

Memorandum

Date: July 3, 2013

To: Fort Ord Reuse Authority
Board of Directors
Mayor Jerry Edelen, Board Chair
Michael Houlemard, Executive Officer

From: Alan Waltner, Esq.

RE: CEQA and Land Use Implications of Potential Revisions to the Fort Ord
Reuse Authority Base Reuse Plan

I. INTRODUCTION

This memorandum addresses the implications under the California Environmental Quality Act (“CEQA”) of potential revisions of the FORA-adopted Base Reuse Plan (“BRP”). This memorandum also addresses how changes to the BRP are affected by the guidelines implementing CEQA and land use law. The current BRP was adopted in 1997 and supported by a programmatic environmental impact report prepared under CEQA (“1997 EIR”). A legal challenge to the adequacy of the 1997 EIR was resolved through a settlement agreement with the Ventana Chapter of the Sierra Club (“Sierra Club settlement”).

As required by the Sierra Club settlement, which was memorialized in Article 8.10.010(h) of the FORA Master Resolution, FORA completed a “reassessment” of the 1997 BRP in December 2012 and produced a report dated December 14, 2012 memorializing that reassessment (“Reassessment Report”). The Reassessment Report divided its evaluation into five categories. Category I consists of various corrections and updates to the 1997 BRP, largely in the form of minor errata to the text of the BRP. Category II consists of changes that would conform the BRP to the substance of previous FORA Board actions, particularly “consistency” determinations, as well as changes that would improve consistency of the BRP with regional plans that have evolved since 1997. Category III evaluates the compliance of various member jurisdictions with certain policies and programs in the 1997 BRP. Category IV is a discussion of more substantive modifications to BRP policies and programs that could be considered by the FORA Board in response to the reassessment. Category V discusses various potential changes to FORA’s governance, including procedures and operations.

At this time, FORA is still in the process of public outreach and is considering a broad range of possible changes to the BRP as reflected in these five categories. In particular, it is anticipated that a colloquium and workshop process will occur during the second half of this year to obtain additional public input and provide a context for additional conversations about potential BRP revisions.

As discussed below, the appropriate CEQA document needed to support these changes will depend on the changes ultimately proposed. Near-term activities such as the colloquium and workshop process are anticipated to remain exempt planning and feasibility studies. Beyond that point, the nature and scope of the appropriate CEQA document should be evaluated through an initial study process. Given the relatively long lead-time required for certain CEQA compliance options, we recommend that this initial study process be initiated soon.

II. CEQA IMPLICATIONS OF POTENTIAL BRP REVISIONS

This section of the memorandum addresses three key issues:

- when is additional CEQA review required?
- what is the appropriate form of a new CEQA document, if any? and
- what is the recommended procedure for determining the appropriate CEQA document?

Land use considerations are discussed in the next section.

A. When is Additional CEQA Review Required?

In situations such as this, where an EIR for a program (or project) has already been prepared, certified, and judicial review has been completed, Section 21166 of CEQA, and Section 15162 of the CEQA Guidelines, establish the criteria for any additional required environmental review under CEQA. Distilled down to its essence, there must be a discretionary action¹, and there must also be one or more of the following: changes in the project (or program), changes in circumstances, or new information.

CEQA Section 21166 describes the three events that trigger the need for preparation of a supplemental environmental impact report as follows: “(a) Substantial changes . . . in the project which will require major revisions of the environmental impact report. (b) Substantial

¹ The discretionary action trigger is described in the CEQA Guidelines as follows:

Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.

Guidelines Section 15162(c). If there is no future discretionary action, the CEQA Guidelines are clear that the agency is not required to reopen the previous approval and CEQA process. See also Guidelines Sections 15002 and 15357.

changes . . . with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report. [and] (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.” CEQA Section 21166.

