide concern”).

123. Ponskhe, *supra* note 56, at 631.

evolving science on adequate fire prevention—as is their role.¹²⁴ Further, SB 474 ignored homeowners with outdated homes, and would have left them without a responsive and flexible local government to help them modernize.¹²⁵

B. Another Problem with Prohibition: The Takings Clause

SB 474 would have created new liability for the State of California under the U.S. Constitution’s Fifth Amendment’s Takings Clause.¹²⁶ First, SB 474’s goals were surely well-intentioned and even legitimate under a *Euclid* analysis.¹²⁷ Yet, this development prohibition aimed to “g[o] too far,” perhaps leading many landowners to seek just compensation in California courts.¹²⁸

Subsection 1 applies the *Euclid* analysis—whether the prevention of wildfire is a rational state goal—to California’s development prohibition.¹²⁹ Subsection 2 analyzes SB 474 under *Penn Central*’s multi-factor balancing test to determine whether it would have been a taking.¹³⁰ Finally, Subsection 3 explores the extent to which SB 474 would have inhibited all “economically beneficial use” of property under *Lucas*.¹³¹

1. The Euclid Test: A Rational Connection

Admittedly, SB 474 had a rational relation to the public health, safety, and welfare.¹³² While the ban met minimum constitutional standards for validity, it would still have faced other constitutional issues.¹³³ SB 474’s prohibition was the Legislature’s reaction to unprecedented levels of wildfire destruction in California—including both loss of life and property damage.¹³⁴ Recent Cal Fire

124. *See id.* (“[I]t is vital that even the lowest levels of government are legally positioned and poised to protect their constituency from disaster.”).

125. *See* Hannigan, *supra* note 55, at 49 (arguing that only by building “community capacity” between local government actors and community leaders can WUI residents adequately prepare for wildfires). *See generally* Barrett, *supra* note 10, at 3 (noting the multi-faceted approach to municipal zoning for wildfire, including: (1) plans; (2) regulations; (3) building codes; and (4) incentives).

126. *See infra* Subsections IV.B.2–3 (arguing that such a sweeping prohibition on individual private property rights would constitute a taking under the 5th Amendment to the U.S. Constitution).

127. *See infra* Subsection IV.B.1 (outlining the *Euclid* test’s low standard for constitutional validity—a mere rational connection to a legitimate public purpose).

128. *See infra* Subsections IV.B.2–3 (arguing that under *Penn Central* and the *Lucas* tests, SB 474 would have required the State of California to pay just compensation to many affected landowners).

129. *Infra* Subsection IV.B.1.

130. *Infra* Subsection IV.B.2.

131. *Infra* Subsection IV.B.3.

132. *See* SB 739 Rules Hearing, *supra* note 78 (“Catastrophic and devastating wildfires have occurred repeatedly in the state in recent years. For example, from the 2017 through the 2019 statewide fire season, over 3 million acres burned in high-severity wildfires resulting in the tragic loss of over one hundred lives, and thousands of structures being destroyed.”).

133. *See infra* Subsections IV.B.2–3 (discussing the ramifications of SB 474 under the U.S. Supreme Court’s holdings in *Penn Central* and *Lucas*).

134. Meyer, *supra* note 12.

inspection reports indicate massive shortfalls in both total property inspections and homes that meet defensible space criteria.¹³⁵ With more than two million properties on over twenty-five million acres of high-risk land, the desire to cut off any further development is understandable.¹³⁶ The data show that, especially in recent years, state and local wildfire agencies have unsuccessfully suppressed and inadequately prepared for these massive fires.¹³⁷ The state can easily show a substantial relation between extreme wildfire destruction and a development ban serving the ends of preserving life, property, and the public purse.¹³⁸ On its face, SB 474 met the bare minimum standards for constitutional validity under *Euclid*.¹³⁹

2. Regulatory Takings: The Penn Central Test

SB 474's "economic impact" on potential California claimants would have varied widely.¹⁴⁰ A development ban would have prohibited landowners from rebuilding wildfire-destroyed homes.¹⁴¹ This prohibition would have potentially forced many homeowners to live elsewhere after a wildfire—incurring significant costs—while drastically reducing their land's value.¹⁴² For example, the Camp Fire in Butte County displaced approximately 50,000 people from their homes.¹⁴³ The neighboring City of Chico experienced a massive influx of new residents seeking housing, which increased property values by over 30%.¹⁴⁴ While these market changes created a boon for existing homeowners with unscathed properties, the displaced faced serious financial headwinds on their way to recovery.¹⁴⁵

