Rosalyn Charles

From: Tom Lippe [lippelaw@sonic.net]
Sent: Wednesday, January 08, 2014 4:08 PM
To: FORA Board
Subject: January 10, 2104 Meeting, Agenda Item # 8b: Certification of the 2010 Monterey County General Plan
Attachments: C001f 010814 to FORA.pdf

Dear Clerk of the Board:

Attached please find my comment letter on behalf of the Sierra Club regarding Agenda Item # 8b: Certification of the 2010 Monterey County General Plan, for your January 10, 2104 Meeting.

Thank you.

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January 8, 2014

Board of Directors
Fort Ord Reuse Authority
920 2nd Avenue
Marina, CA 93933

Re: January 10, 2104 Meeting, Agenda Item # 8b: Certification of the 2010 Monterey County General Plan

Dear Chairperson Edelen and Members of the Board:

This office represents the Ventana Chapter of the Sierra Club with respect to the Fort Ord Reuse Authority's ("FORA") pending certification of the 2010 Monterey County General Plan pursuant to Government Code § 67675.3 and FORA Master Resolution sections 8.01.020 and 8.02.010.

I am writing to clarify, amplify, and add to several comments that the Sierra Club and others have previously submitted regarding inconsistencies between the 2010 County General Plan and the Base Reuse Plan. The Sierra Club objects to FORA certifying the 2010 County General Plan because the 2010 County General Plan is not "consistent" with the Base Reuse Plan for a number of reasons. This letter will explain both specific inconsistencies and the legal standard that governs FORA's determination of "consistency."

1. The 2010 County General Plan Is Inconsistent with the 1997 Base Reuse Plan Because it Weakens or Omits Applicable Base Reuse Plan Policies and Programs.

a. The County General Plan/Fort Ord Master Plan Weakens or Omits Three of the Reuse Plan's Recreation/Open Space Land Use Policies or Programs: Policy A-1, Program A-1 and Program B-2.1.

The Land Use Element of the Base Reuse Plan establishes Recreation/Open Space Land Use objectives, policies and programs that pertain to base land east of Highway 1 within Monterey County's jurisdiction. (Reuse Plan, pp. 213, 262-264, 270-272.) The Reuse Plan Recreation/Open Space Land Use objectives, policies and programs include four "objectives," seven "policies," and nineteen "programs." (Reuse Plan, pp. 270-272.)

The 2010 County General Plan contains a section entitled "Fort Ord Master Plan, Greater Monterey Peninsula Area Plan." (County General Plan/Fort Ord Master Plan, p. FO-1.) The Land Use Element of the County General Plan/Fort Ord Master Plan restates, with three notable exceptions, virtually all of the Reuse Plan's Recreation/Open Space Land Use objectives, policies and programs. (County General Plan/Fort Ord Master Plan, pp. FO-21 - FO-24.) The three exceptions are Policy A-1, Program A-1 and Program B-2.1.

Reuse Plan Recreation/Open Space Land Use Policy A-1 provides: "The County of Monterey *shall protect* irreplaceable natural resources and open space at former Fort Ord." (Reuse Plan, p. 270 (emphasis added).)[1] Corresponding Policy A-1 in the Land Use Element of the County General Plan/Fort Ord Master Plan reads: "The County of Monterey *shall encourage the conservation and preservation of* irreplaceable natural resources and open space at former Fort Ord.) (County General Plan/Fort Ord Master Plan, p. FO-21.) As a result, the County General Plan/Fort Ord Master Plan replaces the words "shall protect" with the words "shall encourage the conservation and preservation of."

Reuse Plan Recreation/Open Space Land Use Program A-1.2 provides: "The County of Monterey shall cause to be recorded a Natural Ecosystem Easement deed restriction that will run with the land in perpetuity for all identified open space lands." (Reuse Plan, p. 270.) The Land Use Element of the County General Plan/Fort Ord Master Plan omits this program entirely.

Reuse Plan Recreation/Open Space Land Use Program B-2.1 provides:

> The County of Monterey shall review each future development projects for compatibility with adjacent open space land uses and require that suitable open space buffers are incorporated into development plans of incompatible land uses as a condition of project approval. *When buffers are required as a condition of approval adjacent to habitat management areas, the buffer shall be at least 150 feet. Roads shall not be allowed within the buffer area except for restricted access maintenance or emergency access roads.*

(Reuse Plan, p. 270 (emphasis added).)[2]

Corresponding Program B-2.1 in the Land Use Element of the County General Plan/Fort Ord Master Plan includes the first sentence of Reuse Plan Program B-2.1, but omits the second and third sentence, providing:

> The County of Monterey shall review each future development projects for compatibility with adjacent open space land uses and require that suitable open space buffers are incorporated into development plans of incompatible land uses as a condition of project approval.

(County General Plan/Fort Ord Master Plan, p. FO-21.)

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[1]Policy A-1, in turn, implements Objective A, which provides: "Encourage land uses that respect, preserve and enhance natural resources and open space at the former Fort Ord." (Reuse Plan, p. 270.)

[2]This program implements Policy B-2 ("The County of Monterey shall use open space as a buffer between various types of land use) and Objective B ("Use open space as a land use link and buffer.") (Reuse Plan, p. 270.)

Several members of the public previously commented to FORA that the County General Plan/Fort Ord Master Plan fails to include numerous specific Reuse Plan policies and programs, including Policy A-1, Program A-1.2 and Program B-2.1.[3] In response, Alan Waltner (FORA's legal consultant) argues that the County General Plan/Fort Ord Master Plan County General Plan "incorporate by reference" all Reuse Plan policies and programs, whether they are specifically identified in the County General Plan/Fort Ord Master Plan or not.[4]

With due respect to Mr. Waltner, he is incorrect on this point. I start my analysis by quoting the text of the County General Plan/Fort Ord Master Plan that is relevant to the issue of "incorporation by reference" of the Reuse Plan, as follows:

> **DESCRIPTION**
> The purpose of this plan is to designate land uses and incorporate objectives, programs, and policies to be consistent with the Fort Ord Reuse Plan (Reuse Plan) adopted by the Fort Ord Reuse Authority (FORA) in 1997. This plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area. In addition, this plan contains additional Design Objectives and land use description clarification to further the Design Principles contained in the adopted Reuse Plan.
>
> The Fort Ord Master Plan consists of this document, the Greater Monterey Peninsula Area Plan, and the Monterey County General Plan. Where there is a conflict or difference between a goal or policy of the Fort Ord Master Plan (FOMP) and the General Plan or Greater Monterey Peninsula Area Plan, the more restrictive policy will apply, except that land use designations will be governed by the FOMP in the Fort Ord area.
>
> **THE PLAN**
> *This plan incorporates the following Fort Ord Reuse Plan Elements, either directly or by reference to the adopted Reuse Plan*, specific to those portions of Fort Ord under County jurisdiction and located east of Highway 1:
> • Land Use Element
> • Circulation Element
> • Recreation and Open Space Element
> • Conservation Element
> • Noise Element
> • Safety Element

(Page FO-1 (emphasis added).)

