From:	John Farrow
To:	Michael Houlemard; Dominique Davis; FORA Board; Michael DeLapa
Subject:	CEQA compliance for Revised Transition Plan attached to staff report for 10-29-18 meeting
Date:	Sunday, October 28, 2018 8:47:13 PM
Attachments:	LandWatch to FORA BOD re Revised TP in 10-29-18 staff report.pdf

Dear Members of the FORA Board of Directors,

Attached please find comments from LandWatch Monterey County regarding the proposed adoption of the Revised Transition Plan attached to staff report for the October 29, 2018 meeting, which staff report was posted after 2:00 pm on Friday, October 26.

By copy to Michael Houlemard and Dominique Davis, I ask that they confirm receipt of this letter and ensure its distribution to Board members as soon as possible and prior to the meeting scheduled for 2:00 pm on October 29, 2018.

John Farrow

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October 28, 2018

By E-mail
Board of Directors
Fort Ord Reuse Authority
920 2nd Ave. Suite A
Marina, CA 93933
board@fora.org
michael@fora.org
dominique@fora.org

Re: CEQA compliance for adoption of Revised Transition Plan attached to October 19, 2018 FORA agenda

Dear Members of the Board:

On behalf of LandWatch Monterey County, I write to object to the proposed finding that the Board's adoption of the revised Transition Plan attached to October 29, 2018 agenda ("Revised Transition Plan") would be exempt from CEQA and to FORA's failure to prepare a subsequent EIR before approving it.

I reiterate and incorporate by reference the comments made in LandWatch's October 17, 2018 letter.

The Revised Transition Plan, which is in the form of a proposed resolution, finds that the Revised Transition Plan is exempt from CEQA because it claims that it will not abandon or alter any previously-adopted CEQA mitigation measures:

> The Board hereby finds and determines that in adopting this Transition Plan as required by Government Code section 67700 FORA is addressing the allocation of FORA's assets, liabilities and obligations in advance of FORA's ultimate dissolution without (a) amending any contemplated or approved land uses within the former Fort Ord, (b) abandoning or altering any Base-wide Mitigation Measures or any other mitigations that were required as a part of the adoption of the Reuse Plan, (c) changing the Reuse Plan itself, (d) eliminating any Base-wide Costs or elements of the CIP, or (d) avoiding the satisfaction and fulfillment of any of FORA's other commitments, pledges, or promises (all of which may be collectively referred to herein as the "FORA Program"). Nothing in this Transition Plan is intended to change any part of the FORA Program that would have any impact on the environment. To the contrary and to the extent not already so contained, this Transition Plan requires each jurisdiction to include all mitigations in its Capital Improvement Program (subject to Constitutional or other

> limitations imposed by applicable law on such jurisdiction's funding obligations). Following FORA's ultimate dissolution, any changes to the FORA Program or any part thereof will be made by the respective land use jurisdiction(s) and any successor(s) to FORA only after full compliance with all applicable laws, including but not limited to CEQA. Accordingly, the Board hereby finds and determines that this Transition Plan is not a project under CEQA and/or is exempt as a mere change in the organization of governmental agencies which does not change the geographical area in which previously existing powers were exercised.

(Revised Transition Plan, § 1.2, emphasis added.) The Revised Transition Plan is not exempt from CEQA. There is no mechanism in the Revised Transition Plan that would assure the referenced "mitigations," whatever they are, will in fact be implemented. There is no certainty that improvements will ever be funded or constructed or that development restrictions will continue to be enforced. FORA has still not even identified which CIP projects and which development restrictions are in fact required as mitigation for the Base Reuse Plan ("BRP"). FORA has not secured valid or binding agreements to continue existing mitigation obligations or prepared a CEQA document that assesses the effects of abandoning or changing existing mitigation. Thus, FORA has not complied with CEQA.

Significant changes to the Base Reuse Plan mitigations that would stem from the Revised Transition Plan, significant new circumstances, and significant new information, require that FORA prepare a subsequent EIR to acknowledge new and more severe significant impacts and propose mitigation for them. Relevant changes and new information include the inability to compel the existing mitigation measures; worsening seawater intrusion and overdraft conditions and the failure to develop the expected replacement for groundwater supplies, which were not anticipated by the BRP's EIR; and changes to CEQA's legal requirements that now preclude identifying and mitigating transportation impacts with reference to Level-of-Service criteria and require instead that analysis and mitigation be based on minimizing vehicle miles travelled and trip generation. These points are set out in LandWatch's October 17, 2017 letter and discussed below.

A. The Revised Transition Plan cannot assure that existing FORA plans can be assigned or will be accepted.

As the staff reports for the October 29, 2018 meeting acknowledges, there is no agreement among the member agencies "as to implementation of base-wide costs and mitigation measures, replacement financing mechanisms and revenue sharing arrangements." Oct. 29, 2018 Staff Report, p. 1. The October 12, 2018 staff report also acknowledge a lack of agreement. The Revised Transition Plan proposes to reach such agreements later, possibly through a mediated discussion to reach "Transition Plan Agreements" (also referred to as "Transition Plan Implementing Agreements") with the member agencies. However, those agencies have not agreed to assume responsibility for

implementing the Base Reuse Plan obligations or mitigation, and some have strenuously objected.