135. See Hearing on SB 739 Before the S. Comm. on Nat. Res. and Water, 2020 Leg., 2019–2020 Sess. (Cal. 2020) [hereinafter SB 739 Nat. Res. Hearing] (on file with the *University of the Pacific Law Review*) ("According to a review by a news organization of almost 500,000 defensible space inspection records, CAL FIRE inspected about 17% of properties in SRAs on average in 2018 – about half of its goal of 33%. Some CAL FIRE units inspected fewer than 10% of applicable properties annually.").

136. *Id.*

137. See INS. INFO. INST., *supra* note 2 (outlining that nine of the top ten most destructive California wildfires have occurred since 2003).

138. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (highlighting that land use regulations "must find their justification in some aspect of the police power, asserted for the public welfare").

139. See *id.* at 388 (assessing land use regulations in the context of nuisance law, noting that states may regulate property owners "by considering [the land or use] in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard").

140. *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

141. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (including, explicitly, development of residential dwellings in the prohibition).

142. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 127 (2006).

143. Charlie Ban, *A Year After the Camp Fire, Rebuilding Remains a Challenge*, NAT'L ASS'N OF COUNTIES (Dec. 9, 2019), <https://www.naco.org/articles/year-after-camp-fire-rebuilding-remains-challenge> (on file with the *University of the Pacific Law Review*).

144. See *id.* (quoting Chico Supervisor Deborah Lucero, stating: "If you had a house [in Chico, California] that was worth \$300,000 on Nov. 7, on Nov. 8 [the date of the Camp Fire] it was worth \$100,000 more (Available) housing was so tight before this. Now it's almost nonexistent").

145. *Id.*

Meanwhile, properties struck by wildfires under SB 474 would have experienced property value decline as landowners often sell such vacant WUI parcels to aspiring developers and home builders.¹⁴⁶ Federal research has already shown that property values in a region decline after only one wildfire strikes.¹⁴⁷ It stands to reason that no potential buyers would have seen value in a high-risk parcel that could no longer be developed.¹⁴⁸ And with California's already significant housing shortage, development is how landowners derive value from vacant parcels across the state.¹⁴⁹ This development, done wisely, is precisely what California needs right now.¹⁵⁰ Without it, the "economic impact" on many landowners who cannot develop their properties will be debilitating.¹⁵¹

The second factor of the *Penn Central* test assesses the claimant's "investment-backed expectations."¹⁵² Many Californian's who purchase rural land intend on utilizing that land for home-building.¹⁵³ These landowners are fully aware of their land's status as high-risk but accept that risk given the perceived benefits of rural living.¹⁵⁴ Furthermore, land in California is expensive, and purchasers expect their land to compensate them for the cost—whether in housing, recreation, farming, or resource extraction.¹⁵⁵

146. See Ross Kendall & Peter Tulip, *The Effect of Zoning on Housing Prices*, CATO INST. (Aug. 1, 2018), <https://www.cato.org/publications/research-briefs-economic-policy/effect-zoning-housing-prices> (on file with the *University of the Pacific Law Review*) (arguing that land use regulation increases housing costs as people are forced to compete for the remaining non-regulated lands); see also Jaeger, *supra* note 142, at 127 (illustrating how land use restrictions can have negative effects on affected land's market value).

147. Julie M. Mueller et al., *Do Repeated Wildfires Change Homebuyers' Demand for Homes in High-Risk Areas? A Hedonic Analysis of the Short- and Long-Term Effects of Repeated Wildfires on House Prices in Southern California*, U.S. FOREST SERV., https://www.fs.fed.us/psw/publications/documents/psw_gtr227en/psw_gtr227_en070mueller.pdf (last visited on Aug. 4, 2020) (on file with the *University of the Pacific Law Review*).

148. See *id.* (describing how high fire risk—and especially previous wildfires—have a significantly negative impact on property values).

149. See Jeff Collins, *Bill to Boost California Homebuilding Headed to Newsom's Desk*, ORANGE COUNTY REG. (Sept. 6, 2019), <https://www.ocregister.com/2019/09/06/bill-seeking-to-boost-california-homebuilding-headed-to-newsoms-desk/> (on file with the *University of the Pacific Law Review*) ("[The Housing Crisis Act of 2019] gives a green light to housing that already meets existing zoning and local rules and prevents new rules that might limit housing we so desperately need.") (quoting Senator Nancy Skinner, the bill's author).