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[3]See e..g., Jane Haines' letters to FORA dated October 10, 2013, November 7, 2013, and November 8, 2013, and Sierra Club's letter to FORA dated October 10, 2013.

[4] Memorandum from Alan Waltner to FORA dated December 26, 2013.

> LAND USE ELEMENT
>
> The Fort Ord Land Use Element is part of the Greater Monterey Peninsula Area Plan and the Monterey County General Plan and consists of those portions of the County of Monterey Land Use Plan - Fort Ord Master Plan (Figure LU-6a) that pertain to the areas of Fort Ord currently under the jurisdiction of the County and located east of Highway 1, and includes the following text. The Land Use Element contains land use designations specific to Fort Ord. These land use designations are consistent with the land use designations (as base designations) included in the adopted FORA Reuse Plan. For each of the Planning Districts, overlay designations are included that provide additional description and clarification of the intended land uses and additional design objectives for that specific Planning District. *The Fort Ord land use designations also include the applicable land use Goals, Objectives, Policies, and Programs directly from the Reuse Plan. These will constitute all the policies and programs to be applied to the Fort Ord Land Use Element. Background information, land use framework and context discussions, as they relate to the subject area, are hereby incorporated by reference into the Fort Ord Land Use Element from the FORA adopted Reuse Plan.* In addition, the Land Use Map contained in this plan is the County of Monterey Land Use Plan (Figure 6a) adopted by FORA into the Reuse Plan.

(Page FO-31 (emphasis added).)

As pertinent to Policy A-1, Program A-1.2 and Program B-2.1 of the Reuse Plan Recreation/Open Space Land Use Element, the County General Plan/Fort Ord Master Plan contains several directives. First, the introductory "Description" states the purpose of the plan is: "to designate land uses and incorporate objectives, programs, and policies to be consistent with the Fort Ord Reuse Plan (Reuse Plan) adopted by the Fort Ord Reuse Authority (FORA) in 1997" and that the "plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area." If that were the end of it, Mr. Waltner's argument would have some force. But there is much more to it.

The "Plan" portion of the introduction indicates that the plan "incorporates" listed elements of Reuse Plan "either directly or by reference." Then, in order to determine which portions of the listed elements are incorporated, and whether the incorporation is done "directly" or "by reference," the reader must turn from the general language in the introductory sections to the more specific language in the individual elements.

As quoted above, the introductory language of the Land Use Element of the County General Plan/Fort Ord Master Plan states:

> The Fort Ord land use designations also include the applicable land use Goals, Objectives, Policies, and Programs *directly* from the Reuse Plan. These will

> constitute *all the policies and programs* to be applied to the Fort Ord Land Use Element. Background information, land use framework and context discussions, as they relate to the subject area, *are hereby incorporated by reference* into the Fort Ord Land Use Element from the FORA adopted Reuse Plan.

(FO-31.)

This language tells the reader exactly which portions of the Reuse Plan Land Use Element are incorporated "directly" and which are incorporated "by reference." The "Goals, Objectives, Policies, and Programs" are incorporated "directly" and the "Background information, land use framework and context discussions" are incorporated "by reference."

True to its word, and as noted above, the Land Use Element of the County General Plan/Fort Ord Master Plan proceeds to "directly" incorporate - word for word - virtually all of the Reuse Plan Recreation/Open Space Land Use objectives, policies and programs except Policy A-1, Program A-1.2 and portion of Program B-2.1. (County General Plan/Fort Ord Master Plan, pp. FO-21 - FO-24.)

We now return to Mr. Waltner's argument. If the general language in the introductory "Description" of the County General Plan/Fort Ord Master Plan stating that "This plan incorporates all applicable policies and programs contained in the adopted Reuse Plan" were sufficient to incorporate the entire Reuse Plan "by reference" then virtually all of the remaining language of the Fort Ord Master Plan and its Land Use Element discussed above would be superfluous and meaningless.

Indeed, if Mr. Waltner were correct, there would be no need for the County General Plan/Fort Ord Master Plan, in its introductory "Plan" description on page FO-1 to distinguish between "direct" incorporation and incorporation "by reference." There would be no need for the more specific directives in the Land Use Element of the County General Plan/Fort Ord Master Plan to tell the reader exactly which portions of the Land Use Element of the Reuse Plan are "directly" incorporated and which are incorporated "by reference." And finally, there would be no reason for the Land Use Element of the County General Plan/Fort Ord Master Plan, its most specific statement on the topic, to recapitulate - word for word - virtually all of the Reuse Plan Recreation/Open Space Land Use objectives, policies and programs except Policy A-1, Program A-1.2, and Program B-2.1.

In short, Mr. Waltner's construction of the Fort Ord Master Plan with respect to Reuse Plan Recreation/Open Space Land Use Program A-1.2 must be rejected because it violates the fundamental rule of statutory construction is that "[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1155.)

It must also be rejected because it violates the rule of statutory construction that where general and specific provisions of a law address the same subject matter, the more specific provisions govern over the more general provisions. (*Elliott v. Workers' Compensation Appeals Bd.*

(2010) 182 Cal.App.4th 355, 365 ["We further point out that as a matter of statutory construction, a specific provision relating to a particular subject will govern that subject as against a general provision"]; Code of Civil Procedure § 1859.)

With respect to Program B-2.1 of the Reuse Plan, the evidence of the County's intent to exclude a portion of the Reuse Plan's Recreation/Open Space Land Use programs is even more specific, and therefore, more irrefutable, than it is with respect to Program A-1 because, rather than omitting the program entirely, the County finely parsed the program, keeping the first sentence of Program B-2.1, but omitting the second and third sentences.

