Fort Ord Reuse Authority
920 2nd Avenue, Suite A, Marina, CA 93933
Phone: (831) 883-3672 ● Fax: (831) 883-3675 ● www.fora.org

ADMINISTRATIVE COMMITTEE MEETING
8:15 A.M. WEDNESDAY, April 18, 2012
910 2nd Avenue, Marina CA 93933 (on the former Fort Ord)

AGENDA

1. **CALL TO ORDER AT 8:15 AM**

2. **PLEDGE OF ALLEGIANCE**

3. **ACKNOWLEDGEMENTS, ANNOUNCEMENTS AND CORRESPONDENCE**

4. **PUBLIC COMMENT PERIOD:** Members of the audience wishing to address the Fort Ord Reuse Authority (FORA) Administrative Committee on matters within the jurisdiction of FORA, but not on this agenda, may do so during the Public Comment Period. Public comments are limited to a maximum of three minutes. Public comments on specific agenda items will be heard at the time the matter is under Committee consideration.

5. **APPROVAL OF MEETING MINUTES** – April 4, 2012 — ACTION

6. **FOLLOW-UP FROM 4/13/12 FORA BOARD MEETING** — INFORMATION/ACTION

7. **OLD BUSINESS**
   a. Habitat Conservation Plan – Update — INFORMATION
   b. California Redevelopment Wind Down
      i. Update and Discussion of "Base Reuse Zones" — INFORMATION/ACTION
      ii. RDA Property Issues — INFORMATION/ACTION
      iii. Tax Increment — INFORMATION/ACTION

8. **NEW BUSINESS –** none

9. **ADJOURNMENT TO JOINT ADMINISTRATIVE/CAPITAL IMPROVEMENT PROGRAM COMMITTEE**

NEXT SCHEDULED MEETING: May 2, 2012

*Information about items on this agenda or persons requesting disability related modifications and/or accommodations can contact the Deputy Clerk at: 831-883-3672 * 920 2nd Avenue, Suite A, Marina, CA 93933 by 5:00 p.m. one business day prior to the meeting. Agendas can also be found on the FORA website: www.fora.org.*

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ADMINISTRATIVE COMMITTEE MEETING
8:15 A.M. WEDNESDAY, APRIL 4, 2012
910 2nd Avenue, Marina CA 93933 (on the former Fort Ord)

MINUTES

1. **CALL TO ORDER**
Administrative Committee Chair Daniel Dawson called the meeting to order at 8:15 a.m. noting a quorum of voting members. The following people, as indicated by signatures on the roll sheet, were present:

Daniel Dawson, City of Del Rey Oaks*
Diana Ingersoll, City of Seaside*
Elizabeth Caraker, City of Monterey*
Nick Nichols, County of Monterey*
Doug Yount, City of Marina*
Rob Robinson, BRAC
Tim O'Halloran, City of Seaside
Kathleen Lee, Supervisor Potter's Office
Pat Ward, Bestor Engineers, Inc.
Greg Nakanishi, CCVC
Carl Holm, County of Monterey RMA
Bob Rench, CSUMB
Candace Ingram, Ingram Group
Bob Schaffer, MCP
Michael Groves, EMC Planning Group
Vicki Nakamura, MPC
Anya Spear, CSUMB
Debby Platt, City of Marina
Beth Palmer, Monterey Downs
Carl Niizawa, MCWD
Kristin Hoschouer, TAMC
Graham Bice, UCSC
Michael Houlemard, FORA
Steve Endsley, FORA
Jim Arnold, FORA
Crissy Maras, FORA
Darren McBain, FORA
Jonathan Garcia, FORA
Robert Norris, FORA
Lena Spilman, FORA

* Voting Members

2. **PLEDGE OF ALLEGIANCE**
Graham Bice led the Pledge of Allegiance.

