

2020

June 18, 2020

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FORA Chair/Supervisor Jane Parker
FORA Board of Directors
920 2nd Avenue, Suite A
Marina, CA 93933

Subject: June 19, 2020 FORA Board Agenda Item 7c 2018 Transition Plan Update

Dear FORA Chair/Supervisor Jane Parker and FORA Board of Directors,

On behalf of the Local Agency Formation Commission (LAFCO) of Monterey County, I am writing in our dissolution oversight role to respectfully comment on Item 7c 2018 Transition Plan Update on the June 19 agenda. Specifically, LAFCO requests that the FORA Board remove new and improper language in sections 1.5, 2.2.8, and 3.1 designating successor agency responsibilities and assigning liabilities to LAFCO (as shown in the attachment to this letter in redline changes). LAFCO objects to new language in section 1.5 to designate LAFCO as the responsible successor agency for litigation concerning FORA's public records, in section 2.2.8 to assign liabilities to LAFCO stemming from late discovered items, and in section 3.1 to designate LAFCO as the responsible successor agency for all legal, financial, and unresolved matters and to assign to LAFCO all unassigned liabilities.

LAFCO cannot and refuses to accept FORA's proposed draft Transition Plan language attempting to shift some of FORA's responsibilities and liabilities to LAFCO. LAFCO rejects FORA staff and counsel's proposals in the following Transition Plan sections:

Section 1.5 – Successor to Litigation Concerning FORA's Records

FORA seeks to designate LAFCO as the responsible successor to litigation concerning FORA's public records prior to July 1, 2020. This is inappropriate because LAFCO cannot inherit the risks that FORA assumed through its compliance or lack of compliance in maintaining its public records. Moreover, the Public Records Act imposes no responsibility on an agency for records it does not own, control or possess.

Section 2.2.8 – Successor to Late Discovered Liabilities

FORA attempts to assign payment responsibilities for late discovered items not tied to real property that result in a liability to County of Monterey and LAFCO. FORA would have LAFCO apply any unexpended funds received from FORA to satisfy these liabilities. This proposed use of funds is improper because the FORA-LAFCO indemnification agreement makes no provision for the \$500,000 received by LAFCO to be used as a funding source to satisfy liabilities or claims levied against FORA or its member agencies. Rather, the indemnification agreement specifies that the \$500,000 is to be used to protect and reimburse LAFCO from a FORA-related legal action or proceeding. Furthermore, FORA staff and counsel's actions to attempt to transfer liabilities to LAFCO are contrary to FORA's indemnification agreement commitments to defend and indemnify LAFCO in matters of FORA dissolution.

Section 3.1 – Successor to All Legal, Financial, and Unresolved Matters and to All Unassigned Liabilities

FORA seeks to designate LAFCO as the responsible successor to all legal, financial, and other unresolved matters, and to assign all liabilities not otherwise specifically assigned in the Transition Plan to LAFCO. As previously pointed out, LAFCO cannot

inherit risks that FORA assumed through its own action or inaction and LAFCO's funds received from FORA are for use in LAFCO's own legal defense.

LAFCO's Limited Role in FORA Dissolution

The FORA Act, California Government Code sections 67650 to 67700, gives LAFCO the oversight role, without enforcement authority, to ensure that FORA completes its dissolution process role of preparing, approving, and transmitting a Transition Plan to LAFCO. Specifically, Government Code section 67700(b)(1) mandates that LAFCO: "provide for the orderly dissolution of the authority including ensuring that all contracts, agreements, and pledges to pay or repay money entered into by the authority are honored and properly administered, and that all assets of the authority are appropriately transferred."

Put simply, there is no legal basis for FORA to include this new language in its Transition Plan and to attempt to place FORA's non-land use related liabilities on LAFCO. California Government Code section 67700 does not invest LAFCO with authority to make assignments, designations or provisions in the event the transition plan approved by the FORA Board failed to do so, nor does it invest LAFCO with authority to accept successor agency responsibilities and assignment of liabilities. The language merely places LAFCO in a referee position to aid in the dissolution process, which LAFCO has done over the last four years through its regular involvement and communications with FORA and interested stakeholders.