Section 15162 of the CEQA Guidelines elaborates on these tests, generally requiring that the changes or new information create the need for “major revisions” relating to “new significant environmental effects” or a “substantial increase” in those effects. This requirement establishes a fairly high bar for reopening the EIR. Ultimately, this question turns on “whether, subsequent to the certification of the EIR, circumstances have changed to the extent that reliance on the EIR is unwarranted. (See *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073 [“section 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired [citation], and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process”].)” *Concerned Citizens of Dublin v. City of Dublin*, Slip Op., at 17 (March 7, 2013; certified for publication March 28, 2013).

Case law has been relatively generous in finding additional environmental review unnecessary to support program changes. For example, a reallocation of 100 residential units from one site to another was not considered a significant change to a specific plan in *Concerned Citizens of Dublin*. Slip Op. at 17. In that case, the EIR analyzed environmental impacts based on the maximum residential units in the program area as a whole, and the Court concluded that shifting 100 units to a different location was not a significant change. Likewise, the Court in *Bowman* considered the rerouting of project traffic from one street to another not to be a significant change.

B. What is the Appropriate Form of a New CEQA Document, if Any?

The next question that needs to be addressed is the form of the CEQA document that will be used to support future actions relating to the Base Reuse Plan. Here there are at least six options: exemption for planning and feasibility studies, categorical exemption, negative declaration, supplemental EIR, subsequent EIR, or addendum. The appropriate document will depend on the timing, scope and nature of the BRP-related activities, in particular any BRP revisions.

First, the CEQA Guidelines contain an exemption for planning and feasibility studies that do not have a legally binding effect on later activities. CEQA Guidelines Section 15262. This was the basis for preparing the BRP reassessment without an accompanying CEQA document. The anticipated colloquium and workshop process also will qualify for this exemption so long as no legally binding actions are taken and the process includes a “consideration of environmental factors.” *Id.*

Second, the CEQA Guidelines contain a categorical exemption that applies to “changes in the organization or reorganization of local governmental agencies where the changes do not change the geographical area in which previously existing powers are exercised.” CEQA Guidelines Section 15320. This categorical exemption would be potentially applicable to the Category V changes to FORA’s governance.

Third, CEQA generally allows a negative declaration to be prepared, rather than an EIR, where there is no “fair argument” that a significant effect on the environment would result from a program or other project. CEQA Guidelines Section 15063. Guidelines Section 15162, however, makes this “fair argument” standard inapplicable in the supplemental EIR context, and instead asks whether substantial evidence supports the agency’s decision not to undertake additional environmental review under CEQA Section 21166. If the initial study recommended below shows that supplemental environmental review has not been triggered for any impact, a negative declaration memorializing that conclusion may be utilized.

Fourth, CEQA Guidelines Section 15163 provides that an agency may choose to prepare a supplemental EIR rather than a subsequent EIR if, among other things, “[o]nly minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.” CEQA Guidelines Section 15163. Therefore, a key consideration in determining whether to prepare a subsequent or supplemental EIR is a fact-based determination of whether the additions or changes to the previous EIR are only minor.

A supplemental EIR does not require recirculation of the previous draft or final EIR and need only contain the information necessary to make the previous EIR adequate for the project as revised. However, when an agency decides whether to approve a future project, it must consider the previous EIR, as revised by the supplemental EIR. CEQA Guidelines Section 15163.

Fifth, if major changes are required to make a previous EIR adequate, the agency must prepare a subsequent EIR. Although there is only limited guidance in the State CEQA Guidelines, Section 15162 states that a subsequent EIR should be prepared if it is necessary to do more than supplement the previous EIR. There is no requirement for the lead agency to consider the original EIR when it considers the subsequent EIR, although CEQA Guidelines Section 15162(d) requires the original EIR to be made available.

Sixth, the CEQA Guidelines authorize the preparation of an addendum in certain circumstances, where the conditions triggering a subsequent EIR under Guidelines Section 15162, as described above, have not occurred, and “only minor technical changes or additions are necessary” CEQA Guidelines Section 15164.

