

MEMORANDUM

TO: JOSH METZ, EXECUTIVE OFFICER
FORT ORD REUSE AUTHORITY

FROM: GEORGE SCHLOSSBERG

DATE: JANUARY 24, 2020

RE: REVIEW AND ANALYSIS OF THAT CERTAIN MEMORANDUM OF
AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE
FORT ORD REUSE AUTHORITY FOR THE SALE OF PORTIONS OF THE
FORMER FORT ORD

Introduction:

This Memorandum is in response to your request that we review, summarize, and analyze the rights and responsibilities of the Fort Ord Reuse Authority (“FORA”), as the Federally recognized local redevelopment authority (“LRA”) for the former Fort Ord, and a party to that certain *Memorandum of Agreement between the United States of America and the Fort Ord Reuse Authority for the Sale of Portions of the Former Fort Ord*, as amended (“EDC Agreement”) with an Execution Date of June 20, 2000.¹ This Memorandum will address the LRA/EDC Agreement issues alone; we will defer discussion of the Environmental Services Cooperative Agreement (“ESCA”) at this time.

The underlying LRA/EDC Agreement issues arise due to the imminent “Sunset” of FORA on June 30, 2020, pursuant to California law, and whether and to what extent, FORA may control or even guide Army property disposal actions under the EDC Agreement following FORA’s Sunset. Specifically, we understand that FORA Board Members wish to understand the future role of the City of Seaside (“Seaside”), should (i) FORA nominate Seaside to be FORA’s successor as the Federally recognized LRA for the former Fort Ord, (ii) the DOD Office of Economic Adjustment (“OEA”) recognize Seaside as the LRA, and (iii) the Army agree to amend the EDC Agreement such that Seaside assumes FORA’s roles and responsibilities under the EDC Agreement.

¹ The EDC Agreement, together with EDC Amendment No. 1, are attached as an Exhibit to this memorandum.

REVIEW AND ANALYSIS OF FORT ORD EDC AGREEMENT

Discussion:

I. The EDC Agreement:

An EDC Agreement permits the Secretary of a Military Department to dispose of surplus property at former military installations closed or realigned pursuant to the Defense Base Closure Act of 1990, as amended (“Base Closure Act”). Unlike other more general Federal disposal authorities, Section 2905(b)(4) of the Base Closure Act permits the United States to dispose of surplus base closure property for no monetary consideration for economic development purposes only to State or local governmental entities recognized as an LRA by OEA. Section 2905(b)(4) was enacted specifically to help communities address the loss of jobs and other economic development challenges brought upon them by base closures.

Following the decision by the Defense Base Closure Commission to realign Fort Ord, and the enactment of appropriate legislation by the State of California creating the Fort Ord Reuse Authority, FORA was recognized by OEA as the LRA for the former Fort Ord. Subsequently, FORA prepared and submitted to the Army an Application for an Economic Development Conveyance dated October 30, 1997. That application, and the subsequent discussions and negotiations, formed the basis for the EDC Agreement.

In simple terms, the EDC Agreement is a “purchase and sale agreement,” that addresses limited obligations relating to the transfer and conveyance of various surplus property interests of the United States to FORA. Although the full document contains dozens of pages, most of which are legal descriptions, form documents, and Army environmental reports, the EDC Agreement itself consists of twenty-five (25) pages describing what, when, and how portions of the former Fort Ord were to be conveyed by the Army to FORA, and FORA’s obligation to report on its activities to the Army.

a. Transfer of Property Interests:

The heart of the EDC Agreement is contained in Article 2, which states, in material part, as follows:

“2.01. No Cost Economic Development Conveyance.”

“A. ...[t]his Agreement represents a contract whereby the Government agrees to convey to the Authority, and the Authority agrees to acquire the Property, by means of a No Cost Economic Development Conveyance, for no monetary consideration. The consideration for the property is the Authority and the Authority member jurisdictions’ agreement to commit proceeds from the sale or lease of the Property toward the economic development of the former Fort Ord for the benefit of the general public in accordance with the terms of this Agreement.”

REVIEW AND ANALYSIS OF FORT ORD EDC AGREEMENT

“B. Following the conveyance of the Property to the Authority, the Authority shall transfer the Property, at no cost, to the Authority member jurisdiction with land use jurisdiction over such portion of the Property.”

“C. In accordance with appropriate State of California and local redevelopment laws and regulations, the Authority or Authority member jurisdiction in possession of the Property may transfer, sell or lease such parcel(s) of Property to a Bona Fide Purchaser or Lessor except for the parcel(s) of Property that the Authority or Authority member jurisdiction utilizes for governmental purposes, consistent with California law.”

[Underline added for emphasis]

As indicated by these three subsections, the EDC Agreement (i) imposes on FORA a contractual obligation to accept the surplus Federal EDC property from the United States, (ii) imposes on FORA a contractual obligation to re-convey such property to the underlying land use jurisdiction in which the property resides, and (iii) authorizes the land use jurisdictions or FORA to sell the surplus Federal EDC property or to retain such property for governmental purposes.