Generally, LAFCO has a "watchdog" role, as created by the Legislature, to guard against the wasteful duplication of services that results from indiscriminate formation of new local agencies or haphazard annexation of territory to existing local agencies. LAFCO also has regulatory and planning responsibilities under the Cortese-Knox-Hertzberg Act for local agencies. FORA is not and has never been regulated by LAFCO. Dissolution of FORA is undertaken pursuant to the FORA Act, not the Cortese-Knox-Hertzberg Act. Through the FORA Act, as amended, the Legislature has declared that FORA shall dissolve as of June 30, 2020. LAFCO has no statutory basis on which to approve, conditionally approve, or deny FORA dissolution.

Impractical for LAFCO to Perform Proposed Responsibilities and Assignments

In the context of FORA dissolution, LAFCO cannot be an active participant in performing successor agency responsibilities and taking on assignment of liabilities because LAFCO's role is to perform oversight of the dissolution process conducted by FORA and its designated successors. It would be a conflict if LAFCO took on responsibilities, for which it is also responsible for monitoring and reviewing to ensure completion. Also, importantly, LAFCO is solely funded through its member agency contributions. Requiring LAFCO's members, a majority of who have nothing to do with FORA, to be responsible for FORA's unresolved responsibilities and liabilities is patently unfair. Furthermore, LAFCO lacks the staff and financial resources to assume FORA's responsibilities and liabilities.

FORA's Responsibility to Negotiate Proper Successors

LAFCO takes exception to a representation made in the staff report for Item 7c stating that the proposed 2018 Transition Plan changes, as related to identifying successors to FORA obligations, were reviewed at previous FORA Board meetings. LAFCO only discovered these recent changes to sections 1.5, 2.2.8, and 3.1 as of June 17, 2020 when a redline version of the 2020 Transition Plan was posted to the FORA Board website. These changes were not included in previous FORA Board agenda items pertaining to the draft Transition Plan.

LAFCO also takes exception to FORA staff and counsel's proposed last-minute divesting of its responsibilities and liabilities to LAFCO. LAFCO is not a proper successor in these matters as pointed out in this letter. FORA staff and counsel did not consult LAFCO about these proposed successor designations and liability assignments to LAFCO. LAFCO has clearly communicated its limited FORA dissolution role from the onset, which was understood in the FORA Board's adoption of the 2018 Transition Plan on December 19, 2018. Since neither FORA or LAFCO could compel FORA member agencies to become responsible successors to FORA's responsibilities and obligations, FORA's 2018 Transition Plan envisioned a process of FORA negotiating Transition Plan Implementing Agreements with FORA members. Although FORA staff and counsel successfully negotiated some implementing agreements such as the ESCA and EDC Agreements with City of Seaside, FORA negotiators failed to reach agreement on a Multi-Agency Implementing Agreement. FORA staff and counsel should not seek to remedy these circumstances by attempting last-minute to shift FORA responsibilities and liabilities to LAFCO.

Given the reasons described in this letter, LAFCO requests that FORA remove language in sections 1.5, 2.2.8, and 3.1, as shown in the attachment to this letter in redline changes. Thank you for your attention to these

urgent dissolution matters. Also, I would like to apprise you that the Local Agency Formation Commission will conduct a public hearing on June 22 at 4:00 p.m. to consider a resolution making determinations about FORA's scheduled dissolution on June 30.

Sincerely,

A handwritten signature in blue ink that reads "Kate McKenna". The signature is fluid and cursive, with the first name "Kate" and last name "McKenna" clearly legible.