Contrary to Revised Transition Plan section 1.3, and as explained in LandWatch's October 17, 2018 letter, the existing Implementation Agreements do not require continued funding by member agencies of the Basewide Costs and Basewide Mitigation Measures. Despite the language in section 4.1 of the Revised Transition Plan, FORA cannot simply assign an "obligation" to fund or construct the CIP projects. Nor can FORA assign an obligation to continue to observe and enforce development restrictions in the Base Reuse Plan. The Revised Transition Plan section 4.2 effectively acknowledges that funding and construction of improvements is uncertain because it merely "requests" and "recommends" that other agencies enter into a Transition Plan Agreement. Section 4.4 admits that the assignments of obligations may not in fact occur and provides only that FORA seek "judicial clarification" or unspecified legislative amendments to ensure "fulfillment of the mitigations, satisfaction of the obligations, and the completion of the elements of the FORA Program which have not effectively been assigned to or accepted by the objecting jurisdictions." There is no assurance that judicial clarification or unspecified legislative amendments will in fact ensure this.

In short, the Revised Transition Plan proposes to kick the can down the road. This approach does not satisfy CEQA's requirement that mitigation be certain.

B. The Revised Transition Plan fails to acknowledge substantial funding shortfalls for the existing CIP projects; and FORA has not demonstrated that any of the CIP's transportation projects are required as mitigation.

The Revised Transition Plan acknowledges in recital J that when FORA sunsets there will be no legal authority to collect the previously planned $72 million in the FORA CFD taxes from previously entitled development. Although jurisdictions can impose alternative exactions on future development that was not previously entitled, they may not legally impose new exactions on previously entitled development. In recital N, the Revised Transition Plan references the need for unspecified legislation to address this problem. However recital N admits that this may not occur by stating that "in the absence of such legislation, ongoing contributions would need to be made in accordance with the approach embodied in the [existing] Implementation Agreements." As explained in LandWatch's October 17, 2018 letter, the existing Implementation Agreements do not oblige member agencies to fund Basewide Costs and Basewide Mitigation Measures through their own means, either before or after FORA sunsets.

In the absence of that planned $72 million, there can be no certainty that the projects in FORA's CIP will be funded or completed, whether identified as mitigation or not.

Compounding the uncertainty from the loss of the previously expected $72 million in funding, is the fact that FORA has not collected adequate funding from

development projects in the past. FORA has consistently underfunded regional and offsite roads in favor of onsite roads through its "local first" funding allocations. It is unlikely that either FORA or TAMC can ever collect the full nexus-based fair share of the cost of regional and offsite roads from Fort Ord development. This is discussed in section B1 and B2 below.

FORA has declined to identify which, if any, of the roads in the CIP it considers to be CEQA mitigation. However, if any of the roads in the CIP were in fact required CEQA mitigation, they would not be the onsite roads, because the BRP EIR does not identify any significant onsite transportation impacts. Furthermore, onsite congestion caused by existing traffic and the BRP project itself cannot be considered a significant impact requiring mitigation: CEQA is concerned about the effect of a project on the environment, not the effect of the environment on the project, or the effect of the project on itself. *California Building Industry Ass'n v. Bay Area Air Quality Management District* (2015) 62 Cal.5th 1067. So onsite congestion could not legally compel onsite roads as mitigation. However, if it is FORA's position that any offsite or regional roads are required mitigation, then FORA must acknowledge that future funding for these roads from Fort Ord development is uncertain.

1. **FORA's "local first" allocation of transportation funding has starved regional and offsite road projects for the benefit of onsite roads.**

TAMC has concluded that FORA has consistently underfunded regional and offsite roads in favor of onsite roads. (Michael Zeller, memorandum top TAMC Board of Directors, October 24, 2018, "Transportation Agency Role in Fort Ord Reuse Authority Transition Planning," available at https://fora.org/Reports/TTF/102418_TAMC_Transition_Report.pdf. TAMC'S memo says:

> FORA's local first policy prioritizes on site projects in the FORA Capitol [sic] Improvement Program over off site and regional projects. Transportation Agency staff compared FORA's historical funding allocations to projects that would otherwise have been covered by the Regional Development Impact Fee program. From a total of $72.9 million of transportation funding allocations made by FORA since the inception of its fee program, $1.6 million has been allocated to off site and regional projects, due the local first policy. A proportional allocation formula would have resulted in $22 million being allocated to off site and regional projects - such as Highway 156, Davis Road, Reservation Road or the Highway 1 corridor.

(*Id*., p. 1, emphasis added.) FORA's "local first" policy is discussed in the April 27, 2017 FORA Fee Reallocation Study: Deficiency Analysis and Fee Reallocation. (Available at https://www.fora.org/Board/2017/Packet/Additional/051217-Item8c-Attach_B.pdf.). The effect of the "local first" distribution policy on planned FORA payments for onsite, offsite, and regional roads is apparent from comparison of the

"Option A: Local First Distribution" and the "Option B: Cap Adjusted Nexus" columns in Table 22 of that FORA Fee Reallocation Study.

