

MONTEREY COUNTY



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Board of Directors
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Re: FORA Transition Plan – Item 7f on FORA’s October 12, 2018 Agenda

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

This letter is written on behalf of the County of Monterey regarding the proposed FORA transition plan. On October 2, 2018, the County Board of Supervisors voted unanimously to inform the FORA Board of the following: the County has legal concerns with the draft transition plan presented to FORA on September 28, 2018 (Attachment A to Item 8e of the September 28, 2018 FORA Board agenda); the County supports FORA’s retention of a facilitator to assist in addressing and revising the transition plan; and the County recommends that FORA staff meet with County staff and County Counsel to address the legal deficiencies in the draft transition plan. Additionally, on September 11, 2018, the Board of Supervisors voted (3-1, one absent) to support state legislation to extend FORA for ten years with some modifications, and the County is sending separate correspondence to FORA on that proposal.

FORA staff released a revised draft transition plan on or about October 5, 2018. (Agenda Item 7f of October 12, 2018 FORA Board Agenda.) The revised draft does not alleviate the legal concerns. The purpose of this letter is to outline some of the legal problems with the draft transition plan and to request a meeting between staff and counsel to discuss the legal issues prior to the proposed vote on the transition plan, which FORA has currently scheduled for October 19.

First, the draft transition plan needs, as a foundation, a more thorough legal analysis of whether and extent to which plans and agreements would survive FORA dissolution. The transition plan should address whether and how the Base Reuse Plan would remain controlling without FORA. The transition plan should start from the documents that clearly survive FORA – such as covenants in the land transfers and adopted local policies and ordinances that are consistent with the Reuse Plan – rather than assume, without analysis, that the Base Reuse Plan or Basewide Costs and/or Basewide Mitigation Measures would survive FORA dissolution. Similarly, the transition plan errs in assuming the Implementation Agreements would survive the dissolution of FORA without some additional action by both contracting parties. The draft transition plan proposal is for FORA to “assign all its rights in each Implementation Agreement to its successor who is responsible to complete all projects in the CIP.” (Agenda Item 7f, at p. 4 of the draft resolution; same statement appears in the September 28 draft.) Assign to whom? The implication is that FORA would “assign” its rights in each Implementation Agreement to the contracting party, for example, FORA would assign to County its rights in the existing Implementation Agreement between FORA and County. That proposal does not pass legal muster, as it would result in County contracting with itself, obviously not a legal contract. A contract requires at least two parties. (California Civil Code sec. 1550.)

Similarly, the draft transition plan's proposal for the Master Resolution is not well considered. The transition plan proposes to continue the policies in the Master Resolution (Chapters 3 and 8 in particular) by directing staff "to record the Master Resolution in its entirety one (1) month prior to dissolution." (Agenda Item 7f, at p.9 of the draft resolution.) This proposal does not appear to serve its intended purpose. First, as to land already transferred, it is questionable whether FORA could legally record the Master Resolution without the permission of the current owner. More substantively, while recordation accomplishes notice to future buyers, recordation does not address how the Master Resolution would be implemented post-FORA when, by its terms, the Master Resolution depends on FORA or a successor centralized regional implementing body. For example, Chapter 8 dictates procedures for the FORA Board to follow for determinations of consistency of local legislative actions with the Base Reuse Plan. Simply recording the Master Resolution does not address how Chapter 8 would be implemented in the absence of a successor centralized body to succeed FORA.