150. See *id.* ("Our failure to build enough housing has led to the highest rents and home ownership costs in the nation.") (quoting Senator Nancy Skinner, the bill's author).

151. *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

152. *Id.* at 123.

153. See Barrett, *supra* note 10, at 15 (noting that from 1990–2010, 41% of all new home-development occurred in WUI regions).

154. See CAL. GOV'T CODE § 51183.5 (West 2020) ("A transferor of real property that is located within a very high fire hazard severity zone, designated pursuant to this chapter, shall disclose to any prospective transferee the fact that the property is located within a very high fire hazard severity zone."); see also Cal. State Geoport, *supra* note 9 (allowing any potential land purchaser to determine if the sought after land falls within a high-risk region).

155. See U.S. DEP'T OF AGRIC., LAND VALUES, 2019 SUMMARY, (2019), available at https://www.nass.usda.gov/Publications/Todays_Reports/reports/land0819.pdf (on file with the *University of the Pacific Law Review*) (placing California in the most expensive category of states given its average farm real estate value of approximately \$10,000 an acre—nearly three times the national average of \$3,160 per acre).

Many landowners who have had their homes ravaged by wildfires fully expect to rebuild their parcels—either by themselves or through a new buyer.¹⁵⁶ Wildfires decrease property values, creating an opportunity for “less risk-averse” homeowners.¹⁵⁷ Purchasers know they are buying at a reduced rate and are cognizant of the risks but still buy expecting to build on the property.¹⁵⁸ Therefore, SB 474 would have negated the expectations that these purchasers—or existing owners—had when buying their parcels in wildfire-ravaged regions.¹⁵⁹

Finally, the third factor under *Penn Central* analyzes the “character of the governmental action.”¹⁶⁰ Given the impacts of California’s wildfire crisis in recent decades, this action is certainly “substantially related” to a policy of the utmost importance: preserving life and property.¹⁶¹ On these grounds, the final factor would have weighed in favor of SB 474’s validity.¹⁶² However, this factor is not dispositive, so courts would have likely found that many affected landowners had suffered a taking and required the state to pay “just compensation.”¹⁶³

3. *The Lucas Test: “Loss of all Economically Beneficial Use”*

SB 474 was strikingly similar to the development ban from the *Lucas* case—where the Court found a taking—and likely would have subjected the state to litigation.¹⁶⁴ The bill would have imposed a ban on “residential . . . , commercial, retail, [and] industrial use,” due to the exigencies of wildfire.¹⁶⁵ Given the applicability of the ban to almost any form of economically productive use of land, nearly all private sectors would have opposed its enactment.¹⁶⁶

Landowners who had purchased land to build a home or business would have found that, under SB 474, their parcels had suddenly become “valueless.”¹⁶⁷

156. See Hannigan, *supra* note 55, at 31–32 (explaining the cycle of “homebuilding, wildfire, rebuilding, wildfire” being the norm in California).

157. Mueller, et al., *supra* note 147.

158. See *id.* (discussing the role of fear and human perception in property value decline after a wildfire, which brings in less “risk-averse” buyers).

159. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (declaring this broad development ban which, as discussed, prohibits virtually any development whatsoever).

160. *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

161. See *id.* at 138 (finding city residents aesthetic enjoyment of a historical landmark to be a valid public interest, justifying a land use regulation); *supra* Part I (conceding wildfire’s significant, deleterious effects on the health, safety, livelihoods, and property of millions of Californians).

162. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (providing that local ordinances designed to protect public health, safety, and welfare are presumptively valid).

163. See *Penn Cent.*, 438 U.S. at 124 (explaining that review of such actions requires “ad-hoc, factual inquiries”).

164. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 (1992) (analyzing the constitutional validity of a law that prohibited development near beaches on the South Carolina coast experiencing erosion).

165. SB 474, 2019 Leg., Reg. Sess. (Cal. 2019).

166. See *id.* (prohibiting not only residential development, but also “commercial, retail, or industrial” uses).

167. See *Lucas*, 505 U.S. at 1006 (describing the complete moratorium on development—akin to SB 474—which the Court found to be a taking).