Furthermore, TAMC points out that the bulk of FORA's planned contributions to offsite and regional roads is programmed for post-2020 collection. $31 million of $37 million of planned regional road fair share contributions and $20 million of $23 million payments for offsite roads are planned for the post-2020 period. In short, FORA's local first policy has for 20 years simply ignored funding for regional and offsite roads in favor of building roads on the base itself.

2. It is unlikely that either FORA or TAMC can ever collect the full nexus-based fair share of the cost of regional and offsite roads from Fort Ord development.

As TAMC points out, Fort Ord is not currently subject to the TAMC's Regional Development Impact Fee ("RDIF") because development there pays the CFD taxes instead, a portion of which is supposed to fund transportation. TAMC staff suggest that TAMC could extend its RDIF collection area into Fort Ord in the future, whether FORA continues or not, and says that "this would be advantageous."

But substituting the RDIF for the FORA CFD tax will not make up for FORA's underpayment of impact fees for regional and offsite roads, because the RDIF cannot be imposed on previously entitled but currently unbuilt projects. TAMC cannot collect fees from those projects through the RDIF because the RDIF program was not applicable to those projects when their entitlements vested and no new exactions can be imposed on a vested project. Tens of millions of expected road fees would not be collected from the six currently entitled projects unless FORA and its CFD are extended, or unless there is a legislative amendment that would permit assigning the CFD to another entity, or all the developers voluntarily agree to make payments that they are not legally obliged to make. None of these outcomes is certain. Of the $72 million in lost CFD taxes from these six projects, some significant portion is supposed to have funded roads. In sum, even if TAMC collects the RDIF from future Fort Ord projects, it cannot collect fees from the six previously entitled projects with vested rights.

There is likely no way to make up for FORA's past under-collection of fees for offsite and regional roads from the Fort Ord projects that have already been built. FORA has not collected a full nexus-based share of the cost of regional and offsite roads from previously built projects that have already paid their CFD taxes. Under-collection was the result of two factors.

First, FORA's past "local first" allocation of the CFD fees it has already collected from already-built projects means that FORA has postponed most of its eventually programmed payments for offsite and regional roads (per discussion in section B.1 above). The only way to collect these postponed payments would be to leave FORA's CFD program in place and hope that the post-2020 payments of the CFD taxes by future

projects under buildout conditions actually occurs so that the postponed payments for offsite and regional roads will occur by some date certain, e.g., the proposed 2028 FORA extension date. This is as uncertain as full Fort Ord buildout by 2028 is uncertain. Unless FORA and its CFD tax are perpetuated indefinitely until the final Fort Ord building permit is pulled, FORA will sunset and eliminate the obligation to pay the CFD tax or any other exaction for any remaining vested but unbuilt projects. And having TAMC substitute the RDIF where it can legally do so - for future projects that are not currently vested - cannot make up for FORA's prior underpayment for the offsite and regional roads. The RDIF could legally only exact a nexus-based fair share from future projects for the future projects' own fair share. Under the Mitigation Fee Act, the RDIF could be applied to compel future projects to make up for prior underpayments by the existing, already built projects.

Second, FORA's decisions to cap its total transportation payments under its existing Implementation Agreements, and to set the CFD for commercial development at an even lower level, means that FORA's CFD taxes, even if eventually collected from every project under full buildout conditions, will not pay for the total nexus-based costs of the planned roads.[1] As shown in Table 20 of the FORA Fee Reallocation Study, the full nexus-based share for the planned onsite, offsite, and regional roads would require $204 million from Fort Ord development. But the amount that is actually included in the FORA CIP to be paid through future CFD taxes is only $114 million. So every project that has already paid its CFD tax has underpaid for its fair share of the cost of all roads, especially the commercial projects, and these already-built projects will never have to make another payment for roads. Thus, even if FORA and its current CFD tax were left in place forever, the current CFD tax will not cover the nexus-based fair share for regional and offsite roads.

In sum, by capping the CFD tax at a level that does not include the actual nexus-based fair share for all roads in the CIP and by allocating the CFD tax collections to build onsite roads first, FORA has set up a system that will never likely pay a fair share for offsite and regional roads. If FORA believes that the BRP EIR mitigation actually requires funding any offsite or regional roads as mitigation, then FORA should prepare a subsequent EIR to address the significant post-1997 information that actually funding these roads is now unlikely.

[1] The decision to cap road fees in the Implementation Agreements is discussed at pages 1-2 of the FORA Fee Reallocation Study: Deficiency Analysis and Fee Reallocation.

C. The Revised Transition Plan would not be exempt from CEQA if the BRP EIR actually required roads as mitigation, and an SEIR would be required with respect to transportation issues.

1. The Revised Transition Plan does not identify transportation mitigation that remains to be completed, if any; and it remains unclear whether FORA believes any roads are required mitigation, and if so, on what basis.

Section 1.2 of the Revised Transition Plan "requires each jurisdiction to include all mitigations in its Capital Improvement Program (subject to Constitutional or other limitations imposed by applicable law on such jurisdiction's funding obligations)." However, the Revised Transition Plan does not specify what those mitigations are. The Revised Transition Plan continues to conflate Basewide Costs and Basewide Mitigation measures as a convenient way to avoid distinguishing what improvements and development restrictions are actually mandated by CEQA.