C. What is the Recommended Procedure for Determining the Appropriate CEQA Document?

Neither CEQA nor the CEQA Guidelines clearly specify a procedure for determining whether a certified program EIR, such as the 1997 EIR for the BRP, remains valid for continued use. However, CEQA and the guidelines suggest the use of an initial study in several related contexts. For example, in determining whether to use a program EIR for a subsequent project-level² approval, CEQA Section 21094 (c) states: “For purposes of compliance with this section, an initial study shall be prepared to assist the lead agency in making the determinations required by this section. The initial study shall analyze whether the later project may cause significant effects on the environment that were not examined in the prior environmental impact report.” See also Guidelines Sections 15153 and 15168. CEQA Section 21157.1

² Guidelines Section 15168(a) suggests that a program such as the BRP “can be characterized as one large project.” Therefore, these “tiering” sections of CEQA and the Guidelines could be considered applicable.

similarly provides for the use of an initial study in determining whether a subsequent project is within the scope of, and adequately covered by, a master environmental impact report. CEQA Section 21157.6 provides for use of an initial study to determine whether a master environmental impact report remains effective beyond an initial five year period.

CEQA practitioners have filled this gap in direct guidance by using a modified initial study checklist for the purpose of evaluating the continuing effectiveness of an EIR. Mechanically, this generally involves the addition of one or more new questions to the initial study checklist that ask whether there have been changes requiring additional analysis. This flexible use of the initial study method is supported by several CEQA guidelines. First, Guidelines Section 15063(f) states that, although example initial study checklists are included in Appendices G and H to the guidelines: “These forms are only suggested, and public agencies are free to devise their own format for an initial study. A previously prepared EIR may also be used as the initial study for a later project.” The use of an initial study in this context is further supported by the definition of an initial study in Guidelines Section 15365: “‘Initial Study’ means a preliminary analysis prepared by the Lead Agency to determine whether an EIR or a Negative Declaration must be prepared or to identify the significant environmental effects to be analyzed in an EIR.”³

We therefore recommend the preparation of an initial study to determine whether additional environmental review is required in connection with the anticipated BRP revisions, and to determine the appropriate scope of that review. As the guidelines above show, the format and contents of the initial study can be adapted to the particular situation. The ultimate format and contents of this initial study should be determined after further consultation with FORA and its consultants.

III. LAND USE CONSIDERATIONS

The BRP is not subject to the same state planning and zoning law requirements that apply to general and specific plans. Specifically, the broad state law requirements for a comprehensive general plan with specified plan elements that are internally consistent, do not apply to FORA’s BRP. Instead, the Authority Act specifies the required elements in very broad terms, and there are no state regulations that constrain FORA’s BRP in the ways that local general plans are constrained.

³ Likewise, CEQA Guidelines Section 15063(c) states that the purposes of an initial study are to:

- (3) Assist in the preparation of an EIR, if one is required, by:
 - (A) Focusing the EIR on the effects determined to be significant,
 - (B) Identifying the effects determined not to be significant,
 - (C) Explaining the reasons for determining that potentially significant effects would not be significant, and
 - (D) Identifying whether a program EIR, tiering, or another appropriate process can be used for analysis of the project’s environmental effects.

- (6) Eliminate unnecessary EIRs;
- (7) Determine whether a previously prepared EIR could be used with the project.

The Authority Act contains a number of requirements for the BRP that will need to be satisfied in connection with any BRP revisions. These requirements are specified in Government Code Section 67675, which states that the BRP (including revisions) is required to include all of the following elements:

- (1) A land use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space, and other natural resources within the area of the base. The land use plan shall designate areas of the base for residential, commercial, industrial, and other uses, and may specify maximum development intensities and other standards and criteria. The land use plan shall provide for public safety.
- (2) A transportation plan for the integrated development of a system of roadways, transit facilities, air transportation facilities, and appurtenant terminals and other facilities for the movement of people and goods to, from, and within the area of the base.
- (3) A conservation plan for the preservation, development, use, and management of natural resources within the area of the base, including, but not limited to, soils, shoreline, scenic corridors along transportation routes, open spaces, wetlands, recreational facilities, historical facilities, and habitat of, or for, exceptional flora and fauna.
- (4) A recreation plan for the development, use, and management of the recreational resources within the area of the base.
- (5) A five-year capital improvement program that complies with the requirements of Section 65403. The program shall include an allocation of the available water supply, sewage treatment capacity, solid waste disposal capability, and other limited public service capabilities among the potential developments within the area of the base. The program shall also identify both of the following:

(A) Base-wide facilities identified pursuant to Section 67679.