2021 / Land Development Ban Will Hinder Solutions to the Wildfire Crisis

Further, much of California’s high-risk land is in the WUI, meaning remote, rural, and often underserved by utilities or commercial presence.¹⁶⁸ It is difficult to see a practical alternate use for rural land that could mitigate an endeavoring home or business owner’s financial loss.¹⁶⁹ The development ban would have also impacted communities seeking to rebuild after a wildfire.¹⁷⁰ Meanwhile, cities like Paradise often promulgate significantly more rigid building codes in response to wildfire.¹⁷¹ Among other difficulties, these stringent codes have an inhibiting effect on the ability of landowners to rebuild their homes.¹⁷² Thus, SB 474 would have only made the situation worse.¹⁷³

Further, SB 474 barred retail, industrial, or commercial interests from establishing themselves to serve communities trying to rebuild.¹⁷⁴ For example, utility companies would have been unable to install new power lines in such rural, underserved communities.¹⁷⁵ Moreover, the ban would have barred other basic services—such as grocery stores, gas stations, pharmacies, and hospitals—as many still need to rebuild.¹⁷⁶ SB 474’s real effect would have been consigning towns like Paradise to a status of non-existence.¹⁷⁷ And the Legislature cannot ignore the fact that California will continue to burn in these WUI regions, while SB 474 would have barred all conscientious reconstruction.¹⁷⁸ Further, SB 474 would have decreased the amount of inhabitable land in the state and increased housing costs.¹⁷⁹ Finally, SB 474 would have also resulted in a bevy of claimants pursuing

168. See Stephen R. Miller, *Planning for Wildfire in the Wildland-Urban Interface: A Guide for Western Communities*, 49 URB. L. 207, 208, 210 (2017) (describing the WUI as the areas “where humans and their development meet or intermix with wildland fuel”).

169. See *Lucas*, 505 U.S. at 1018 (“[B]y requiring land to be left substantially in its natural state—[carries] a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”).

170. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (banning all necessary development after a massive wildfire, including, residential, commercial, retail, or industrial projects).

171. See Kirk Siegler, *The Camp Fire Destroyed 11,000 Homes, A Year Later Only 11 Have Been Rebuilt*, NPR (Nov. 9, 2019), <https://www.npr.org/2019/11/09/777801169/the-camp-fire-destroyed-11-000-homes-a-year-later-only-11-have-been-rebuilt> (on file with the *University of the Pacific Law Review*) (“[T]he town has passed some new, tougher building codes. That includes no more wood decks or fences and expanded setbacks between homes and flammable material. They’re also looking to reconfigure some streets for better escape routes. Some people died while trying to evacuate in the gridlock.”).

172. *Id.*

173. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (prohibiting all essential development for long term habitation of a scorched region).

174. See *id.* (seeking to create a bar to any development which would have applied to most regions recently ravaged by wildfires).

175. See *id.* (prohibiting any commercial or industrial development, surely meant to include construction of new power lines).

176. See *id.* (barring all such building projects, explicitly).

177. See *id.* (preventing all building projects in the town of Paradise, as the Board has now entirely classified Paradise as high fire risk).

178. See Meyer, *supra* note 12 (noting that the effects of long-embraced suppression policies—increasing quantities of easily burnable fuels—and climate change are exacerbating the current crisis and will continue to breed more intense fires).

179. See JOHN LOCKE, CONSEQUENCES OF LOWERING INTEREST, Part 3 (1691) (“The rising and falling of

“just compensation” for the loss of all “economically viable use” of their properties.¹⁸⁰

C. The Reality: What A Dose of Prevention May Be Worth in an Era of Suppression

The motivation behind SB 474 is certainly rational given the increase in demands for fire suppression.¹⁸¹ In the event of a wildfire, Cal Fire’s general policy is to respond immediately and limit all spread.¹⁸² Cal Fire’s budget clearly delineates between “normal, day-to-day” costs—like prevention—and emergency fire suppression costs.¹⁸³ Estimated suppression costs in 2004–2005 totaled over 75% of Cal Fire’s budget.¹⁸⁴ These numbers have only increased in recent years.¹⁸⁵ By the 2017–2018 fire season, Cal Fire’s emergency expenditures alone reached an estimated \$773 million—nearly a ten-fold increase since 2010, taking into account inflation.¹⁸⁶ Yet, one scholar noted that “attempting to extinguish all wildfires is costly, dangerous, and unrealistic.”¹⁸⁷

Recent estimates indicate that Cal Fire spends over 40% of its budget on wildland fire suppression—and the smallest totals go toward prevention.¹⁸⁸ Preemptory fire preparedness receives the least agency funding by category and, as illustrated by the many failed fire prevention bills, often fails to gain traction politically.¹⁸⁹ While the state must play a pivotal role in wildfire management, its myopic focus on suppression and banning development comes at the cost of other real solutions.¹⁹⁰

the Price of Land, as of other things, depends much on the quantity of Land, set to Sale.”).