As explained in LandWatch's October 17, 2018 letter, the definition of Basewide Mitigation Measures in the Implementation Agreements, now adopted in the Revised Transition Plan Glossary, is entirely ambiguous:

> Basewide Mitigation Measures include: basewide transportation costs; habitat management capital and operating costs; water line and storm drainage costs; FORA public capital costs; and fire protection costs. The Basewide Mitigation Measures are more particularly described in the Fort Ord Comprehensive Business Plan, described in Section 1 {f), the Development and Resource Management Plan, and the Findings attached to the Base Reuse Plan.

(Revised Transition Plan, Glossary.) Many of these measures are clearly not intended to mitigate significant environmental impacts under CEQA but are merely the development infrastructure that the BRP proposes. The definition confuses the BRP project itself with its required mitigation. For example, the referenced "Section 1 {f)" of the Comprehensive Business Plan (available at https://www.fora.org/Reports/BRP/BRP_v3_AppendixB-Business-Operation-Plan.pdf) includes not just CEQA mitigation but infrastructure that may be desired for "marketability" and to facilitate development; and it does not identify the improvements with any specificity. It is unclear from the definition's reference to multiple sources to identify mitigation measures whether a project qualifies as "mitigation" only if it is specified in *each* source or whether it qualifies if it is merely identified, in very general terms, in *one* source.

Clarity is essential because FORA staff have in the past mischaracterized infrastructure projects such as onsite roads as CEQA mitigation in order to persuade member agencies to include them in the CIP. As discussed above, it is clear that onsite roads are not legally required mitigation. Indeed, the Mitigation Monitoring Plan for the

BRP EIR does not identify any roads as mitigation. BRP PEIR, Table 2.5-1. If in fact FORA believes that any offsite or regional roads are required mitigation, FORA should identify them. There can be no certainty as to continuing mitigation unless and until FORA identifies which specific offsite and regional roads, if any, are in fact required mitigation under the BRP.

2. If FORA does believe that any roads are required mitigation, FORA must address the uncertainty of transportation mitigation caused by the Revised Transition Plan in a CEQA document; it cannot delegate that to agencies in the future.

As discussed, there is no certainty that FORA can assign the obligation to implement mitigation, either in the form of infrastructure improvements or development restrictions. Despite this, section 2.2.6 of the Revised Transition Plan purports to assign such obligations. If it is FORA's position that the construction of any particular roadway is required mitigation for the BRP, then FORA must prepare a CEQA document that identifies this roadway and addresses the uncertainty of mitigation caused by the Revised Transition Plan.

The Revised Transition Plan admits that there may be no Transition Plan Agreement, yet sections 2.1.5 and 2.2.6 blithely purport to assign responsibility for funding and completing transportation infrastructure projects to the member agencies; and the Revised Transition Plan assumes that the roads will all be built on the schedule in FORA's CIP. Section 4.2 then attempts to assign to other jurisdictions the obligation to prepare a CEQA analysis, at some indefinite point in the future, of the consequence of choosing not implement the unspecified mitigation obligations:

> If any jurisdiction chooses not to perform, include, or address any such project, such jurisdiction shall comply with the requirements of all applicable laws, including but not limited to by making such analysis and taking such action as CEQA may require in connection with such change.

(Revised Transition Plan, §4.2.) But even if a moment in time could be identified for the jurisdiction's "choice" not to build a road, CEQA analysis is not required when an agency decides not to take action or approve a project. Public Resources Code, §21080(b)(5); Guidelines, §15270(b).

FORA cannot delegate to other agencies FORA's own, current obligation to undertake CEQA review for the Revised Transition Plan. It is FORA's decision to approve a transition plan that would abandon, change, or render uncertain previously adopted BRP mitigation, if in fact there is any. CEQA review is required for the adoption of the Revised Transition Plan because the Revised Transition Plan is a project that may result in physical changes to the environment. This matter cannot be deferred for the Transition Plan Agreements because FORA is obliged under CEQA to address the effects of its Revised Transition Plan *before* it adopts it.

Furthermore, the Revised Transition Plan has not addressed the significant new information regarding transportation mitigation, if any, which would include CEQA's replacement of Level-of-Service significance criteria with vehicle-miles-travelled criteria and FORA's historic under-collection of fair share fees for transportation infrastructure. If there is any remaining transportation mitigation, the Revised Transition Plan is not exempt from CEQA with regard to its effects on transportation and FORA must prepare a subsequent EIR before adopting it.