3. **ACKNOWLEDGEMENTS, ANNOUNCEMENTS AND CORRESPONDENCE**
Chair Dawson congratulated Executive Officer Michael Houlemard on being the recipient of the Monterey Peninsula Chamber of Commerce Ruth Vreeland Public Official of the Year Award. Mr. Houlemard expressed his appreciation for the award and his respect for its namesake Ruth Vreeland.

4. **PUBLIC COMMENT PERIOD**
No comments were received.

5. **APPROVAL OF MARCH 14, 2012 MEETING MINUTES**

MOTION: Tim O'Halloran moved, seconded by Graham Bice, and the motion passed unanimously to approve the minutes as written.

6. **APRIL 13, 2012 FORA BOARD MEETING REVIEW**

The Committee reviewed the April 13, 2012 Board agenda. Mr. Houlemard provided an overview of the Base Reuse Plan Reassessment process. Senior Planner Jonathan Garcia explained that several community groups had requested the reassessment incorporate components that were not included in the original reassessment plan. For that reason, staff planned to return the following month to request an additional add on amount to the previously authorized $250,000 consultant contract. Mr. Houlemard summarized AB 1842 and announced that the Assembly Veteran Affairs Committee were scheduled to consider the bill on April 24, 2012. He stated that the updated appraisal of Preston Park had come in higher than the previous appraisal and noted that a summary of the appraisal would be included in the Board packet. Mr. Bice explained that UCSC had been approached by a strawberry farmer interested in farming on the east campus. UCSC had been granted interim agricultural water use in the past and was now making a similar request. Mr. Houlemard added that the interim water use would not interfere with any development and would generate some revenue for the Marina Coast Water District. He discussed the upcoming Annual Legislative Mission.

7. **OLD BUSINESS**

a. Capital Improvement Program (CIP) Development Forecasts

Mr. Garcia explained that FORA had received a development forecast from UCSC, but was still waiting on several other jurisdictions. The CIP development forecasts would be available for review at the next meeting.

b. Habitat Conservation Plan (HCP) – Update

Mr. Garcia announced that the draft HCP had been distributed to the various wildlife agencies and permitees on Friday, March 16, 2012. Staff had requested that all comments be received within the month. Mr. Houlemard also planned to address the item while in Washington D.C for the Annual FORA Legislative Mission.

c. Base Reuse Plan (BRP) Reassessment – Consultant Selection Update

Michael Groves, EMC Planning Group, reviewed the consultant kick-off presentation that EMC planned to make at the April 13, 2012 Board meeting. He briefly discussed EMC's community involvement strategy and answered questions from the Committee regarding the reassessment process.

d. California Redevelopment Wind Down – Update and Discussion of Assembly Hearing

i. Update and Discussion of Assembly Hearing/Meeting

Mr. Houlemard stated he had attended a meeting organized by the Speaker of the California State Assembly to discuss the creation of real property and financial provisions for military base communities. The meeting was attended by various legislators, senior legislative staff members, and representatives from other Redevelopment Agencies across the state.

ii. RDA Property and Tax Increment Issues
Assistant Executive Officer Steve Endsley provided an overview of the topic and discussed the impact of redevelopment wind down on property agreements between different agencies.

e. Proposed Veterans Cemetery Legislation – AB 1842
Mr. Houlemard indicated that the item had already been addressed and required no further discussion.

8. **NEW BUSINESS**
None.

9. **ADJOURNMENT**
Chair Dawson adjourned the meeting at 9:25 a.m.