180. U.S. CONST. amend. V; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992); see Hannigan, *supra* note 55, at 39–40 (arguing that a development prohibition is a virtual non-starter given private property and Takings Clause jurisprudence in the United States).

181. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (noting that fire prevention and suppression on SRAs are primarily the financial responsibility of the state).

182. GIAMBATTISTA, *supra* note 11, at 4.

183. *Id.* at 8.

184. *Id.* at 9.

185. CAL. DEP’T OF FORESTRY & FIRE PROTECTION, *supra* note 46.

186. See *Consumer Price Index Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 2, 2020) (on file with the *University of the Pacific Law Review*) (showing an inflation rate increase of approximately 14.1% over the years between 2010–2018); see also CAL. DEP’T OF FORESTRY AND FIRE PROTECTION, *supra* note 46 (showing emergency suppression expenditures from 2010–2011 equaling \$90.1 million).

187. Barrett, *supra* note 10, at 27.

188. See GIAMBATTISTA, *supra* note 11, at 8–9 (highlighting that for the past ten years these costs have consistently increased ten percent annually and showing that the smallest total expenditure by program area is “prevention”).

189. *Id.* at 8; see *infra* Subsections IV.D.1, IV.D.2 (discussing the failed preemptory fire preparedness bills AB 1516 and SB 739).

190. See *California Burning: Episode 1: Our History With Fire*, PODCAST & PUB. RADIO SERIES (Sept. 29, 2019), <https://www.californiaburning.net/> (downloaded using Overcast) (on file with the *University of the Pacific Law Review*) (highlighting the over-reliance on suppression and ignoring the benefits of utilizing fire—

The unfortunate reality is that suppression has been the main goal of California’s wildfire policy for over a century.¹⁹¹ As recent decades have shown, agencies must revisit California’s wildfire policy as people continue flocking to the WUI.¹⁹² WUI regions are constantly evolving—as what was once rural, undeveloped wildland in many areas is now fully urban—and require continuous alteration of wildfire policy.¹⁹³ Therefore, agencies must regularly update land use and planning regulations to reflect the needs of the changing landscape of human presence and wildfire.¹⁹⁴

Moreover, many prevention efforts center around informal voluntary educational programs that help participants to more adequately prepare for potential wildfire.¹⁹⁵ These prevention measures co-opt the efforts and passion of citizens most directly affected by wildfires.¹⁹⁶ This education—especially if the Legislature were to pair it with more adequate funding—could very likely prevent the destruction to homes and businesses like TurkeyTail Farms.¹⁹⁷ Also, the state could direct some funding toward subsidies for homes constructed with fire-resistant materials and thereby reduce the long-term need for large scale suppression strategies.¹⁹⁸

SB 474 indicated the Legislature’s shift away from nuanced solutions and toward the conclusion that the exigencies of wildfire require more simple, prohibitive measures.¹⁹⁹ The ban on development—despite property owners’ fire preparedness—was a broad injunction that lacked nuance and ignored the most

to fight fire).

191. *See id.* (“[T]he agenda was to remove fire as fully as possible from the landscape. This was academic forestry’s argument. The more fire you could take out, the better everything would be.”).

192. *See California Burning: Episode 4: The Wildland-Urban Interface*, PODCAST & PUB. RADIO SERIES (Sept. 29, 2019), <https://www.californiaburning.net/> (downloaded using Overcast) (on file with the *University of the Pacific Law Review*) (highlighting other objectives which communities and agencies must consider, such as: (1) forest and vegetation management; (2) streets with multiple escape routes; (3) fire-resistant homes; (4) defensible space).

193. *See Miller, supra* note 168, at 208, 210 (“[I]t is important to recognize that the WUI is not a stagnant concept; rather, as a community develops, the WUI will change.”).