[Underline added for emphasis]

b. Water and Wastewater:

(i) Allocation of Water and Wastewater Collection Systems and Rights: Article 5 of the EDC Agreement discusses the disposition of the water and wastewater collection systems on the EDC Property and the Presidio of Monterey Annex, including their respective water rights and wastewater discharge rights (“Water/Wastewater”). Specifically, Section 5.02 provides that the Government reserves out of its controlled interests:

*“ ... 1729 acre feet per year (“afy”) of water exclusively for Government use (“Government Water Rights”). Also, the Government will retain ownership of 1.08 million gallons per day (“mgd”) of wastewater discharge rights (“Government Wastewater Discharge Rights”).”*²

Section 5.02 provides further that if the Government does not utilize all of the retained Government Water Rights or Government Wastewater Discharge Rights:

“ ... the Authority shall have the right to negotiate with the Government for use of the Government Water Rights or Government Wastewater Discharge Rights not

² EDC Agreement Amendment No. 1 reduces these amounts for specific projects, including SunBay Housing, and Bay View Community/Brostrom Housing Area.

REVIEW AND ANALYSIS OF FORT ORD EDC AGREEMENT

utilized by the Government (collectively “Unutilized Government Water/Wastewater Rights”). The Government and the Authority agree to meet and confer regarding the Unutilized Government Water/Wastewater Rights two (2) years following the completion of the installation of water meters at the Presidio of Monterey Annex (“POMA”). The Government shall determine the amounts of unutilized Government Water/Wastewater Rights on an annual basis and will consult with the Authority regarding this determination on an annual basis. In the event of a proposed transfer of Government Water Rights or Government Wastewater Discharge Rights to a third party, the Authority shall have the first right of refusal to any such transfer rights.”

[Underline added for emphasis]

With regard to the Water/Wastewater conveyed to FORA pursuant to the EDC Agreement, and for all future Water/Wastewater conveyed to FORA, or its successors or assigns, the EDC Agreement mandates an equitable allocation of such Water/Wastewater, by requiring in Section 5.03 and Section 5.04, the following:

5.03. Equitable Allocation of Water. The Authority, and its successors and assigns, shall cooperate with the Marina Coast Water District, Monterey County Water Resources Agency and grantees of former Fort Ord Property to establish and apply a fair process to ensure that all grantees of former Fort Ord property will be provided an equitable supply of the water at the former Fort Ord.

5.04. Wastewater Discharge Rights. The Authority, and its successors and assigns, shall cooperate with the Marina Coast Water District, the Monterey Regional Water Pollution Control Agency and grantees of former Fort Ord Property to establish and apply a fair process to ensure that all grantees of former Fort Ord property will enjoy equitable utilization of the existing sewage treatment capacity, including existing connections to the former Fort Ord sewage collection system.

We believe the “...fair process...” established and applied by FORA pursuant to Section 5.03 and Section 5.04 of the EDC Agreement to ensure an equitable supply of water and the equitable utilization of the existing sewage treatment capacity at the former Fort Ord can and should be binding on any FORA successor to the EDC Agreement to the extent that additional Water/Wastewater is ever made available to FORA, or a successor LRA, pursuant to the EDC Agreement.

(ii) Disposition of Water and Wastewater Collection Systems and Rights: As of the Effective Date of the EDC Agreement, the United States intended to convey to the Marina Coast Water District (“District”), the water and wastewater collection systems on the EDC Property

REVIEW AND ANALYSIS OF FORT ORD EDC AGREEMENT

and the Presidio of Monterey Annex, including their respective water rights and wastewater discharge rights (“Water/Wastewater”), pursuant to the District’s “No-Cost Public Benefit Conveyance” application dated August 26, 1997³.

Subsequently, pursuant to Article 1.a. of EDC Agreement Amendment No. 1, the Government determined to transfer such Water/Wastewater to FORA, and obligated FORA to transfer such Water/Wastewater to the District, by stating:

“a. In lieu of the Government transferring the Water and Wastewater Systems and all associated and ancillary rights directly to the District under the PBC ... the Government, ..., shall transfer to the Authority at no-cost, as part of the Economic Development Conveyance, ... the Water and Wastewater Systems on the Property and the Ord Military Community, together with all their respective water rights and wastewater discharge rights and ancillary rights.”

“c. Immediately following the transfer of the Water and Wastewater Systems on the Property and the Ord Military Community, together with all their respective water rights and obligations and wastewater discharge rights and obligations and ancillary rights and obligations, from the Government to the Authority, the Authority shall transfer such Water and Wastewater Systems and all associated ancillary rights and obligations to the District.”

[Underline added for emphasis]

c. Use of Sale or Lease Proceeds and Reporting Obligation:

To guarantee that the surplus Federal EDC property is used to support the region’s economic development, the EDC Agreement further requires in Subsection 2.01.D:

“D. The Authority agrees that Sale or Lease Proceeds received by the Authority or Authority member jurisdiction during the Reporting Period shall be used or obligated either on-site or off-site to support the economic redevelopment of, or economic development related to, the former Fort Ord, California (“Economic Development Uses”).”