Minutes Prepared by Lena Spilman, Deputy Clerk

Approved by:

Michael A. Houlemard, Jr., Executive Officer

Table 1. Schedule for Installation-Wide Multispecies Habitat Conservation Plan for Former Fort Ord, CA

Key:
- Document Preparation
- Meetings
- Review Periods
- Notice prep/publish
- Final Approval Steps

		Status	2012												2013											
			J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
	HCP																									
1	Draft Pre-Public HCP	Done																								
2	Key Issue Resolution status updates	Done																								
3	Wildlife Agengy and Working Group Review Period (8 wk)	Done																								
4	Meetings to Identify Key Issues																									
5	Bi-weekly meetings (as necessary) with Wildlife Agencies, FORA, and Working Group Members to check-in or resolve outstanding issues																									
6	Prepare 3rd Admin Draft HCP	Done																								
7	Review 3rd Admin Draft HCP (Permit Applicants and BLM only)	Done																								
8	Revise 3rd Admin Draft HCP	Done																								
9	Review 3rd Admin Draft HCP (Permit Applicants, BLM, Wildlife Agencies)																									
10	Prepare Screen-check Draft HCP																									
11	Review Screen-check Draft HCP (Wildlife Agencies)																									
12	Prepare Public Draft HCP																									
13	Prepare and publish Notice in Federal Register for HCP, EIS, IA																									
14	Public/Agencies Reviw Period (90 days)																									
15	Prepare Final HCP																									
16	See Approval process steps																									
	EIR/EIS																									
1	Prepare 1st Admin Draft EIS/EIR																									
2	Review Period																									
3	Prepare 2nd Admin Draft EIS/EIR																									
4	Solicitor review																									
5	Prepare Public Review EIS/EIR																									
6	Prepare and publish Notice of Availability in Federal Register (see HCP-7 above)																									
7	Prepare and publish CEQA Notice of Availability (1 - 2 months)																									
8	Public/Agencies Review Period (90 days)																									
9	Respond to public comments/Prepare 1st Admin Draft Final EIS/EIR																									
10	Review Period																									
11	Prepare Final Public Draft EIS/EIR - clear for publication																									
12	Publish Notice of Final EIS, HCP and IA Availability in Federal Register - 30 day comment period																									
13	Publish CEQA Notice of Determination - Permit Applicants - 30 day challenge period																									
14	CEQA Notice of Determination--CDFG - 30 day challenge period																									
15	See Approval Process steps																									
16	Federal Prep and Pub of *Record of Decision (ROD) - 30 day wait period*																									

Table 1. (Continued)

Key: Document Preparation; Meetings; Review Periods; Notice prep/publish; Final Approval Steps

		Status	2012												2013											
			J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
17	See Approval Process steps																									
	Implementing Agreement																									
1	Prepare 2nd Admin Draft IA	Done																								
2	Wildlife Agency and Working Group Review Period	Done																								
7	Prepare 3rd Admin Draft IA	Done																								
8	Review 3rd Admin Draft IA (Permit Applicants and BLM only)	Done																								
9	Respond to comments	Done																								
10	Review 3rd Admin Draft IA (Permit Applicants, BLM, Wildlife Agencies)																									
11	Prepare Screen-check Draft IA																									
12	Review Screen-check Draft IA (Wildlife Agencies)																									
13	Prepare Public Draft IA																									
14	Prepare and publish Notice of Availability in Federal Register (see HCP-12 above)																									
15	Public/Agencies Review period (90 days)																									
16	Prepare Final IA																									
17	See Approval Process steps																									
	Approval Process																									
1	Permit Applicants and BLM Approval of Final Plan, Final EIR/EIS and Final IA																									
2	Establish Implementing Entity																									
3	Implementing Entity approves Final Plan. EIR/EIS and Implementing Agreement																									
4	See EIR/EIS steps 11, 12 and 13																									
5	Local Agencies Adopt Imp Ordinances																									
6	Wildlife Agencies Approval of Plan, EIR and EIS and IA																									
7	FG Findings Preparation																									
8	FWS Findings/Biological Opinion																									
9	Permits Issued by FWS																									
10	Permits issued by CDFG																									

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MEMO

To: **MICHAEL A. HOULEMARD, Jr., Executive Officer**

From: **JERRY BOWDEN, Authority Counsel**

Subject: **LIQUIDATION OF FORMER FORT ORD RDA LANDS**

Date: **March 14, 2012**

I. Issue:

Does H&S 34177 require successor agencies to dispose of real property when the land in question is subject to any of the following conditions:

a. The former redevelopment agency did not acquire the land with "tax increment revenues" [See H&S Section 34181(a)] and
b. The land was acquired from the federal government under deed restrictions that require hazardous contaminant remediation prior to transfer of title to an end user.