The transition plan also needs to differentiate more precisely between true legal obligations and matters of policy choice and discretion. The draft transition plan characterizes the proposed projects in the Capital Improvement Program (CIP) as "obligations" to be assigned to successors, but this assertion is not supported by the relevant documents or law. The draft transition plan purports to rely on "the authority granted by the legislature in Government Code section 67700(b)" to designate "all projects identified in the CIP as obligations required to be assigned by this Transition Plan in accordance with the formulas set forth in the Implementation Agreements . . ." (Agenda Item 7f, at p. 4 of the draft resolution; same statement appears on p. 4 of the September 28 draft.) Government Code section 67700 provides for the assignment of assets, liabilities, and obligations, but it does not address the predicate question of which FORA programs and activities are "obligations" to be assigned. The Reuse Plan incorporates a growth management approach, with the CIP as a primary tool for growth management. The Reuse Plan also includes a Development and Resource Management Policy to "restrain development to available resources and service constraints." (Reuse Plan, Policy 3.11.5, at p. 194.) But, neither the Base Reuse Plan, Implementation Agreements, or restrictions recorded on title as part of the land conveyances mandate the completion of specific CIP projects. While there may be specific contractual or financial commitments that do give rise to a legal obligation for a specific project, the transition plan would need to identify those specifically. In the absence of such specific contractual obligations for specific projects, the transition plan should recognize the general legal principle that, if a future proposed CIP project is "assigned" to a jurisdiction, that jurisdiction has discretion to determine whether to proceed with the project, based on future environmental review, funding availability, analysis of consistency with its general plan policies and ordinances, and other factors within that jurisdiction's sound discretion. Absent some specific contractual obligation, FORA does not have the legal authority, nor do Government Code sections 56886 or 67700 provide FORA or LAFCO the authority, to require jurisdictions to decide to undertake specific infrastructure projects.¹

The transition plan should also take account of the legal limitations on local jurisdictions' ability to make future financial commitments based on an unknown future source of funds. The draft transition plan "assigns" post-dissolution costs "based on projected CFD special taxes to be collected" for habitat, transportation, and water/wastewater, totaling more than \$19 million of future costs in the case of the County according to the draft transition resolution. (Item 7f, at pp.

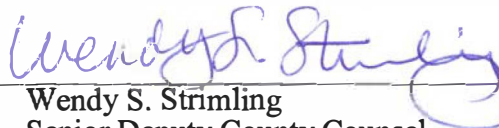
¹ Government Code Section 67700(b)(1) authorizes LAFCO to "provide for the orderly dissolution of the authority including ensuring that all contracts, agreements, and pledges to pay or repay money entered into by the authority are honored and properly administered, and that all assets of the authority are appropriately transferred." Section 67700(b) states that the "transition plan shall assign assets and liabilities, designate responsible successor agencies, and provide a schedule of remaining obligations." Government Code Section 56886, which is also cited by the Plan, also does not provide authority to assign land use projects to jurisdictions. Section 56886 states explicitly that "none of the terms and conditions" of change of organization "shall directly regulate land use, property development, or subdivision requirements."

7 -9 of the draft resolution.) In addition to failing to acknowledge the discretion of jurisdictions over whether to approve the CIP projects, the transition plan fails to recognize the legal constraints on making future financial commitments. The proposed device of a "Transition Plan Implementation Agreement" only partially addresses the issue. It provides for a mechanism for consent but still ultimately relies on assignment by FORA if TPIAs have not been executed by the time of FORA dissolution and also fails to recognize jurisdictions' financial limitations. (Agenda Item 7f, at p. 10 of the draft resolution.) The County is subject to the California Constitution debt limitation clause which prohibits the County from incurring indebtedness or liability exceeding income or revenue in a given fiscal year unless the County encumbers the funds when it makes the commitment or makes its commitment contingent of funding being available. (Cal. Const., Art. 16, sec. 18.) Thus, the transition plan must recognize that, even if jurisdictions are able to enter into TPIAs, monetary commitments in any such TPIA would likely, of legal necessity, be contingent on availability of funding, and neither FORA or LAFCO have authority to make assignments that would cause jurisdictions to exceed their authority under the California Constitution.

We would welcome the opportunity to meet with FORA staff and FORA counsel to discuss these and other legal issues and to put the transition plan on more solid legal footing prior to the vote on the plan. Thank you for considering these comments.

Sincerely,

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By: 
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cc:
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