194. *See id.* (“WUI wildfire planning must be updated to reflect the changes in a community’s urbanization, even if all other factors remain the same.”).

195. AB 1516, 2019 Leg., 2018–2019 Sess. (Cal. 2019) (as passed on Sept. 10, 2019, but vetoed by Governor); SB 739, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended on Jan. 15, 2020, but not enacted).

196. *See SB 739 Rules Hearing, supra* note 78 (noting that the program would likely “effectively leverage and target the limited resources of Cal Fire and other local agencies to perform regulatory inspections while ensuring consistent standards are used statewide”).

197. *See Tchudi, supra* note 1 (noting that the locally provided training programs, to date, have prohibitively expensive costs for entry for many local residents).

198. *See* PODCAST & PUB. RADIO SERIES, *supra* note 192 (“What we’ve been doing is working with our partners for our Community Wildfire Protection Plan. So, we bring together a bunch of partners and then design where do the projects need to take place. Where there is the most critical risk to fire danger in the communities. And then we wait for the right grant to come, and if it will fund fuels reduction or watershed health or forest thinning.”) (quoting Calli-Jane DeAnda, Executive Director of the Butte County Fire Safe Council).

199. *See SB 474*, 2019 Leg., Reg. Sess. (Cal. 2019) (signaling the move from voluntary training and education of Californians to an outright “development prohibition”).

basic prevention strategies.²⁰⁰ The ban also failed to adequately capture the unique needs of different cities, communities, and individuals.²⁰¹ Further, the ban failed to address *existing structures* in the WUI, whose owners often lack the resources or knowledge to properly prepare for fire.²⁰² SB 474 would have left existing homeowners in harm's way, potentially unable to update their homes with firesafe materials.²⁰³

In addition, this development ban would have disincentivized landowner presence on *vacant* WUI parcels—reducing vegetation removal and other fire prevention efforts—allowing for unmitigated, dangerous vegetation growth.²⁰⁴ These unintended effects would have left large sectors of the state dormant, significantly increasing fire-risk to neighboring properties containing homes and other structures.²⁰⁵ SB 474 undermined its own purported goals by ignoring essential fire prevention, leaving homeowners at heightened risk, and seemed to be a response only to out-of-control suppression costs.²⁰⁶

D. Practical Considerations: Other Measures Can Have Real Positive Effect for Individual Californians Facing Wildfire Risk

Fire prevention bills like AB 1516 and SB 739 sought to impose minimal regulatory hurdles, increase community buy-in, and raise awareness on wildfire preparedness while respecting private property rights.²⁰⁷ In his veto message for AB 1516, Governor Newsom wrote: “[E]ach community is different and the best practices to achieve resiliency need to be crafted to meet the individual needs of that community. This bill takes a *broad swath approach* that does not reflect those individual needs.”²⁰⁸ Governor Newsom’s justified aversion to overly broad

200. See *id.* (removing locality’s powers to regulate land development in high risk regions and SRAs); see SB 739 Rules Hearing, *supra* note 78 (highlighting home hardening, prevention training, and clearance requirements as among the most essential tools for combating wildfire destruction to homes).

201. See SB 739 Rules Hearing, *supra* note 78 (citing Governor Newsom’s objection to a “broad swath approach”).

202. See Tchudi, *supra* note 1 (stating that many of his properties’ trees and neighbors’ homes were virtually untouched by the Camp Fire—including his parents’ home, which still stands on TurkeyTail Farms).

203. See *supra* Section IV.A (arguing that prohibiting conscientious development will only exacerbate the wildfire crisis by leaving outdated, high fire risk homes unaddressed).

204. See *supra* Section IV.B (inferring that with no economically viable use for WUI parcels, landowner’s will be less inclined to maintain them).

205. See Thomas Curwen & Joseph Serna, *The Camp Fire Burned Down Homes But Left Trees Standing: The Science Behind the Fire’s Path*, L.A. TIMES (Nov. 20, 2018), <https://www.latimes.com/local/california/lame-camp-fire-lessons-20181120-story.html> (on file with the *University of the Pacific Law Review*) (noting that the defensible space requirement “stops at the property line which creates a situation where homes can be built beside one another within that [100 foot] perimeter” and other key factors which contributed to the fire’s spread, such as: (1) flammable roofs; (2) vegetation around structures; and (3) rain gutters choked with leaves and needles).