II. Conclusion:

H&S 34177 does not require successor agencies to dispose of real property held by a former RDA if the land in question was not acquired with tax increment revenue.

III. Analysis:

The requirement that successor agencies dispose of land held by a former RDA is expressly limited to those lands acquired with tax increment revenues. Health and Safety Code section 34177reads in part:

> Successor agencies are required to do all of the following:
> …
> (e) Dispose of assets and properties of the former redevelopment agency as directed by the oversight board; provided, however, that the oversight board may instead direct the successor agency to transfer ownership of certain assets pursuant to subdivision (a) of Section 34181. The disposal is to be done expeditiously and in a manner aimed at maximizing value. ...

H&S 34181, referred to in the previous section, reads in part as follows:

> 34181. The oversight board shall direct the successor agency to do all of the following:
>
> (a) Dispose of all assets and properties of the former redevelopment agency ***that were funded by tax increment revenues of the dissolved redevelopment agency***; provided, however, that the oversight board may instead direct the successor agency to transfer ownership of those assets that were constructed and used for a governmental purpose, such as roads, school buildings, parks, and fire stations, to the appropriate public jurisdiction pursuant to any existing agreements relating to the construction or use of such an asset. Any compensation to be provided to the successor agency for the transfer of the asset shall be governed by the agreements relating to the construction or use of that asset. ***Disposal shall be done expeditiously and in a manner aimed at maximizing value.***
>
> (b) Cease performance in connection with and terminate all existing agreements that do not qualify as enforceable obligations.
>
> [Emphasis added]

The statutory phrase "that were funded by tax increment revenues" in 34181(a) can only mean "that were acquired with tax increment money." For that reason, the clearest and most defensible reason to exclude lands on the former Fort Ord from the RDA divestment requirement is found in the statute that created this requirement as recited above. There are, however, other grounds for exempting RDA owned lands on the former Fort Ord from this requirement. One of these grounds is the doctrine of federal preemption.

The federal government has a multilayered structure for Base Realignment and Closure ("BRAC"). That BRAC structure includes: 1) identifying military bases for closure, 2) deciding how best to transfer title to a local reuse authority (LRA), in this case the Fort Ord Reuse Authority (FORA), 3) determining what needs to happen before and after title is transferred from the Army to LRA's like FORA, 4) establishing covenants that will run with the land being conveyed, and similar procedures. The state is barred by the preemption doctrine from frustrating the objectives of the base reuse program established by the federal government for its closed military bases. This result is also barred under and the supremacy clause.

The supremacy clause is found in Article 6 of the constitution. It reads in part:

> … *the Laws of the United States .. shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [emphasis added]

The BRAC statute and the regulations adopted under its authority are "*the supreme Law of the Land.."* To the extent that the RDA divestment requirement conflicts with that federal law, it is invalid.

In addition, the statutory requirement to divest defunct RDA's of land acquired at no cost from the federal government under elaborate reuse requirements may violate the constitution's contract clause. The Contract Clause appears in the, Article I, section 10, clause 1 of the US Constitution. It states in part:

> "No State shall …pass any …Law impairing the Obligation of Contracts…"

The Contract Clause prohibits states from enacting any law that retroactively impairs contract rights. This statutory divestiture requirement would invalidate executory contracts between FORA and the Army.

IV. Limitations of this opinion:

This letter presents a final opinion on the statutory issue posed by the application of H&S 34177 (specifically H&S 34181(a)) to former Fort Ord properties owned by underlying jurisdictions redevelopment agencies. As to the constitutional issues, however, it is only a preliminary opinion. Considerably more research and analysis would be needed to validate my initial assessment of those constitutional doctrines to the facts posed by the termination of redevelopment agencies on the former Fort Ord.