Kate McKenna, AICP
Executive Officer

Attachment: Requested changes to FORA's 2020 Transition Plan Update

Requested changes to FORA's 2020 Transition Plan Update included as **Attachment A** to Item 7c in the June 19, 2020 FORA Board meeting packet:

1.5 Transfer of FORA's Records:

Except for (a) records pertaining to the ESCA, which records will be transferred to the City of Seaside as custodian pursuant to the ESCA contract documents; (b) records transferred to the local redevelopment authority designated as FORA's successor in connection with the EDC MOA; and (c) records of attorney-client privileged communications and materials protected by the attorney work product doctrine, which will be transferred to Authority Counsel, Kennedy, Archer & Giffen, PC, all of FORA's public records will be transferred to the County of Monterey which shall be the custodian and is designated as the responsible successor agency for records management and compliance with applicable law concerning FORA's public records, including but not limited to the California Public Records Act for the period after FORA's dissolution. Appropriate compensation to the County and the County's responsibilities with regard to the stewardship of FORA's public records will be further defined in an agreement entered into between FORA and the County prior to FORA's dissolution. ~~FORA hereby designates LAFCO as the responsible successor agency for any litigation concerning FORA's compliance or alleged lack of compliance with applicable law, including but not limited to the California Public Records Act, concerning FORA's records for the period prior to FORA's dissolution.~~

2.2.8 Late Discovered Items: To the extent that any contractual or other obligation of FORA is discovered during implementation of this Transition Plan, those obligations shall be assigned as follows: If the liability or obligation is related to the use of real property, it shall be assigned to the underlying land use jurisdiction. If the liability or obligation is unrelated to the use of real property, LAFCO shall notify any appropriate insuring entity and the County. Upon the establishment of the validity and amount of the liability or obligation by LAFCO and the County acting in coordination with each other, such established liability or obligation shall be paid or discharged first (a) by the County applying monies, if any, then on hand in the FORA accounts; next (b) ~~by LAFCO applying any then unexpended funds received from FORA, including but not limited to the litigation reserve funds received from FORA as described in Section 2.1.3; and only then (c)~~ by encumbering and expending future property tax revenues pursuant to Health and Safety Code section 33492.71. The County shall continue to accrue such property tax revenues in FORA's account until all of FORA's recognized debts have been retired.

3.1 Schedule of Remaining Obligations, General Designation of Responsible Successor Agency, and General Assignment of Liabilities:

Obligation	Reference in Updated Transition Plan
Implementation of Mitigation Measures Pertaining to North-South Road/Highway 218 Project and CEQA Lead Agency Status	See Section 1.2
Implementation of Mitigation Measures Pertaining to Relocation and Reconfiguration of General Jim Moore Boulevard Project and CEQA Lead Agency Status	See Section 1.2
Habitat Management Responsibilities on Sites Held by the Monterey Peninsula Community College District	See Section 1.2
Repair of Stormwater Infiltration Units on Eucalyptus Road CEQA Lead Agency Status	See Section 2.1.5
Removal of the Stockade and Ancillary Buildings CEQA Lead Agency Status	See Section 2.1.5
South Boundary Roadway and the Intersection at General Jim Moore Boulevard Improvements CEQA Lead Agency Status	See Section 2.1.5
Transfers of Real Property in accordance with the federal "Pryor Amendment"	See Section 2.1.9
Payment of Unfunded Terminated Agency Liability to CalPERS	See Section 2.2.1
Payment of Late Discovered Obligations	See Section 2.2.8 <i>(note: incorporate LAFCO's changes)</i>
Successor for Litigation Matters	See Section 3.1 (also 1.5)
FORA Contract with California Native Plant Society and City of Del Rey Oaks	See Section 3.3

Except as identified in the schedule of remaining obligations set forth above or specifically provided for elsewhere in this Transition Plan, FORA is not aware of any remaining obligations. ~~In recognition that FORA has transmitted funds identified for indemnification of LAFCO in the aggregate amount of \$500,000 as described in Section 2.1.3, except as specifically provided to the contrary elsewhere in this Transition Plan, FORA hereby designates LAFCO as the responsible successor agency for all legal, financial, and other unresolved matters, known and unknown, and assigns to LAFCO all liabilities not otherwise specifically assigned in this Transition Plan.~~