D. The Revised Transition Plan is not exempt from CEQA and an SEIR is required with respect to water supply issues.

The Revised Transition Plan fails to identify which BRP policies, development restrictions, and infrastructure are mitigation for water supply impacts or to ensure that those policies, development restrictions, and infrastructure remain committed. For example, there is no evidence or analysis that FORA can "assign" to MCWD the obligation to construct a water supply augmentation project or to enforce existing water supply allocations. There is no evidence or analysis that FORA can "assign" to MCWD the obligation to enforce or implement BRP policies that require determination of a safe yield; the obligation to bar development approval if water supply for that development would exceed safe yield; or the obligation to construct the expected alternative water supply that would replace groundwater pumping on the former Fort Ord. Unlike FORA, MCWD does not have land use authority and it cannot stop land use jurisdictions from approving projects. There is no evidence that MCWD is even considering a halt to <u>increased</u> groundwater pumping, much less considering construction of a water supply to replace groundwater pumping in the former Fort Ord. Again, FORA's decision to approve a transition plan that would abandon, change, or render uncertain previously adopted BRP mitigation compels FORA to undertake CEQA review before it adopts the Revised Transition Plan.

Furthermore, for the reasons set forth in LandWatch's October 17, 2018 letter, the Revised Transition Plan is not exempt from CEQA with regard to its effects on water supply. It is no longer possible for FORA to rely on the water supply analysis in the 1997 Fort Ord Reuse Plan EIR due to changes in circumstances, new information, and failure to implement the Fort Ord Reuse Plan itself. FORA must prepare a subsequent EIR before adopting the Revised Transition Plan.

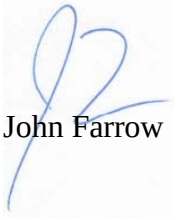
<u>Conclusion</u>

LandWatch urges FORA to consider this information and the underlying records provided with LandWatch's October 17, 2008 letter and cited in this letter carefully before acting. LandWatch offers to meet with FORA decision makers and senior officials to discuss the issues in this letter and how to resolve them, before the FORA

Board acts. FORA has time to address its omissions because it has more than two months before it needs to submit a plan to LAFCO.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



John Farrow

JHF:hs

From:	Keith Van Der Maaten
To:	FORA Board
Cc:	Michael Houlemard; Tom Moore
Subject:	MCWD Comment letter for Special Meeting on 10/29/2018
Date:	Monday, October 29, 2018 12:34:35 PM
Attachments:	10-29-18 FORA Transition Agenda Item 7a_MCWD Comment Letter.docx

Dear Chair Rubio and Honorable Members of the FORA Board of Directors,

Please see the attached comment letter from MCWD regarding Agenda item 7A on the October 29, 2018 FORA Board of Directors Special Meeting Agenda.

Thanks,
Keith Van Der Maaten

MARINA COAST WATER DISTRICT

11 RESERVATION ROAD, MARINA, CA 93933-2099
Home Page: www.mcwd.org
TEL: (831) 384-6131 FAX: (831) 883-5995

October 29, 2018

Via E-mail

Board of Directors
Fort Ord Reuse Authority
920 2nd Ave, Suite A
Marina, CA 93933
board@fora.org

Re: Transition Planning Process Update Agenda Item

Dear Chair Rubio and Honorable Members of the FORA Board of Directors,

In response to the Transition Plan Resolution (item 7a on the October 29, 2018, FORA Board of Directors Special Meeting Agenda) and comments provided to FORA on October 7, 2018 from LandWatch Monterey County, MCWD is providing the following comments to help clarify important information regarding water and wastewater service to the Ord Community:

1. MCWD already owns the water rights (except for the Army's reserved rights) and the potable and recycled water infrastructure and holds the State permit to serve potable water for the Ord Community. The Army by long-term contract provides its reserved water rights to MCWD for MCWD to use to meet present and future Army water demands. Since MCWD already owns all of the Ord water infrastructure and the Ord water rights for non-Army uses, ownership of those assets and whether any other entity can provide water service to the Ord Community are not LAFCO transition issues.

2. MCWD will continue to provide water and sewer collection services to the Ord Community after FORA dissolves.

3. MCWD is in the process of annexing those Ord Community parcels, which are already receiving water service or have an existing water entitlement from the applicable land use jurisdiction.

4. MCWD's Ord Community service area is within three different DWR-designated groundwater subbasins: (a) the Monterey Subbasin where all of MCWD's production wells are located and a substantial portion of the existing and former Ord military facilities; (b) more than a majority of the Seaside Subbasin, where existing military housing and the

Bayonet and Blackhorse golf courses are located; and (c) the 180/400 Foot Aquifer Subbasin where northern portions of the City of Marina are located.

5. MCWD has conducted extensive groundwater hydrology studies of the area south of the Salinas River within the 180/400 Foot Aquifer Subbasin and the Monterey Subbasin including Stanford University's aerial electromagnetic (AEM) study, a study of the results of the multi-million dollar Fort Ord contaminated groundwater cleanup efforts, and analysis of CalAm's monitoring well data for the MPWSP, etc. Those studies show that MCWRA's seawater intrusion maps are not based upon extensive or accurate groundwater quality data and misrepresent the actual extent and depths of the seawater intrusion south of the Salinas River. MCWRA's maps appear to show that all aquifers and areas to the west of the seawater intrusion "front" are contaminated with seawater, when in fact the area south of the Salinas River is not largely contaminated because of the presence of an existing fresh groundwater layer and the presence of a frequently occurring seaward groundwater gradient which in combination protect the Ord Community, the City of Marina, and MCWD's production wells from seawater intrusion.