Redevelopment Law Unconstitutional Because of Impairment of Contract?

By Geoffrey Willis – Sheppard Mullin, Real Estate, Land Use & Environmental Law Blog

Largely lost in the noise and furor surrounding the decision by the California Supreme Court upholding AB 1X 26 (*California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, which terminated the functions of local redevelopment agencies, is that there are strong arguments the new law violates state and federal constitutional provisions prohibiting legislation that results in impairment of existing contracts. Neither side in the *Matosantos* case raised the impairment of contracts argument and the Supreme Court chose not to raise the issue *sua sponte*. If AB 1X 26 was found to violate the Impairment of Contract clauses of either the state or federal constitutions, the violative provisions are so deeply woven throughout the fabric of the act that severance of non-offending provisions would be difficult at best, potentially resulting in the entire act being struck. While a successful impairment argument would possibly lead to the voiding of the legislation, it would not necessarily mean that the California Legislature could not enact a narrower RDA "abolishment" statute that terminated future and further contracts while better protecting the enforceability of existing contracts.

California Constitution Article 1, Section 9 provides in pertinent part that "a bill of attainder, ex post facto law, or law impairing the obligations of contracts may not be passed." In similar fashion the United States Constitution Article 1, Section 10 provides "No State shall . . . pass any Bill of Attainder, ex post facto law, or law impairing the Obligation of Contracts . . .." Legislation running afoul of these constitutional protections can be stricken. *Teachers Retirement Board v. Genest* (2007)154 Cal.App.4th 1012; *Valdes v. Cory* (1983) 139 Cal.App.3d 773 These constitutional provisions were put into place to prevent the legislative branch from enacting bills that prevented the performance of existing contractual obligations.

AB 1X 26 appears to violate constitutional contractual impairment prohibitions in several ways. First, billions of dollars of bonds have been issued through the actions of RDAs, and many of the contracts establishing the rights of bondholders are still in effect. Virtually all of those bonds were secured by the RDA's obligation to repay the bond debt through constitutionally protected tax increment sources, and that source of funds was specifically identified in those contracts. Cal.Const. Art. XVI, Sect. 16. The new law transforms the repayment source from constitutionally protected tax increment sources to simple property taxes, which lack constitutional protection and are potentially subject to shortfall. Yet, people buying the bonds reasonably and materially relied upon the stable repayment source provided by tax increment and valued the bonds accordingly. Changing the repayment source from the stable and secure tax increment source to the unstable and unsure property tax source immediately reduces the value of the bonds, thereby impermissibly impairing the bondholders constitutionally protected contractual rights. Nothing in the *Montasantos* opinion addressed this argument.

Second, AB 1X 26 imposes an entire, potentially flawed process to terminate, challenge and attempt invalidation of existing RDA obligations. This process includes:

- A requirement to create enforceable obligation schedules. As a result, an agency's failure to include an agreement on the applicable schedule could result in that agreement's being

deemed unenforceable. Thus, the developer or other counter-party's rights would be terminated for no reason other than the change in law and administrative oversight.

- An obligations statement review process, which allows oversight boards, county controllers, other taxing authorities and the State Department of Finance to challenge the enforceability of scheduled obligations. Each of these bodies/agencies/departments has the right to demand and review all documentation, ask for more time, and challenge inclusion on the schedules.
- Reviews of successor agency action by oversight boards, county controllers, other taxing authorities and the State Department of Finance, which can potentially lead successor agencies to ignore or overlook requirements of good faith and fair dealing. For example, a typical Disposition and Development Agreement providing for the sale of RDA property to a developer requires the developer to provide project designs and financing plans for agency review. The oversight board (or county controller or State controller) could simply direct the successor agency to refuse to approve the plans, and then terminate the contract because the plans have not been timely approved.
- Oversight board obligation to review and, if possible terminate existing agreements where default payments would cost less than performance costs. This provision would literally require successor agencies to breach existing agreements.
- Certain specific RDA obligations, such as issuance of new bonds, have been expressly prohibited. Many redevelopment agreements contemplate the issuance of bonds on satisfaction of certain conditions, such as completion of a project or phase.