Finally, and perhaps most importantly, the County's rewording of Policy A-1 to replace the words "shall protect" with the words "shall encourage the conservation and preservation of" cannot be considered meaningless, as Mr. Waltner would have it, because the new language deprives this policy of its legal "teeth." As Mr. Waltner concedes in his December 26, 2013, memorandum, under well-established case law applying the "vertical consistency" requirement of the state Planning and Zoning Law, courts usually defer to a local agency's determination that a land use entitlement is "consistent" with a local general plan where the agency must balance the achievement of many competing general plan goals and objectives. But where a general plan policy is stated in mandatory language, such as "shall protect," the courts will enforce such requirements without regard to the usual deference to agency discretion associated with the "substantial evidence standard of review. (See e.g., *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup"rs* (1998) 62 Cal.App.4th 1332, 1336, 1338, ,1342.)

In sum, the County's selective recapitulation of the Reuse Plan's Recreation/Open Space Land Use policies and programs is meaningful in the extreme, precisely because the clear intent and the clear legal effect of this effort is to transform the mandatory requirements of Policy A-1, Program A-1.2, and Program B-2.1 into discretionary standards that are difficult for the public to enforce.

b. The County General Plan/Fort Ord Master Plan Omits Reuse Plan Hydrology and Water Quality Programs B-1.3 and B-2.7.

The Conservation Element of the Base Reuse Plan includes a number of Hydrology and Water Quality goals, objectives, policies and programs that apply to base land within Monterey County's jurisdiction east of Highway 1. (Reuse Plan, pp. 353-3554.) Tthe County General Plan/Fort Ord Master Plan omits a number of these policies and programs, including Reuse Plan Hydrology and Water Quality Programs B-1.3, B-2.7, and B-6.1, all of which contain mandatory requirements.

Reuse Plan Hydrology and Water Quality Program B-1.3 provides: "The County shall adopt and enforce a water conservation ordinance for its jurisdiction within Fort Ord, which is at least as stringent as Regulation 13 of the MPWMD." (Reuse Plan, p. 353.)

Reuse Plan Hydrology and Water Quality Program B-2.7 provides:

> "The City/County, in order to promote FORA's DRMP, shall provide FORA with an annual summary of the following: 1) the number of new residential units, based on building permits and approved residential projects, within its former Fort Ord boundaries and estimate, on the basis of the unit count, the current and projected population. The report shall distinguish units served by water from FORA's allocation and water from other available sources; 2) estimate of existing and projected jobs within its Fort Ord boundaries based on development projects that are on-going, completed, and approved; and 3) approved projects to assist FORA's monitoring of water supply, use, quality, and yield."

(Reuse Plan, pp. 353, 347.)

> Reuse Plan Hydrology and Water Quality Program C-6.1 provides:
>
> The City shall work closely with other Fort Ord jurisdictions and the CDPR to develop and implement a plan for stormwater disposal that will allow for the removal of the ocean outfall structures and end the direct discharge of stormwater into the marine environment. The program must be consistent with State Park goals to maintain the open space character of the dunes, restore natural land forms, and restore habitat values.

(Reuse Plan, pp. 354, 347.)

These programs implement Hydrology and Water Quality Policy B-1 ("The County shall ensure additional water to critically deficient areas"), which implements Objective B ("Eliminate long-term groundwater overdrafting as soon as practicably possible").

In addition to the County General Plan/Fort Ord Master Plan's introductory language regarding incorporation by reference, the Conservation Element of the County General Plan/Fort Ord Master Plan contain additional relevant language, stating:

> Those relevant portions of the adopted Reuse Plan are hereby incorporated into the Monterey County Fort Ord Conservation Element by this reference. For convenience, relevant Goals, Objectives, Policies and Programs pertaining to the subject area are provided herein.

(County General Plan/Fort Ord Master Plan, p. FO-34.)

Any remaining doubt that Mr. Waltner's simple "'incorporation by reference" argument is incorrect is eliminated by considering the Hydrology and Water Quality sections of the Conservation Elements of the Reuse Plan and the County General Plan/Fort Ord Master Plan. The County General Plan/Fort Ord Master Plan liberally reorganizes, rewrites, add new programs to and omits programs from the comparable text in the Reuse plan. Most, importantly, the County General Plan/Fort Ord Master Plan omits Reuse Plan Hydrology and Water Quality Programs B-1.3, B-2.7,

and B-6.1, all of which contain mandatory requirements. In addition, the County General Plan/Fort Ord Master Plan adds new Programs A-1.1, A-1.2, and A-1.3, which are not found in the Reuse Plan. (See County General Plan/Fort Ord Master Plan, pp. FO-37 - FO-31.)

Once again, if Mr. Waltner's "'incorporation by reference" theory were correct, all of these changes would be both unnecessary and meaningless.

2. The Legal Standard Governing FORA's Determination of "Consistency."

The legal standard governing FORA's determination whether the County General Plan/Fort Ord Master Plan is "consistent" with the Base Reuse Plan is set forth in Master Resolution § 8.02.010, as follows"

> In the review, evaluation, and determination of consistency regarding legislative land use decisions, the Authority Board shall disapprove any legislative land use decision for which there is substantial evidence supported by the record, that
>
> (1) Provides a land use designation that allows more intense land uses than the uses permitted in the Reuse Plan for the affected territory;
> (2) Provides for a development more dense than the density of use permitted in the Reuse Plan for the affected territory;
> (3) Is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of this Master Resolution.
> (4) Provides uses which conflict or are incompatible with uses permitted or allowed in the Reuse Plan for the affected property or which conflict or are incompatible with open space, recreational, or habitat management areas within the jurisdiction of the Authority;
> (5) Does not require or otherwise provide for the financing and/or installation, construction, and maintenance of all infrastructure necessary to provide adequate public services to the property covered by the legislative land use decision; and
> (6) Does not require or otherwise provide for implementation of the Fort Ord Habitat Management Plan.

Mr. Waltner's December 26, 2013 memorandum makes several arguments regarding this standard.

First, Mr. Waltner sets out to rebut the notion that this standard requires the County General Plan/Fort Ord Master Plan to "strictly adhere" to the Base Reuse Plan. This "strict adherence" standard appears to be a rhetorical straw man, and therefore a distraction, because I have not seen any comment that urges such a position.