(B) Local facilities that are in the county or a city with territory occupied by Fort Ord and that primarily serve residents of the county or that city.

Since the 1997 BRP was subject to these same requirements, it contains all of the required elements. Generally, we recommend that the existing structure of the BRP be retained in order to carry forward all of these mandatory elements, as well as to provide a familiar structure and contents.

The BRP is also authorized to include any element or subject specified in Government Code Section 65302, relating to local general plans, such as a safety or housing element. (Government Code Section 67675(d)), but is not required to do so. The Authority Act contains no other references to the Planning and Zoning Law (Government Code Section 65000 *et seq.*), supporting the view that the Authority Act contains a “stand-alone” set of land use requirements that do not adopt or otherwise imply the application of parallel provisions of the Planning and Zoning Law.

The BRP is also required to be consistent with: “approved coastal plans, air quality plans, water quality plans, spheres of influence, and other county-wide or regional plans required by federal or state law, other than local general plans, including any amendments subsequent to the enactment of this title” The plan must also consider: “(1) Monterey Bay regional plans.

(2) County and city plans and proposed projects covering the territory occupied by Fort Ord or otherwise likely to be affected by the future uses of the base. (3) Other public and nongovernmental entity plans and proposed projects affecting the planning and development of the territory occupied by Fort Ord.” Government Code Section 67675(f).

Once the BRP has been adopted, all of the local jurisdictions with territory in Fort Ord are required to submit both the then-current general plan as well as general plan amendments to the FORA Board, accompanied with a certification that the plan “applicable to the territory of Fort Ord is intended to be carried out in a manner fully in conformity with [the Authority Act].” Government Code Section 67675.2. The FORA Board then approves and certifies the general plans and amendments applicable to the territory of Fort Ord if it finds that the plan “meets the requirements of [the Authority Act] and is consistent with the [BRP]. Government Code Section 67675.3. Following that approval, zoning ordinances and “other implementing actions” are required to be submitted to the FORA Board, which the Board can only reject “on the grounds that they do not conform with, or are inadequate to carry out, the provisions of the certified general plan applicable to the territory of Fort Ord.” Government Code Section 67675.5. Following the original general plan certification, amendments to that local plan only take effect upon certification by the FORA Board. Government Code Section 67675.7.

Government Code Section 67675 also states that the FORA Board “shall . . . revise from time to time, and maintain” the BRP. As discussed above, however, under the Authority Act, FORA retains considerable discretion regarding the contents of the BRP

IV. RECOMMENDATIONS AND NEXT STEPS

As described above, we recommend as an initial step that an initial study be commenced to evaluate the potential BRP revisions and the continuing ability of the 1997 BRP to support those revisions. An initial study could provide a framework for public participation, provide substantial evidence and a concrete description of FORA’s analysis, and help focus a future environmental document. It will be important for this effort that the anticipated list of BRP revisions be developed as quickly and accurately as possible, in order to provide an accurate, stable and finite “project description.” However, understanding that this is an ongoing process, a “framework” initial study could be prepared, based upon the information that currently is known (i.e. plan contents such as those in Categories I and II that are anticipated to be included, context changes and/or new information such as population, traffic, economic and other factors, and those Category IV items that are the most likely to be included). The framework would include an initial study checklist adapted to this situation, a summary of how the 1997 BRP EIR addressed each environmental impact, and an evaluation of the implications of those program changes, changed circumstances and new information that can currently be anticipated. With this framework initial study, ongoing discussions about the BRP revisions would be informed by the framework analysis and appropriate revisions to the initial study made as the BRP revision evolves.