The law thus creates numerous situations in which successor agencies could overlook or ignore existing contractual rights in violation of both state and federal Impairment of Contract prohibitions.

These two categories of possible impairment—bondholder interests and partially completed contracts—are just two of the many types of agreements potentially impaired by AB 1X 26 and the termination of which may be legally challengeable. Impairment challenges could be brought as either a facial challenge or as an "as applied" challenge. Given the facts necessary to prove other impairment actions, it is more likely that they will be brought "as applied."

The drafters of AB 1X 26 understood and tried to protect the legislation from a challenge based upon an impairment argument. Section 34172(c) provides that the Redevelopment Property Tax Trust Fund is deemed a special fund to pay principal and interest of debt, and Section 34172(d) earmarks revenues that would have been allocated pursuant to Cal. Const. Art. XVI, Section 16 to the Redevelopment Property Trust Fund, such that only the amounts in excess of what is needed to pay obligations of the former redevelopment agency are deemed property tax revenues. Additionally, Section 34173(b) is a savings clause giving the successor agencies all the powers of redevelopment agencies that was not expressly stripped away by AB 1X 26.

However, these measures may not be sufficient to overcome an impairment challenge to AB 1X 26. Among other things, the savings clause in 34173(b) may not provide sufficiently clear authority for successor agencies to issue debt. Thus, to the extent a DDA contains a pledge of tax increment, the failure of a successor agency to issue debt in response to a demand under such a pledge could set up an impairment claim.

In order to avoid an Impairment of Contract claim, a court would first seek to read the statute in a way to avoid the constitutional problems. In this case—since elimination of tax increment, the review process for all agency obligation and of the minimization of redevelopment agency liabilities are all core parts of AB 1X 26—it may be impossible for the court to do so. Alternatively, the court could try to sever the constitutionally infirm provisions from the other parts of the statute. While this may work for some provisions, e.g., eliminating the statutory requirement for oversight boards to require successor agencies to breach contracts, it seems unlikely that the court would be able to sever many other provisions, such as those relating to tax increment pledges (because the elimination of tax increment is the primary economic purpose of AB 1X 26). As a result, the only remaining remedy available to the court would be to strike all of AB 1X 26 as unconstitutional.

The Impairment of Contract prohibition does not prevent the legislature from terminating RDAs or preventing RDAs from incurring new obligations or entering into new agreements. The prohibition simply prevents the legislature from terminating executed and existing contracts in violation of the state and federal constitutions. Appropriate modifications to the legislation could better protect the rights of existing parties, saving litigation expense and uncertainty, at a cost to the state of only a small portion of the tax increment revenues of the redevelopment agencies over the next several years.

Southern California LRAs to File Suit over Redevelopment Law

The local redevelopment authorities for the former Norton and George Air Force bases in San Bernardino County, Calif., plan to ask a state court for injunctions exempting them from last year's law eliminating the state's 400 redevelopment agencies.

The Inland Valley Development Agency (IVDA), the LRA for Norton AFB, will argue that it was not established under the same legislation that allows local governments to create municipal redevelopment agencies, reported the San Bernardino County Sun.

"We are maintaining that we received our redevelopment powers under a unique section of the redevelopment law and therefore we are exempt," an attorney for the IVDA board said last week. State officials have said that since the authority uses tax increment financing for economic development, it is covered under the legislation spearheaded by Gov. Jerry Brown (D) to help balance the state's budget, the attorney noted.

The IVDA plans to file its suit this week, followed by the LRA for George AFB, now Southern California Logistics Airport.