The Sierra Club's position is that because the standard set forth in section 8.02.010 uses the words "shall disapprove," it is mandatory. The Sierra Club's position is also that the way section 8.02.010 uses the concept of "substantial evidence" in conjunction with the words "shall

disapprove" requires that, if the record contains "substantial evidence" that any of the six criteria in section 8.02.010 are met, FORA must disapprove the County General Plan's "consistency" with the Reuse Plan even if there is also substantial evidence supporting a conclusion that none of the criteria are met.

Second, Mr. Waltner argues that the term "consistent" as used in the Military Base Reuse Authority Act and Master Resolution must have the same meaning as the term has in the state Planning and Zoning Law (and as construed by the case law applying that statute.) Assuming this is correct, it does not rebut Sierra Club's position. In fact, it supports it because, as discussed below, the case law applying the vertical consistency requirement of the state Planning and Zoning Law recognizes that the courts will enforce the mandatory procedural requirements of local general plans. Section 8.02.010 is a mandatory procedural requirement of the Master Resolution. Thus, Mr. Waltner's primary error is in construing FORA's "consistency" determination as identical to a county determination that a land use entitlement is consistent with the substantive standards of a general plan, but without regard to the specific, mandatory, procedural requirement in section 8.02.010.

In the Planning and Zoning case law, a local agency's determination that a land use entitlement is "consistent" with a local general plan will be upheld by the court's if there is substantial evidence in the record that the entitlement will not frustrate the achievement of the general plan's goals. except where the language of general plan is mandatory. The following is an excerpt from a leading case on this issue:

> A project is consistent with the general plan "if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." [citation] A given project need not be in perfect conformity with each and every general plan policy. . . .
>
> The Board's determination that Cinnabar is consistent with the Draft General Plan carries a strong presumption of regularity. [citation] This determination can be overturned only if the Board abused its discretion—that is, did not proceed legally, or if the determination is not supported by findings, or if the findings are not supported by substantial evidence. [citation] As for this substantial evidence prong, it has been said that a determination of general plan consistency will be reversed only if, based on the evidence before the local governing body, "a reasonable person could not have reached the same conclusion."

Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup'rs (1998) 62 Cal.App.4th 1332, 1336, 1338 ("*Families Unafraid*").

The Court in *Families Unafraid* also held that where a general plan policy is "mandatory" as opposed to a general statement of goals or objectives, then it must be followed, stating:

> There was also a question of density consistency in *Sequoyah*. (23 Cal.App.4th at p.

> 718.) But the general plan in *Sequoyah* afforded officials "some discretion" in this area, and their density allowances aligned with this discretionary standard. (*Ibid.*)
>
> By contrast, the land use policy at issue here is fundamental (a policy of contiguous development, and the Draft General Plan states that the "Land Use Element is directly related to all other elements contained within the General Plan"); the policy is also mandatory and anything but amorphous (LDR "shall be further restricted to those lands contiguous to Community Regions and Rural Centers" [both of which are specified 'town-by-town' in the Draft General Plan], and "shall not be assigned to lands which are separated from Community Regions or Rural Centers by the Rural Residential land use designation").
>
> Moreover, Cinnabar's inconsistency with this fundamental, mandatory and specific land use policy is clear-this is not an issue of conflicting evidence. (Cf. *Corona, supra,* 17 Cal.App.4th at p. 996 [in rejecting a challenge of general plan inconsistency, the court there stated: "In summary, the General Plan is not as specific as those in the cases on which the [challenger] relies and does not contain mandatory provisions similar to the ones in those cases."].)

Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup'rs (1998) 62 Cal.App.4th 1332, 1341-42.

In the area of administrative law, the term "substantial evidence" is a "term of art" that has been defined, dissected, and construed in literally thousands of appellate decisions. The most common application of the "substantial evidence" standard results in courts giving deference to agency fact findings, because the court reviews the record to determine if it contains "substantial evidence" supporting the agency's determination; and if it finds such "substantial evidence," the court must uphold the agency's determination even if there is "substantial evidence" supporting the opposite conclusion.

For example, when reviewing a legal challenge to an EIR under CEQA, courts review the record to determine if it contains "substantial evidence" supporting the EIR's factual conclusions. If it does, any challenge to those factual conclusions must be rejected, even if there is also substantial evidence supporting the opposite factual conclusion. This is the usual application where the "substantial evidence" standard results in the courts giving deference to agencies' factual conclusions. (See e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 ["In applying the substantial evidence standard, 'the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." [citation] The Guidelines define 'substantial evidence' as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' (Guidelines, § 15384, subd. (a).)"

There are exceptions, however, to the usual application of the "substantial evidence" test. For instance, when reviewing a legal challenge to a Negative Declaration under CEQA, the courts

look at the record to see if its contains "substantial evidence" supporting the challenger's contention that the project may have a significant adverse effect on the environment. If it does, the challenge to the Negative Declaration's factual conclusions that the project will not have significant adverse effect must be sustained and the Negative Declaration overturned.

> [W]hen the reviewing court: "perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to proceed 'in a manner required by law.' " [citation] More recently, the First District Court of Appeal summarized this standard of review, stating: "A court reviewing an agency's decision not to prepare an EIR in the first instance must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact; in such a case, the agency has not proceeded as required by law. [Citation.] Stated another way, the question is one of law, i.e., 'the sufficiency of the evidence to support a fair argument.' [Citation.] Under this standard, *deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.* [Citation.]" (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318, 8 Cal.Rptr.2d 473, italics added.) Thus, the applicable standard of review appears to involve a question of law requiring a certain degree of independent review of the record, rather than the typical substantial evidence standard which usually results in great deference being given to the factual determinations of an agency. We agree with and adopt the First District's *Sierra Club* standard of review as quoted above.

Quail Botanical Gardens Foundation, Inc. v. City of Encinitas (1994) 29 Cal.App.4th 1597, 1602; CEQA Guideline § 15064(f)(1) ["[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect."])

This application of the "substantial evidence" standard results in the courts giving no deference to agencies' factual conclusions. Instead, the courts give deference to the purposes and policies of the law that requires applying the substantial evidence standard. Under CEQA, the policy of the law is to favor preparation of an EIR, and the courts employ the substantial evidence standard toward that end. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, supplemented, (1975) 13 Cal.3d 486 ["[S]ince the preparation of an EIR is the key to environmental protection under CEQA, accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact].)