206. See *id.* (showing the lingering risks in towns like Paradise that would have persisted despite SB 474).

207. See SB 739 Rules Hearing, *supra* note 78 (seeking to create voluntary fire preparedness and training programs for WUI regions with low inspection compliance ratings).

208. SB 739 Rules Hearing, *supra* note 78 (emphasis added).

legislation was a response to a bill that merely imposed regulatory updates to vegetation clearance and defensible space requirements.²⁰⁹

SB 474 went far beyond such piecemeal, mitigatory regulation and constituted a ban on development with many compounding effects.²¹⁰ Subsection 1 introduces the vetoed AB 1516.²¹¹ Subsection 2 discusses the more narrowly tailored, and similarly failed, SB 739.²¹²

1. The Failed AB 1516—Fire Prevention: Defensible Space and Fuels Reduction Management

AB 1516 required state agencies and local governments to improve community safety, response, and fire prevention training.²¹³ The failed AB 1516 did create “more intense fuel reduction” obligations on landowners but also provided funding to adequately perform this work on their properties.²¹⁴ SB 474 provided no funding for existing structures and would have unnecessarily—and unproductively—increased state costs by having to pay compensation to many landowners.²¹⁵ The funding component is pivotal for certain localities’ fire preparedness—or lack thereof—given wealth differentials.²¹⁶ Reports from local agencies indicate higher income counties experience the highest rates of annual inspections—“up to 100% of applicable homes.”²¹⁷ These wealthier, coastal counties are mostly urban or suburban and are the most prepared and protected.²¹⁸ SB 474 would have had a disproportionate effect on lower wealth regions of California by barring development on land with already lower market values and lower inspection

209. See SB 739 Rules Hearing, *supra* note 78 (imposing no additional regulatory hurdles for local governments or landowners).

210. See *supra* Sections IV.A–C (highlighting the ways in which this bill would have, in fact, likely increased both state costs and the intensity of WUI burns).

211. *Infra* Subsection IV.D.1.

212. *Infra* Subsection IV.D.2.

213. AB 1516, 2019 Leg., 2018–2019 Sess. (Cal. 2019) (as passed on Sept. 10, 2019, but vetoed by Governor).

214. See AB 1516, 2019 Leg., 2018–2019 Sess. (Cal. 2019) (as passed on Sept. 10, 2019, but vetoed by Governor) (“This bill would require a person described above to utilize more intense fuel reductions between 5 and 30 feet around the structure, and to create an ember-resistant zone within 5 feet of the structure, as provided.”).

215. See *supra* Subsections IV.B.2–3 (discussing the constitutional provisions which would have required the State of California to pay “just compensation” to many affected landowners).

216. See LEGISLATIVE ANALYST’S OFFICE, CALIFORNIA’S GEOGRAPHY OF WEALTH 6, 8–9, 13 (Sept. 2019), available at <https://lao.ca.gov/reports/2019/4093/ca-geography-wealth-090519.pdf> (on file with the *University of the Pacific Law Review*) (outlining that California’s wealthiest counties are located on the Coast, typically more densely populated urban centers); Tchudi, *supra* note 1 (arguing that the financial cost of fire prevention training programs is a bar to entry for many Butte County residents).

217. See SB 739 Rules Hearing, *supra* note 78 (listing those counties as: (1) Ventura; (2) Los Angeles; (3) Santa Barbara; and (4) Orange).

218. LEGISLATIVE ANALYST’S OFFICE, *supra* note 216, at 8; see SB 739 Rules Hearing, *supra* note 78 (noting the resident homeowners with the highest rates of fire preparedness inspection compliance being those located in wealthy coastal counties); see also INS. INFO. INST., *supra* note 2 (showing that six of the ten costliest fires in California history were in rural, less wealthy counties).

rates.²¹⁹

2. *The Abandoned SB 739—Fire Prevention: Defensible Space and Home Hardening Training*

SB 739 recognized the limitations of state agencies toward wildfire prevention by empowering localities and individuals to rise to the challenge of fire prevention.²²⁰ This bill was a more narrow redrafting of AB 1516 and included only its least onerous provision: a fire prevention training program.²²¹ Even this bill failed, again reinforcing some legislator's full embrace of suppression as the chief means of wildfire management.²²² Thereafter, SB 474 had a singular focus: the prohibition of all building on high-risk properties.²²³ But as recent prevention bill failures—and consideration of SB 474—indicate, some in the Legislature overlook landowners and their *existing structures* in favor of a “broad swath approach.”²²⁴