6. MCWD is developing a Groundwater Sustainability Plan (GS Plan) pursuant to SGMA for the Marina and Ord Groundwater Management Areas of the Monterey Subbasin in cooperation with the SVBGSA. The GS Plan will determine the sustainable yield of the Monterey Subbasin. The sustainable yield could be found to support more or less than the BRP's 6,600 AFY. The GS Plan is required to be completed and submitted to DWR by no later than January 31, 2022; however, MCWD is endeavoring to complete the GS Plan before that deadline.

7. The GS Plan will include proposed groundwater recharge projects that could help maintain and potentially increase the sustainable yield of the Monterey Subbasin. MCWD has already started feasibility studies for various projects. Projects are also being studied pursuant to the three-party agreement among MCWD, FORA, and M1W to develop the additional 973 AFY of potable and non-potable water to meet the 2,400 AFY of Augmentation Water identified in the BRP. It is expected the three-party agreement work will be completed before FORA dissolves, but in the unlikely event that this has not been completed by then, the three parties will need to agree upon how best to complete the work and/or amend the agreement accordingly. The other 1,427 AFY consists of MCWD's entitlement under the Pure Water Monterey Project with the first 600 AFY of PWM advanced treated water becoming available in 2019.

8. MCWD will honor the BRP's existing potable and recycled water allocations, subject to the GS Plan's determination of the sustainable yield of the Monterey Subbasin. If there are cutbacks or increases to the sustainable yield based on the GS Plan results, it will be applied in an equitable manner to all land use jurisdictions (proportionally applied). Development of the additional potable and recycled water supply sources needed to meet the BRP's existing potable and recycled water allocation must be adequately financed by those land use jurisdictions or developers who will use that water supply. FORA will need to transfer or provide for payment of the $17 million for water augmentation to MCWD before FORA dissolves; otherwise, MCWD through its existing authority will establish the

necessary fees and financing agreements to implement the additional supply projects to be paid for by the land use jurisdictions or developers.

9. MCWD plans to enter into Transition Agreements with each individual land use jurisdiction within the Ord Community. In those agreements, MCWD will agree to honor each land use jurisdiction's existing potable and recycle water allocations (subject to the GS Plan's sustainable yield determination). In any event, MCWD will continue to provide potable and recycled water and sewer collection services moving forward.

Thank you for considering these comments.

Sincerely,

Keith Van Der Maaten
General Manager

cc:
Michael Houlemard, Executive Director
Thomas Moore, MCWD Board President

Michael W. Stamp
Molly Erickson

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October 29, 2018

Via Email
Ralph Rubio, Chair
Board of Directors
Fort Ord Reuse Authority

Subject: Proposed resolution / transition plan

Dear Chair Rubio and member of the Board of Directors:

This office represents Keep Fort Ord Wild. The newest transition plan proposed by FORA late Friday, less than 72 hours ago, is fatally flawed.

Inadequate notice.

FORA cannot proceed with action on the transition plan until FORA first makes a CEQA determination. The Board cannot find that the action is exempt from CEQA because there is no evidence that FORA provided the public notice required by Master Resolution section 8.03.060, "PUBLIC NOTICE OF ENVIRONMENTAL DECISION":

> "Notice of decisions to prepare an environmental impact report, negative declaration, or project exemption shall be given to all organizations and individuals who have previously requested such notice. Notice shall also be given by publication one time in a newspaper of general circulation in Monterey County."

Please provide to me as soon as possible the evidence that FORA provided this prior notice. The Master Resolution controls here, because it states that "Where conflicts exist between this Article [Master Resolution] and State [CEQA] Guidelines, the State Guidelines shall prevail except where this Article is more restrictive." Absent proper notice under the Master Resolution, FORA cannot even proceed with a first vote on this item, because the first vote would be invalid and void.

Proposed resolution is subject to second vote requirement.

Master Resolution section 2.02.040(b) states that "A resolution, ordinance, or other action of the Board will not be approved or adopted sooner than 72 hours after its introduction, unless approved by unanimous vote of all members present at the time of consideration." This requirement applies to the action on the transition plan, which is the first time the board will vote on the plan.

The resolution was introduced after 2:30 p.m. on Friday, October 26, which was less than 72 hours before the special meeting of the board.

These are important rules adopted in the interest of fair public process and justice. Before you act today, each of you should consider that "The provisions of this Master Resolution and all proceedings under this Master Resolution are to be construed so as to give effect to the objectives of the Authority Act, this Master Resolution, and the promotion of justice" (Master Resolution, § 1.01.100(f)) and "This chapter contains the minimum requirements of the protection of the public convenience, safety, health, and general welfare" (Master Resolution, § 1.01.100(a)).

Inadequate notice to KFOW.

Longtime KFOW spokesperson Michael Salerno did not get the notice of the special meeting that FORA emailed after 2:30 p.m. on Friday. He would like to be present today but cannot be due to the inadequate notice. It appears FORA deliberately left Mr. Salerno off the list, although for years he has normally received FORA email updates, including Board meeting notices, committee meeting notices, and FORA's weekly updates. KFOW objects on this basis to the meeting proceeding.