Here, the policy of the Master Resolution is to require "disapproval"of the County General Plan if the record contains "substantial evidence" that any of the six criteria in section 8.02.010 are met. If there is such "substantial evidence," FORA must disapprove the County General Plan

"consistency" with the Reuse Plan even if there is also substantial evidence supporting a conclusion that none of these criteria are met. Thus, this language in section 8.02.010 uses the term "substantial evidence" in a way that is markedly different than the way the term "substantial evidence" is used in the case law applying the "consistency" requirement of the Planning and Zoning Law.

Finally, Mr. Waltner's analysis ignores the important fact that the FORA agreed to the the specific procedural requirements in section 8.02.010 as part of an agreement to settle litigation. This new language would be unnecessary and meaningless if it did not alter the FORA's obligations when making consistency determinations regarding local general plans.

3. Application of the Legal Standard Governing FORA's Determination of "Consistency" to the County General Plan's Inconsistencies.

In footnote 4 of his December 26, 2013, memorandum, Mr. Waltner suggests that the use of the word "and" to connect paragraphs (5) and (6) of subdivision (a) of section 8.02.010 of the Master Resolution may require the Board to find that all six criteria are met before it may disapprove the County General Plan. This suggestion is incorrect.

It is well-settled that the word "and" may have a disjunctive meaning where the context indicates that is the legislative intent. (See e.g., *People v. Skinner* (1985) 39 Cal.3d 765, 769 ["It is apparent from the language of section 25(b) that it was designed to eliminate the *Drew* test and to reinstate the prongs of the *M'Naghten* test. However, the section uses the conjunctive "and" instead of the disjunctive "or" to connect the two prongs. Read literally, therefore, section 25(b) would do more than reinstate the *M'Naghten* test. It would strip the insanity defense from an accused who, by reason of mental disease, is incapable of knowing that the act he was doing was wrong"].)

The courts will not enforce the literal language of a law where doing so would achieve an absurd result. (*Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 1003 ["The plain meaning of a statute has been disregarded when the plain meaning "would have inevitably resulted in 'absurd consequences' or frustrated the 'manifest purposes' of the legislation as a whole"]; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 ["The apparent purpose of a statute will not be sacrificed to a literal construction"].)

A quick review of the six criteria in section 8.02.010 reveals that construing the word "and" as conjunctive rather than disjunctive would be the absurd. For example, construing the word "and" as conjunctive would allow local agencies to draft their general plan to comply with criteria (6) (i.e., "require or otherwise provide for implementation of the Fort Ord Habitat Management Plan") but fail entirely to comply with all of the other criteria (which relate to fundamental policies and programs of the Reuse Plan such as density and intensity of land uses and which land uses are allowable) but the Board would be powerless to disapprove a local general plan's consistency with the Reuse Plan.

Finally, the discussions in sections 1 and 2 above demonstrate that the inconsistencies between the County General Plan/Fort Ord Master Plan and the Reuse Plan are legally meaningful.

Therefore, there is "substantial evidence" that the County General Plan/Fort Ord Master Plan "is not in substantial conformance with applicable programs specified in the Reuse Plan."

4. The Issues Raised in Footnote 3 of Mr. Waltner's December 26, 2013 Memorandum Are Not "Substantial Questions."

Footnote 3 of Mr. Waltner's December 26, 2013, memorandum states:

> There are also substantial questions as to whether the 1997 FORA Board could adopt provisions in the Master Resolution that conflict with the FORA Act, establish review standards binding on a reviewing Court, or limit the police power discretion of subsequent FORA Boards. These issues are reserved for subsequent elaboration if needed.

For the reasons discussed in this section, these issues do not affect the Board's consistency determination.

a. "Whether the 1997 FORA Board could adopt provisions in the Master Resolution that conflict with the FORA Act"

This rhetorical question posed by Mr. Waltner assumes that 1997 FORA Board adopted provisions in the Master Resolution that conflict with the FORA Act. It did not. Therefore, the question posed is irrelevant.

The Board has broad discretion to adopt quasi-legislative rules to carry out its mandate to implement the Fort Ord Reuse Authority Act (Gov't Code § 67650 et seq.). The Mater Resolution is such a rule.

The California Supreme Court has stated the fundamental rule governing this question as follows:

> It is a "black letter" proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind — quasi-legislative rules — represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. (See, e.g., 1 Davis & Pierce, Administrative Law, *supra,* § 6.3, at pp. 233–248; 1 Cooper, State Administrative Law (1965) Rule Making: Procedures, pp. 173–176; Bonfield, State Administrative Rulemaking (1986) Interpretive Rules, § 6.9.1, pp. 279–283; 9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 116, p. 1160 [collecting cases].) Because agencies granted such substantive rulemaking power are truly "making law," their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the

> lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.
>
> We summarized this characteristic of quasi-legislative rules in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65, 219 Cal.Rptr. 142, 707 P.2d 204 (*Wallace Berrie*): " '[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute" [citation].' [Citation.] 'These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity....' [Citation.] Our inquiry necessarily is confined to the question whether the classification is 'arbitrary, capricious or [without] reasonable or rational basis.' (*Culligan, supra,* 17 Cal.3d at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593 [citations].)"

Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 10-11.

Here, no one has suggested how the Master Resolution might arguably conflict with the Fort Ord Reuse Authority Act. The procedures and standards for determining consistency set forth in Mater Resolution sections 8.01.020 and 8.02.010 are "within the scope of the authority conferred" and "reasonably necessary to effectuate the purpose of the statute."

The only exception to the highly deferential standard of review that courts use to review the validity of agency-adopted quasi-legislative rules is where the agency has allegedly adopted regulations that "alter or amend the statute or enlarge or impair its scope;" in which case "the standard of review is one of respectful nondeference." *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022. The Board's adoption, in 1997, of the mandatory procedural requirements in Master Resolution section 8.02.010 does not "alter or amend the statute or enlarge or impair its scope."

This is especially true if one agrees with Mr. Waltner that "consistent" in section 67675.3 has the same meaning it has in the Planning and Zoning Law . This is because, as discussed above, under that statute agencies have broad discretion to craft their general plans in ways that either maximize their discretion or, by using mandatory language, to severely restrict their own discretion when determining "consistency." (See e.g., *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup'rs* (1998) 62 Cal.App.4th 1332, 1341-42.) Here, the FORA Board in 1997 merely adopted mandatory requirements for determining the consistency of local general plans with the Base Reuse Plan.