V. CONCLUSION

Proper fire protection requires striking a balance akin to what California's state and local agencies have worked towards for nearly a century.²²⁵ This balance must weigh the costs and benefits of both suppression and prevention.²²⁶ While a development ban is arguably a means to serve both ends, the conclusion that all development on high-risk land is unwise proves too much.²²⁷ In so doing, SB 474 opens the state to potential litigation costs, undermines local agency autonomy, and fails to address lingering risks.²²⁸ Furthermore, other failed measures—while

219. See SB 739 Rules Hearing, *supra* note 78 (noting that local agencies “perform defensible space inspections of homes at a higher rate in local responsibility areas” and these do not tend to be rural, lower-income counties lacking the funding and resources).

220. SB 739 Rules Hearing, *supra* note 78.

221. See SB 739 Nat. Res. Hearing, *supra* note 135 (discussing Governor Newsom's “broad swath” objection to AB 1516 given its additional regulatory hurdles for local agencies and Cal Fire, whereas, SB 739 only sought to create an *optional* training program).

222. See *supra* Section IV.C (highlighting the massive increases in emergency suppression costs since 2000).

223. See SB 474, 2019 Leg., Reg. Sess. (Cal. 2019) (“a new development shall not be created or approved in a very high fire hazard severity zone or a state responsibility area.”).

224. SB 739 Rules Hearing, *supra* note 78.

225. See *supra* Section II.C (describing the tandem nature of state and local governmental wildfire preparedness and suppression regulations).

226. See *supra* Section IV.C (discussing the essential roles of both prevention and suppression in a comprehensive wildfire preparedness schema).

227. See *supra* Part IV (arguing that a land development ban is unwise for constitutional, practical, and policy reasons).

228. See *supra* Part IV (outlining the Takings Clause implications, federalism concerns, and negative practical impacts of such sweeping legislation).

none a panacea—provided more nuanced solutions.²²⁹ Fire prevention bills like AB 1516 and SB 739 would have reinforced property rights while ensuring minimum safeguards remained in place to protect landowners and their neighbors.²³⁰ And for landowners like Christopher at TurkeyTail Farms, these bills could have co-opted local resources and captured local passion in preparation for wildfire.²³¹

SB 474 conveyed the message that the Legislature was trying to find the easy way out.²³² Merely holding the status quo on this multi-faceted problem would not have addressed persisting risks nor garnered many future rewards.²³³ State government often defaults to broad legislation to solve perceived statewide problems, but many of the challenges are inherently local with wildfire.²³⁴ The less traveled route may be the wiser choice here, empowering individuals and local entities to strengthen their communities—paired with resources, education, and funding.²³⁵ California’s nuanced wildfire problem requires similarly nuanced solutions, and SB 474 would have created more difficulties than it resolved.²³⁶

229. See *supra* Section IV.D (supporting the more piecemeal, nuanced approaches offered by wildfire preparedness bills like AB 1516 and SB 739).

230. SB 739 Rules Hearing, *supra* note 78.

231. See SB 739 Rules Hearing, *supra* note 78 (noting that “expanding community opportunities to protect our neighborhoods” will “support and augment” Cal Fire who is “often not equipped with the support necessary from the state” to accomplish proper preparedness).

232. See *supra* Section IV.C (describing the current wildfire crisis’ significant impact on annual state budgets).

233. SB 739 Rules Hearing, *supra* note 78; see *supra* Part IV.B (highlighting persistent risks like existing structures and vacant parcels and how SB 474 would have left them at heightened risk).

234. See SB 739 Rules Hearing, *supra* note 78 (citing Governor Newsom’s objection to a “broad swath approach”) (“[E]ach community is different and the best practices to achieve resiliency need to be crafted to meet the individual needs of that community.”); *supra* Section IV.A (discussing local government’s essential role in a comprehensive wildfire preparedness regime).

235. See *supra* Section IV.A (arguing that SB 474 would have crippled local government’s ability to help their residents prepare, modernize, and rebuild).

236. See *supra* Part IV (outlining the constitutional, practical, and policy challenges that a development ban would have created, and the better impact more nuanced, piecemeal legislation could have on California’s wildfire crisis).