

MEMORANDUM

TO: Board of Directors of the Fort Ord Reuse Authority

FROM: Authority Counsel

DATE: Tuesday, June 16, 2020

RE: Interpretation of Survivability of the Base Reuse Plan, Master Resolution, and Implementing Agreements

I. INTRODUCTION

The Monterey County Local Agency Formation Commission (“LAFCO”) has requested that FORA opine as to the future status of the Base Reuse Plan (“BRP”), Master Resolution, and Implementing Agreements after FORA’s statutory sunset date of June 30, 2020. This memorandum addresses LAFCO’s request.

II. EFFECT OF FORA’S INTERPRETATIONS

Under Government Code § 67700, subdivision (b)(1), LAFCO is tasked by the State Legislature with providing “for the orderly dissolution of” FORA. Under subdivision (b)(2) of the same statute, the FORA Board is empowered to generate a transition plan assigning assets and liabilities, designating responsible successor agencies, and providing a schedule of remaining obligations.

Notably, the FORA Act (Government Code § 67650 *et seq.*) does not confer on FORA the power to make any binding or persuasive declaration of the continuing legal effect of documents such as the BRP, Master Resolution, and Implementing Agreements. In legal terms, FORA’s analysis and statement of a position is a gratuitous act that does not bind other persons or entities.

Under certain circumstances, the California Courts look to agency interpretations of the law for persuasive authority. See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8. However, this rule of affording respect to agency determinations is contextual. In the context of a gratuitous opinion developed in the final month of FORA’s existence, the persuasive effect of FORA’s interpretation of the law will be minimal at best.

In deference to LAFCO’s request this statement has been prepared to set forth in writing FORA’s opinions regarding the post-dissolution status of the BRP, the Master Resolution, and the Implementing Agreements. Nevertheless, FORA cannot warrant that its interpretations will have any legal effect whatsoever or constrain any party from advocating a different interpretation.

III. SURVIVAL OF PROGRAM ELEMENTS

A. BRP and Master Resolution

FORA's generation of a BRP was both authorized and mandated by Gov. Code § 67675, subdivision (a). The statute provides that "[t]he board shall prepare, adopt, review, revise from time to time, and maintain a plan . . ." The final verb in this quoted provision, "maintain," suggests a legislative intent to have the BRP continue for a period of time. Yet the FORA Act does not expressly state the effect of dissolution on the BRP, nor does it provide any procedures for assignment or post-dissolution enforcement of the BRP.

It is necessary to look to other documents, in particular the Master Resolution, in order to resolve the issue of the post-dissolution status of the BRP.

FORA's Master Resolution was first adopted by the Board on March 14, 1997, and has been amended in part approximately 17 times since its initial adoption. The Master Resolution takes up implementation of the BRP in Section 8.01.010. The subdivisions of this section partly restate and implement the FORA Act provisions authorizing the BRP.

Section 8.01.010, subdivisions (j) and (k), address continuing enforcement of the BRP and Master Resolution. Collectively, these provisions direct FORA to record a notice or covenant running with the land on all property within the "Fort Ord Territory" requiring consistency with the BRP and Master Resolution in future development. Recorded notices or covenants running with the land are generally effective to maintain land use restrictions, and this enforceability will hold true irrespective of FORA's dissolution. The enforceability of recorded covenants under the Master Resolution has already been tested in the case of *Monterey/Santa Cruz etc. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1512–1520, in which the Sixth District Court of Appeal held that the recorded Master Resolution was enforceable by entities other than FORA.

To summarize, the Master Resolution already provides for continuing viability of the BRP and Master Resolution. The specified method of continuing enforceability is by recording notices and covenants running with the land, which has been done in connection with Army property transfers made to date and which FORA expects will continue to be done in connection with future transfers of former Army property. The Master Resolution itself was recorded on April 14, 2020.

B. Implementing Agreements

The Implementing Agreements are a series of written two-party agreements executed in 2001 between certain of FORA's member jurisdictions and FORA. The Agreements do not address what happens upon FORA's dissolution, nor do they mention assignability by FORA. The general rule under California law is that contractual rights and duties are assignable unless a law

or contract provides otherwise. Because no contrary authority exists relating to the assignability of the Implementing Agreements, rights and duties under the Agreements are freely assignable.

Under well-established contract law, FORA's dissolution will not extinguish the Implementing Agreements. For natural persons, the longstanding rule is that contracts of a deceased person are not extinguished by the person's death unless they relate to personal services of a character that cannot properly be performed by others. See *In re Burke's Estate* (1926) 198 Cal. 163, 167. Courts have regularly applied the same rule of non-extinguishment to other entities, such as partnerships. See, e.g., *Zeibak v. Nasser* (1938) 12 Cal.2d 1, 17. There are no legal principles or authorities that suggest that FORA's dissolution will have a different effect on its contracts than these other types of legal entities.

After June 30, 2020, FORA, as a dissolved entity, will no longer have the legal capacity to bring any enforcement action against any party based on an Implementing Agreement. FORA sought to find assignees willing to accept responsibilities and liabilities under the Implementing Agreements and enter into a new Transition Plan Implementation Agreement with the signatories to the old Implementing Agreements, each to no avail. LAFCO has taken the position that it lacks the authority to compel other entities to accept assignments of legal rights or duties from FORA. Because (i) FORA was unable to find any willing assignees and was unable to persuade the signatories to enter into a replacement Transition Plan Implementation Agreement and (ii) LAFCO will not enforce any involuntary assignments, the Implementing Agreements (although not technically extinguished by FORA's sunset) may as a practical matter become difficult or impossible to enforce due to the lack of any voluntary assignee. Enforcement by a third party would require that such party establish that it is an intended third-party beneficiary of the Implementing Agreements, which may a difficult hurdle to overcome. Under the circumstances, it is not possible to state with certainty whether the Implementing Agreements will be enforceable by any particular party in the wide variety of possible contexts.

C. Multi-Party Agreements

As to agreements entered into between FORA and more than one other party, the cessation of FORA's existence will not necessarily bring those contracts to an end. FORA anticipates that the surviving parties will continue to be obligated as provided in the respective agreements.

IV. CONTEXT

In the months and years preceding dissolution, FORA has worked diligently within its limited powers granted by the FORA Act to arrange for a transition despite legal and practical barriers. One option to allow more time for planning of an orderly dissolution would have been to extend FORA for a brief period to provide additional time to resolve these complex issues. SB 189 (2019-2020 session) was a bill sponsored by multiple local legislators to provide for a two-year extension of FORA, which would have allowed FORA to operate with reduced powers until June 30, 2022. This bill did not receive approval to pass out of the Appropriations Committee, and

has not been enacted. Other efforts to obtain legislative clarification to the dissolution provisions of the FORA Act did not meet with success either.