As shown by the court in *Families Unafraid,* the courts will enforce these mandatory requirements. And as noted by the California Supreme Court in *Yamaha*, "quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,' [ ] if authorized by the enabling legislation, bind this and other courts as firmly as statutes

themselves." *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

b. "Whether the 1997 FORA Board could establish review standards binding on a reviewing Court."

This question is fully answered, in the affirmative, by the last two paragraph in the preceding section.

c. "Whether the 1997 FORA Board could limit the police power discretion of subsequent FORA Boards."

All legislation and quasi-legislative regulations limit the discretion of subsequent legislative bodies. That is their purpose. That is why we have a "government of laws, not men." The process for subsequent Boards to change the limits on their discretion is simple: amend the regulations.

5. Conclusion.

As described above, in drafting its new General Plan, the County altered or omitted many important, mandatory policies and programs of the Base Reuse Plan. These specific, targeted changes cannot be swept under the rug by pretending that the County General Plan incorporates the entire Base Reuse Plan "by reference." The incorporation language of the County General Plan/Fort Ord Master Plan is very specific in this regard, and leaves no doubt that the County intended to, and did, alter or omit these Reuse Plan policies and programs.

These alterations and omissions fundamentally change the County's legal obligations when it reviews future development entitlements, because the changes transform mandatory requirements of the Reuse Plan into discretionary decisions by the County.

As a result, there is substantial evidence that the County General Plan/Fort Ord Master Plan "is not in substantial conformance with applicable programs specified in the Reuse Plan" and must be disapproved under the mandatory procedural requirements of Master Resolution section 8.02.010.

Thank you for your attention to this matter.

Very truly yours,

Tom Lippe

Thomas N. Lippe

C001f 010814 to FORA.wpd

Rosalyn Charles

From: Haines Jane [janehaines@redshift.com]
Sent: Thursday, January 09, 2014 8:40 AM
To: FORA Board
Cc: Michael Houlemard; Ford John
Subject: January 10 FORA agenda item 8b - Consider Concurrence in the 2010 Monterey County General Plan Consistency Determination

Dear FORA Board of Directors:

I request that you deny Monterey County's request for concurrence in the 2010 Monterey County General Plan consistency determination for the reasons stated in my October 10, November 7 and 8, and December 30 letters. A comparison of my letters with Mr. Waltner's characterization of my letters shows many discrepancies.

Mr. Waltner provides no legal authority to support his claim that the missing Reuse Plan programs are incorporated into the General Plan. Apparently he is relying on the following statement in the General Plan: "This plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area." However, at least eleven Reuse Plan programs applicable to Monterey County are either omitted, partially omitted, or misstated in the General Plan. Saying the applicable programs are incorporated doesn't mean they are. Moreover, Civil Code section 3530 states: "That which does not appear to exist is to be regarded as if it did not exist." At least eleven Reuse Plan programs do not exist in the 2010 General Plan, and saying that they are incorporated does not make them appear to exist. Thus, I request you to vote "no" on staff's recommendation to approve the resolution in Attachment A to the staff report.

Staff proposes an alternative, the resolution in Attachment B. That resolution provides that your Board would not find consistency at tomorrow's hearing, but rather your Board would authorize FORA's director to find consistency once the missing programs are added. That alternative might have been acceptable had the resolution been based on the Authority Act and Chapter 8 with findings that bridge the analytic gap between the evidence and the findings. But as has been the case in every consistency determination that FORA has made since 1998, that resolution is based on Title 7 of the Government Code, rather than the Authority Act at Title 7.85, and its findings fail to bridge the analytic gap between the evidence and Section 8.02.010 of Chapter 8. California law requires findings that bridge the analytic gap. The findings in the resolution in Attachment B do not bridge the analytic gap, and they are based on Government Code Title 7, rather than Title 7.85 and Master Resolution Chapter 8. Thus, approving the resolution in Attachment B would violate applicable legal requirements.

For those reasons, I request that you deny Monterey County's request for concurrence by voting "no" on the resolution in Attachment A, "no" on the resolution in Attachment B, and "yes" to refuse certification of the General Plan.

Sincerely,
Jane Haines

Rosalyn Charles

From: Amy White [awhite@mclw.org]
Sent: Thursday, January 09, 2014 1:53 PM
To: FORA Board; Michael Houlemard; Ford, John H. x5158
Subject: LandWatch letter re: item 8b on January 10th agenda
Attachments: LandWatch letter to FORA re Monterey GP Consistency 1-9-14.pdf

Dear FORA and Mr. John Ford,

Attached is the LandWatch letter regarding item 8b on tomorrow's agenda. Please distribute appropriately and please verify you received this.

Thank you,

Amy L. White, Executive Director
LandWatch Monterey County
150 Cayuga Street, Suite 9
Salinas, CA 93901
831-75-WATCH (92824)
www.landwatch.org

m | r | wolfe
& associates, p.c.
attorneys-at-law

January 9, 2014

Via E-mail

Fort Ord Reuse Authority Board of Directors
920 2nd Avenue
Marina, CA 93933

Re: Consistency of 2010 General with Fort Ord Reuse Plan

Dear Members of the Board:

On behalf of LandWatch Monterey County, we write to object to the proposed resolution finding the 2010 General Plan to be consistent with FORA's Fort Ord Reuse Plan. As you know, the FORA Act requires that FORA certify consistency with the Fort Ord Reuse Plan before the County's 2010 General Plan's and its Fort Ord Master Plan becomes effective in the Fort Ord area. Government Code, § 67675.7. The proposed resolution finding consistency employs the wrong standard of review for FORA's determination of consistency, and it fails to acknowledge substantial evidence of inconsistencies between the Reuse Plan and the 2010 General Plan. FORA should decline to find the General Plan consistent and direct the County to make necessary revisions before resubmitting the General Plan for consistency review.