Pursuant to Amendment No 1, Article 3 to the EDC Agreement, dated October 23, 2001, the EDC Agreement Reporting Period was defined as follows:

“1.20. Reporting Period. A period of time, beginning with the recordation of the Deed or Lease in Furtherance of Conveyance (“LIFO”) for the initial transfer

³ See: EDC Agreement, Section 5.01.

REVIEW AND ANALYSIS OF FORT ORD EDC AGREEMENT

of property and ending seven (7) years thereafter, within which the Authority will submit annual statements as described in paragraph 2.01(F) of this Agreement.”⁴

Importantly, the Army and FORA conducted the initial closing and conveyance of surplus Federal EDC property on August 8, 2000, thereby starting FORA’s Reporting Period. Accordingly, FORA’s Reporting Period, and EDC Agreement reporting obligations, ended on or around August 9, 2007.

d. Balance of EDC Agreement:

The balance of the EDC Agreement is procedural in nature, and establishes the general terms and conditions for the transfer of surplus Federal EDC Property from the United States to FORA, as the recognized LRA for the former Fort Ord. Various EDC Agreement sections set forth defined terms (Article 1), describe the timing and pre-conditions for conveyance of property interests (Article 3), the documents to be utilized for various transfers (form Deeds and other Documents set forth as Exhibits), title issues (Article 8), environmental notices and disclosures mandated by law (Articles 15, 16, 17, 18), representations of the Parties (Articles 11, 12), disputes (Article 24), insurance and damage related issues (Article 21), and various clauses mandated by Government Contracts (Articles 20, 26, 27, 28, 31).

Kutak Rock assisted in the negotiation of the EDC Agreement, and the EDC Agreement Amendments, and we remain available to further discuss any of the specific terms and conditions contained therein.

II. What is not Required by the EDC Agreement:

The Fort Ord Reuse Authority is a creature of State law. The EDC Agreement is authorized by Federal law, and is separate and apart from that body of California law that created FORA. Any entity recognized by the DOD Office of Economic Adjustment as a successor to FORA with regard to the former Fort Ord, will inherit only those rights and obligations granted by the EDC Agreement, and absent further State legislation, none of the authorities, rights or obligations granted to FORA pursuant to FORA’s enabling authorities.

While we defer to FORA’s regular counsel as to FORA’s State granted rights, obligations, and authorities, we believe that FORA’s role as the Federally recognized LRA for the former Fort Ord and as a Party to the EDC Agreement gives FORA, and any Federally recognized FORA successor, the ability only to receive surplus Federal EDC property interests from the United States, with the attendant obligation to re-convey those interests to the appropriate land use jurisdiction. Moreover, should additional Water/Wastewater as described in the EDC Agreement ever become available, FORA, and any Federally recognized FORA

⁴ Section 2.01(F) relates to the Authority’s annual financial statement to be certified by an independent Certified Public Accountant.

REVIEW AND ANALYSIS OF FORT ORD EDC AGREEMENT

successor, may seek to receive such Water/Wastewater, and to transfer such interests to the District with allocations established in accordance with the “Fair” process mandated by Section 5.03 and Section 5.04 of the EDC Agreement.

III. Can FORA Control the Designation of an LRA Successor:

It would be appropriate for FORA to indicate its preference to OEA for how the United States should address the remaining EDC conveyance issues following FORA’s sunset; in fact, both OEA and the Army have expressed an interest in having a designated successor, and in learning how FORA believes the process should play out post July 1, 2020. This FORA preference for a successor, be it Seaside or not, could be expressed to OEA and the Army by simple resolution, or any manner of letter, agreement or other document. However, the United States is not bound by anything FORA decides, or any party it designates, or anything in an agreement arrived at between the various FORA constituents. Should it chose to do so, OEA could recognize as the LRA an entity different from the one designated by FORA, or recognize no entity.

Should FORA decide to designate Seaside as the LRA successor, for purposes of implementing the EDC Agreement, we recommend some form of agreement with the other land use jurisdictions setting forth the ground-rules for what, when, and how Seaside will address property interests conveyed to Seaside as the LRA pursuant to the EDC Agreement. Of course, it should be remembered, that OEA could designate Seaside as the successor LRA, even without FORA’s designation, or such implementing Agreements, with the understanding that Seaside will simply comply with the terms of the EDC Agreement.

Conclusion:

I trust this Memorandum is responsive to your request for information concerning the limited Federal rights and obligations granted or imposed upon FORA as the federally recognized local redevelopment authority for the former Fort Ord. If you have any questions, please call me directly at 202-828-2418, or call my cell at 202-549-7117, or contact me by email at George.schlossberg@kutakrock.com.

G.R.S.

Attached: Memorandum of Agreement between the United States of America and the Fort Ord Reuse Authority for the Sale of Portions of the Former Fort Ord, as amended, together with EDC Agreement Amendment No. 1.