As a separate reason, the late Friday release did not allow adequate time to review something as entirely new and important as the transition plan. KFOW has not had adequate time to review the hastily cobbled-together resolution, most of which is new, according to FORA.

Roll call vote.

The Master Resolution allows any Board member to request a roll call vote, and we urge you to have a roll call vote on all items related to the transition plan. (§ 2.02.040(c) ["A roll call vote may be requested by any member on any item before the Authority"].)

The proposed resolution is (1) a project, and (2) not exempt from CEQA.

The Board cannot find that the action is exempt from CEQA because it is a project and is not exempt. It is far more than a mere reorganization. The proposed action is a wholesale abandonment of adopted Reuse Plan mitigations, which is against the public interest and avoids the proper procedure through which the decision makers and the public would be adequately informed of the action and its impacts on the environment. The mitigations, policies and procedures have not been adequately implemented by FORA and adopted by the land use jurisdictions. The lax standards used by FORA to determine consistency of land use jurisdictions' plans with the Reuse Plan do not meet the stringent requirements of CEQA mitigations.

Problems with the latest version of the proposed resolution.

The staff report admits that there are significant issues with all of the following:

> LAFCO/FORA jurisdiction issues; assignability of the Implementation Agreements; survivability and enforcement of the Base Reuse Plan and Master Resolution post-2020 and in particular, prevailing wage policies and affordable housing policies.

The resolution is fatally flawed for numerous reasons. KFOW joins in many of the comments made by LandWatch Monterey County and others, and for that reason does not repeat them here.

The new resolution was presented less than 72 hours prior to the meeting, released for the first time in a dramatic new format, without a redline version. FORA staff stated "given the substantial reformat of the Transition Plan Resolution no red line is provided as it would be mostly red and not helpful." It is not FORA staff's role to determine what is helpful to the public, to KFOW and to the board of directors. This morning, the immediate following business morning following the afternoon release of the special meeting notice, I asked FORA staff (Ms. Damon and Ms. Davis) to send me the red line version. As of the finalizing of this letter, FORA has not provided the red-line version to allow review.

Much of the proposed resolution is factually and legally inaccurate. As one example, recitation F claims that "Pursuant to the requirements of Government Code section 67675, FORA adopted a Fort Ord Reuse Plan (the "Reuse Plan") on June 13, 1997, which identified (1) environmental actions required to mitigate development and reuse of the former Fort Ord (the "Base-wide Mitigation Measures") and (2) infrastructure and related costs necessary to accommodate development and reuse of the former Fort Ord (the "Base-wide Costs") . . . ." The recitation improperly jumbles and confuses Government Code, state planning & zoning law, and CEQA requirements with definitions that FORA has come up with out of whole cloth – "Base-wide Mitigation Measures" and "Base-wide Costs." These FORA definitions are not consistent with Government Code, state planning & zoning law, and CEQA, and FORA's incantations do not convert them into something that is enforceable or valid. As a separate issue, FORA's definitions in the proposed new resolution are different from the definitions that FORA put into the Implementation Agreements, which if adopted would make for a further mess. FORA is calling many things mandatory that are not, and is avoiding many mandatory requirements. FORA has had years to work with the land use jurisdictions on these issues, and has failed to do so.

The proposed plan improperly defers the formulation of the implementation agreements to a future date. The contents of those agreements are material to the plan and to the CEQA determination that FORA makes on the plan. There are no minimum or maximum terms placed on the contents fo the implementation agreements – put another way, there are no performance standards that provide certainty to KFOW and the decision makers as to what the agreements will state and contain. Therefore, FORA cannot adopt transition plan because too much uncertainty and too much

depends on these undrafted future agreements which one, several, or all the land use jurisdictions may or may not sign.

There is no assurance that the transition plan will implement the mitigations in the Reuse Plan EIR. As one example, the oak woodlands mitigations are still not complete more than 20 years after the Reuse Plan was adopted. As one example, the water mitigations are in the form of Reuse Plan policies and programs that requires the agencies to determine safe yield, prohibit development that relies on groundwater pumping in excess of safe yield, and develop an alternative water supply in order to support Fort Ord development and to shut down the Fort Ord wells. Despite these Reuse Plan policies, FORA and the land use agencies have incorrectly assumed that there is a permanent groundwater supply of 6,600 afy to support future development, and they have relied on FORA's allocation of that 6,600 afy to approve development projects. The transition plan purports to perpetuate that 6,600 afy allocation even though that would conflict with Reuse Plan policies and programs and even though FORA has no legal authority to impose even this allocation constraint on post-FORA development. The transition plan cannot actually limit future groundwater pumping by MCWD or others unless they agree to such limits. They have not.

FORA has not complied with CEQA. CEQA requires that FORA evaluate the changes the transition plan will make to previously adopted mitigation, including the Reuse Plan policies and programs identified as mitigation for water supply impacts, and CEQA requires that FORA prepare a subsequent EIR to evaluate the impacts of the transition plan on water supply and propose new mitigation to prevent future impacts to the groundwater supply. FORA proposes to discard the Reuse Plan, an action that would have numerous significant, unanalyzed and unmitigated impacts.