A. FORA Must Disapprove A General Plan If There Is Substantial Evidence That It Is Not In Substantial Conformance With Applicable Programs Specified In the Reuse Plan And Section 8.02.020 of the Master Resolution

LandWatch concurs with the arguments regarding the plain meaning of section 8.02.010 of the Master Resolution set out in letters by Jane Haines dated October 10, 2013, November 7, 2013, November 8, 2013 and December 30, 2013. That provision provides that FORA "shall disapprove" the County's General Plan if there is substantial evidence that the General Plan is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of the Master Resolution. As Ms. Haines explains, this language calls for a particular standard of review for FORA's adjudication of consistency. Under this standard of review, FORA must disapprove the General Plan if there is some substantial evidence of inconsistency, regardless whether FORA believes there is also some substantial evidence of consistency.

This standard is appropriate for at least two reasons. First, as Ms. Haines points out, FORA itself expressly adopted this standard of review for its consistency determinations in a settlement agreement with the Sierra Club in order to ensure the faithful implementation of the Reuse Plan. The FORA Act clearly gives FORA the discretion to adopt such regulations. Gov. Code, § 67664. Accordingly, Mr. Waltner is incorrect in his December 26, 2013 letter in implying that the FORA Board did not have the authority to adopt this standard of review.

In fact, as Mr. Waltner points out, there is no case law authority that would require FORA to uncritically apply the substantial evidence standard of review used in General Plan consistency determinations under the California Planning and Zoning Law. Accordingly, FORA's adoption of the standard of review in Master Resolution section 8.02.010 is not an "implied modification of the applicable standard of review" as Mr. Walter contends, because FORA has reasonably decided to adopt this standard of review to guide its consistency determinations and because nothing in the statute or case law bars it from doing so. If the current FORA Board wishes to establish a different regulation to guide its consistency review, it may do so, consistent with its obligations under the settlement agreement. But until it does revise its regulation, it must abide by it.[1]

Second, the Master Resolution expressly mandates that the County actually include all applicable open space and conservation policies and programs in its General Plan:

> "Prior to approving any development entitlements, each land use agency shall act to protect natural resources and open spaces on Fort Ord territory by including the open space and conservation policies and programs of the Reuse Plan, applicable to the land use agency, into their respective general, area, and specific plans." Master Resolution, § 8.02.020(a), emphasis added.

Again, this regulation was adopted by FORA to ensure faithful implementation of the Reuse Plan. In effect, § 8.02.020(a) requires each agency faithfully to identify and incorporate into its General Plan each applicable open space and conservation policy and program in the Reuse Plan.

The policy rationale for the requirement to incorporate each applicable policy or program is clear. Issuance of development entitlements is guided in the first instance by a determination whether those entitlements are consistent with member agencies' general plans. Gov. Code, § 67675.6; Master Resolution § 8.01.030(a). Indeed, FORA has shown extraordinary deference to member agency general plans in its past consistency determinations. This deference is only warranted if the member agency general plan faithfully incorporates each applicable open space and conservation policy and program. Master Resolution sections 8.02.010 and 8.02.020(a), adopted in the Sierra Club settlement agreement, were intended to require that general plans provide a blueprint that ensures that projects consistent with those general plans are also consistent with the Reuse Plan.

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[1] Mr. Waltner also suggests that FORA's adoption of the "strict adherence" standard of review would somehow trespass on the judicial standard of review. Not so. FORA's consistency determination is not a judicial review, it is an administrative adjudication. Courts are comfortable reviewing agency adjudications under a variety of standards of review. For example, depending on the context, courts review agency CEQA determinations under a "fair argument" standard, which is analogous to the "strict adherence" standard advocated by Ms. Haines, and, alternatively, under a substantial evidence standard when warranted.

Thus, contrary to Mr. Waltner's December 26 letter, it is not sufficient that the County's general plan purports generally to incorporate the Reuse Plan. If that were all that is required, the recitation of applicable polies and programs in the member agency general plans would not be required at all. Indeed, the language on which Mr. Walter apparently relies, "[t]his plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area," could be interpreted as a finding that the omitted and misstated policies are not applicable. Thus, instead of a guarantee that the misstated and omitted policies will be honored, this provision could be interpreted as a promise to ignore them.

Again, as Ms. Haines has pointed out, the proposed FORA resolution finding consistency sets forth the wrong standard of review for the FORA Board's adjudication. In particular, recital "L" is incorrect in implying that that consistency may be found merely on a finding that there is substantial evidence of consistency. The correct standard should be articulated with reference to Master Resolution section 8.02.010, which requires a finding of inconsistency if there is substantial evidence that the General Plan does not include all applicable open space and conservation policies and programs.

B. There Is Substantial Evidence That The 2010 General Plan is Not In Substantial Conformance With Applicable Programs Specified In the Reuse Plan and Section 8.02.020 of the Master Resolution

The relevant question in FORA's consistency review of the County's General Plan is not whether some future development project will or will not comply with applicable open space and conservation policies and programs, but whether the General Plan document meets the mandate of Master Resolution section 8.02.020 to include those policies and programs. Ms. Haines and the Sierra Club have clearly presented substantial evidence that the 2010 General Plan fails adequately to reflect critical policies and programs in the Reuse Plan.

- The General Plan fails to include the Reuse Plan's applicable Recreation/Open Space Land Use Program A-1.2 requiring recordation of a Natural Ecosystem Easement deed restriction. See Haines letters of October 10, 2013 and November 7, 2013; Sierra Club letter of October 10, 2013. LandWatch appreciates the County's statement that it is "committed to complying" with the Reuse Plans Ecosystem Easement Deeds Program 1-1.2. See Benny Young letter, October 23, 2013. If so, the County should not object to memorialize that commitment through inclusion of the applicable language in the 2010 General Plan. However, a commitment made outside the General Plan that applicable policies will be honored in the future is not relevant to whether the General Plan itself properly reflects the Reuse Plan

- The General Plan omits the applicable Reuse Plan Noise Program B-1.2 requiring segregation of noise generating uses from sensitive receptors. See Haines letters

of October 10, 2013 and November 7, 2013. The County has not addressed this omission. The program is clearly intended to protect sensitive users from significant noise impacts.

- The General Plan omits a material portion of Recreation/Open Space Land Use Program B-2.1 requiring habitat buffers to be at least 150 feet and requiring that the buffers not contain roadways. See Haines letters of October 10, 2013, and November 7, 2013; Sierra Club letter of October 10, 2013. The County has not addressed this omission. The policy is clearly intended to protect habitat from development impacts.

- General Plan Recreation/Open Space Policy Land Use Policy A-1 misquotes the applicable Reuse Plan policy by changing "shall protect" to "shall encourage the conservation and preservation. . ." See Sierra Club letter of October 10, 2013. The County claims that this word change was only intended to protect resources on three particular sites that have already been protected "through implementation" affecting these three sites. It is not clear that the intent of the language was so limited. In any event, there may yet be future implementation actions affecting these sites and there is no reason that the County should object to using the specific language that was adopted in the Reuse Plan CEQA review.

In sum, because the issue at hand is whether the General Plan contains applicable policies and programs, the relevant evidence here is simply the evidence that one document includes the applicable policy or program and the other does not. Therefore Mr. Waltner is incorrect that Ms. Haines has not identified the substantial evidence upon which she is relying.

Again, the issue before FORA is not the consistency of a specific development project but the consistency of two planning documents. However, it is foreseeable that the failure to attain consistency between these documents will have real world impacts. The Reuse Plan policies at issue were specifically adopted to address environmental impacts of future development, and the provisions and specific wording of these policies were salient in FORA's CEQA conclusions about the Reuse Plan. As noted, Sierra Club points out that the Reuse Plan's language for Recreation/Open Space land Use Policy A-1 was crafted in the Final EIR for the Reuse Plan in order to mitigate impacts. The County admits in its October 23rd letter that it incorrectly adopted the Reuse Plan language identified at the time of the Draft EIR for the Reuse Plan. If FORA approves language that is inconsistent with the Reuse Plan provisions, it cannot assume that the changes have no environmental consequence, and must undertake a new CEQA review.

C. Conclusion

LandWatch joins the Sierra Club and Ms. Haines in opposing the proposed consistency determination. The County must modify its General Plan so that it faithfully reflects all applicable open space and conservation policies and programs.

Thank you for the opportunity to provide these comments.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.

John H. Farrow

JHF: am
cc: Amy White

Rosalyn Charles

From: Rachael Mache [mache@stamplaw.us]
Sent: Friday, January 10, 2014 1:01 PM
To: FORA Board; Lena Spilman; Michael Houlemard
Cc: Jon Giffen; Cassie Bronson; Molly Erickson
Subject: Inadequate Public Notice - Agenda Item 8b
Attachments: 14.01.10.FORA.BOD.ltr.to.re.public.notice.pdf

Attached please find a letter on behalf of Keep Fort Ord Wild.

Thank you.

Rachael Mache
Paralegal
Certified Law Student
STAMP | ERICKSON
479 Pacific Street, Suite One
Monterey, CA 93940
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January 10, 2014

Via Email
Jerry Edelen, Chair
and Members of the Board of Directors
Fort Ord Reuse Authority
920 2nd Ave., Suite A
Marina, CA 93933

Subject: January 10, 2014 FORA Board Agenda Item 8b–
Consistency Determination: 2010 Monterey County General Plan
Inadequate Public Notice

Dear Chair Edelen and Members of the Board of Directors:

FORA has not provided proper public notice of the hearing on Item 8b on your Board agenda. Keep Fort Ord Wild urges you to postpone the hearing until and unless the public hearing notice is adequate.

To the extent that FORA is relying on its tiny notice in the legal notices in the December 26, 2013 Monterey County Weekly, that reliance is misplaced. The Weekly notice stated as follows:

> The Fort Ord Reuse Authority Board of Directors will conduct a public hearing on January 10, 2014 at 3:00 p.m. to receive testimony regarding Monterey County's Determination of their 2010 General Plan Consistency with Fort Ord Base Reuse Plan. The hearing will be held at the Carpenters Union Hall at 920 2nd Avenue, Marina, CA 93933. Interested parties may review the relevant documents at www.fora.org.

The Weekly notice does not comply with the FORA Master Resolution section 8.01.020(c), which states in part as follows:

> "the Authority Board shall conduct a noticed public hearing, calendared and noticed by the Executive Officer, to certify or refuse to certify, in whole or in part, the portion of the legislative land use decision applicable to Fort Ord Territory."

The mandatory notice must be for a public hearing for FORA "to certify or refuse to certify" the County's action on its land use plans. That requirement has not been met by the tiny Weekly ad. The Weekly ad merely describes "to receive testimony regarding Monterey County's Determination of their 2010 General Plan Consistency with Fort Ord Base Reuse Plan." The Weekly ad does not say anything about a hearing "to certify or refuse to certify," as the Master Resolution requires. The Weekly ad does not provide notice of any proposed action by the FORA Board other than to "receive testimony."

To make matters worse, the FORA Board Agenda is inconsistent with both the FORA Master Resolution and the tiny Weekly notice. The agenda item is "Consider Concurrence in the 2010 Monterey County General Plan Consistency Determination." That is not the same as the tiny Weekly notice ("to receive testimony regarding Monterey County's Determination of their 2010 General Plan Consistency with Fort Ord Base Reuse Plan") or the mandatory language of the Master Resolution section 8.01.020(c) ("a noticed public hearing . . . to certify or refuse to certify, in whole or in part, the portion of the legislative land use decision applicable to Fort Ord Territory.").

The inconsistencies are demonstrated in the chart below.

Document	Language (underlining added for emphasis)
FORA Master Resolution § 8.01.020(c) (mandatory)	"the Authority Board shall conduct a noticed public hearing, calendared and noticed by the Executive Officer, to certify or refuse to certify, in whole or in part, the portion of the legislative land use decision applicable to Fort Ord Territory."
Monterey County Weekly notice	"The Fort Ord Reuse Authority Board of Directors will conduct a public hearing on January 10, 2014 at 3:00 p.m. to receive testimony regarding Monterey County's Determination of their 2010 General Plan Consistency with Fort Ord Base Reuse Plan"
January 10, 2014 FORA Board agenda	"Consider Concurrence in the 2010 Monterey County General Plan Consistency Determination."

To make matters even worse, the proposed FORA Board resolution is not consistent with the FORA agenda, the Weekly ad, or the FORA Master Resolution. The Board resolution proposes action that is not disclosed in the agenda and ad.

The documents show that FORA has not given proper legal notice as required by FORA's own rules and the Brown Act. Under the circumstances, FORA has failed to provide adequate public notice as required on a matter of significant public concern and controversy. FORA should continue the item to a properly noticed public hearing. Otherwise, FORA proceeds at its own risk, and Keep Fort Ord Wild will consider its options.

Very truly yours,

Molly Erickson