KFOW has long been concerned about the incomplete status of the implementation of the Reuse Plan policies and programs, many of which are specifically identified as mitigation for the development at Fort Ord, as well as the CEQA mitigations identified in the Reuse Plan MMRP. KFOW has provided letters and evidence explaining the problems. These were reinforced by the reassessment report's list of policies and programs yet to be implemented. KFOW continues to object to this material failure by FORA. KFOW objects that the transition fails to demonstrate that the incompletely implemented and wholly unimplemented mitigations, and the policies and programs that constitute environmental mitigation, will be implemented in the future. These include significant mitigations including water augmentation as described, oak woodlands, open space protection, the lack of adoption by Monterey and Del Rey Oaks of the plans and policies assigned to the land they received, improper approvals of road projects, and much more. I refer you to the letters and evidence on these points that KFOW has submitted in the past to FORA. If you need copies, please let me know and I will provide them.

The resolution fails to mention the Regional Urban Design Guidelines: The Regional Urban Design Guidelines were belatedly adopted in 2015 by FORA as part of

the 1997 Reuse Plan mandatory directives. However, even though the Guidelines say "shall" and use other mandatory language, the City of Seaside has already shown that Seaside's position is that the Guidelines are not mandatory language, and that FORA and Seaside do not have to follow the Guidelines. This was shown by the comments of FORA Chair Ralph Rubio, mayor of Seaside, when he refused to apply the Guidelines to the South Boundary Road project and Gigling Road project. Mayor Rubio, sitting as a FORA board member at a FORA board meeting, stated he understood the Guidelines were not mandatory. The proposed transition plan fails to mention the guidelines which were prepared at significant expense and resources, and which are a mitigation of the Reuse Plan. As shown by its acts, FORA's position is that the guidelines are not binding on FORA, and thus presumably FORA's position is that the land use jurisdictions would be free to ignore the guidelines as well, on current and future projects. Please advise me promptly in writing if FORA has stated a different position in writing or at any public meeting.

A material change in the law is the holdings that it is not necessary to determine the impact of the environment on the project. *(CBIA v. BAAQMD* (2015) 62 Cal.4th 369; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455.) Under these holdings, on-site congestion whether caused by through traffic from other sources (i.e., caused by the environment) or caused by the project itself no longer counts as a significant impact that would require mitigation. This is another reason that the on-site Fort Ord roadways are not compelled as mitigation.

There is no reason the FORA member agencies should bind themselves under the transition plan to a fund and construct the FORA CIP road projects when the member agencies they are not legally compelled to do so and when they will not be able to rely on CEQA mitigation to force developers to pay for those roads in the future.

In contrast to the mandatory Reuse Plan mitigations identified in the plan and in the adopted MMRP and the EIR, the CIP projects are *not* mandatory. The projects are FORA's voluntary list. On top of that, the list of CIP projects – and FORA's claims of what has been completed and what has not – is inaccurate and incomplete. As one example, FORA claims that the recent approval of the South Boundary Road widening and realignment project was mandatory. FORA is incorrect. The South Boundary Road project is not described or listed anywhere in the Reuse Plan.

As an additional problem with FORA's analysis, FORA has failed to assign all the remaining FORA CIP projects, so FORA's arguments fail. For example, the CIP lists the South Boundary Road project as a project that extends from General Jim Moore to York Road. The project approved in 2017 by FORA is for a project that extends only from General Jim Moore to 200 feet past Rancho Saucito Road, from York Road. Thus, FORA has not completed the remaining CIP South Boundary Road project that extends from 200 feet past Rancho Saucito to York Road. This is approximately half a mile of widening through an area of known sensitive and protected habitat and actual identified locations of protected species. The remaining portion of the road is mandatory"

according to FORA, and would presumably be required of the City of Monterey to fund and construct. But FORA has not assigned that to the City of Monterey, and the omission is inconsistent with FORA's asserted approach in the resolution.

The resolution fails to adequately and legally consider and account for all liabilities, contracts and litigation. For example, the resolution fails to consider litigation not yet filed and fails to consider the FORA contracts with the California Native Plant Society and with the land use jurisdictions. The resolution's attempt to address "late-discovered items" does not absolve FORA of the duty to fairly disclose and evaluate all issues now to the public, the decision makers, and LAFCO. The resolution's attempt to assign the undisclosed items with regard to whether or not they are "related to the use of real property" fails, because it is uncertain who makes that determination, what process would be used, how the late discovered items would be disclosed to all interested parties, and what roles, rights, and remedies the public and jurisdictions would have in the processes.

Offer to meet.

KFOW offers to meet with you to discuss these issues in the hope of a resolution before FORA acts. You, the FORA Board member, control the schedule. KFOW does not. KFOW urges you to carefully consider all of the information provided before you vote on the CEQA determination and the transition plan.

Summary.

For each of the concerns and issues identified here, in the public process, and in FORA's records, you should not find the plan is exempt from CEQA and you should not approve or implement the transition plan as proposed.

Very truly yours,

STAMP | ERICKSON

Molly Erickson

Molly Erickson
Michael W. Stamp