

March 14, 2019

By E-mail

Board of Directors
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Re: Proposed legislation to amend FORA Act – comments on Board Report

Dear Members of the Board:

LandWatch Monterey County (“LandWatch”) offers the following comments on the Board Report regarding the draft legislation to amend the FORA Act (“Proposed Amendments”).

LandWatch reiterates the comments in its March 11, 2019 letter. The Board Report fails to consider or to effectively address a number of LandWatch’s concerns.

Given the short time between the release of the Board Report today and the Board meeting tomorrow morning at 10:00 am, LandWatch can only summarize its most salient concerns.

A. The Proposed Amendments fail to clarify who will have final authority to determine “regional needs” or the programming of the uses for CFD taxes and revenues realized by “replacement funding mechanisms.”

Sections 66700(h)(3), and (k)(1) would authorize FORA to determine what counts as “regional needs” because they authorize the Board to disburse funds for “habitat management, transportation, transit, and water supply augmentation,” identified as the “regional needs,” and they require that the Board “continue to fund regional needs.” Even if the open-ended phrase “including but not limited to” were removed, the set of projects that might qualify as “habitat management, transportation, transit, and water supply augmentation projects” is ultimately left to the Board’s discretion.

The June 2020 CIP would be the initial and presumptive set of “regional needs” project. Although 66700(h)(3) provides that this project list can be “modified to reflect agreements between underlying land use jurisdictions implementing the Transition Plan, or other applicable agreements and actions of the governing bodies of the underlying land

use jurisdictions.” Unless there is unanimous agreement among all land use jurisdictions, the Proposed Amendments provide no mechanism other than the FORA CFD Board’s dictate to resolve disagreements as to what “regional needs” projects should be funded, much less the priority and timing of those projects. It is highly unlikely that the land use jurisdictions will reach unanimous agreement to follow the 2020 CIP or unanimous agreement as to changes that should be made to it. Thus, the FORA CFD Board will be in control.

If a land use agency determines that its lands are no longer subject to the Reuse Plan under section 6700(j)(1), the FORA CFD Board would still have the authority to compel that agency to fund regional needs. Again, it is presumably the FORA CFD Board that would have the authority to determine how the land use jurisdiction’s departure from the Reuse Plan would affect the set of infrastructure projects required to meet “regional needs” and what level of continued funding would be required from that agency.

Assuming all of the land use jurisdictions agreed on the “regional needs” projects and their priority, or are willing to defer to the FORA CFD Board indefinitely on this matter, the land use agencies would also be required to defer to the FORA CFD Board’s determination of their “pro rata” shares under section 66700(k)(2). The Board Report proposes to clarify the pro rata share determination problem by adding a new provision:

The pro rata basis shall be determined by the provisions of the Transition Plan and implementing agreements and by the regional entities to address any shortfalls in revenue generation for the following regional needs: habitat management, transportation, transit, and water supply augmentation projects. The Board may not withhold satisfaction/approval if all of the regional entities and Transition Plan and implementing elements are met.

This passive voice construction obscures the issue of what agency would have the authority to make the determination of the pro rata basis. Absent some other mechanism, that agency would be the FORA CFD Board. This new language provides no standards or guidance to determine whether there is a “shortfall,” when it would occur, how big it is, and how to allocate that shortfall among the land use jurisdictions. Not only are the terms “regional entities” and “implementing elements” obscure and undefined, the proposed language does not explain what it means to say that “all of the regional entities and Transition Plan and implementing elements are met.”

In sum, the FORA CFD Board would continue to determine what infrastructure must be funded and when, and it would still compel land use jurisdictions to fund it. The Board Report’s claim that FORA would not be authorized “to promulgate any new programs or projects” ignores the facts that the FORA Board CFD would have plenary authority to (1) decide what regional needs projects would be funded; (2) collect and disburse the funding; (3) authorize any changes from the 2020 CIP; and (4) compel land use jurisdictions to pay a pro rata share of the “regional needs” projects.

These provisions indefinitely perpetuate FORA's control over regional infrastructure needs, and they are inconsistent with the mandate to sunset FORA and the autonomy of the land use jurisdictions.

B. The Proposed Amendments do not clarify what elements of the Base Reuse Plan will “continue to be applicable” or how applicability would be enforced.

The Proposed Amendments provide that the Reuse Plan "shall continue to be applicable" unless a land use jurisdiction determines it is no longer applicable to a land use. (Proposed Amendments, § 67700(j)(1).) As LandWatch objected, this language does not clarify what particular mandates of the Reuse Plan would remain “applicable,” including

- specific land use designations;
- land use intensities;
- specific regional infrastructure plans;
- development allocations to each land use jurisdiction in terms of total units;
- specific policies intended to regulate development at the project level;
- specific policies intended to be implemented at the program or plan level such as jobs/housing balances.

Nor is it clear who would have authority to enforce the continued applicability of the Reuse Plan. The Board Report ignores this issue.

However, as the Board Report acknowledges, the currently mandated consistency determinations will no longer take place. Thus, no affected landowner, member of the public, or land use jurisdiction would have any remedy for failure to comply with the Reuse Plan.

The proposed Amendments should be modified to identify each specific provision of the current Base Reuse Plan that would continue to apply, as it does in section 667700(j)(2) for affordable housing and prevailing wage. It should also specify which provisions a land use jurisdiction can change in the future and what action it would need to make that change (e.g., amend its General Plan).

C. The Proposed Amendments would perpetuate FORA until the final building permit is pulled for any approved project that has an obligations to pay the CFD tax or to contribute to a “replacement funding mechanism.”

As LandWatch objected on March 11, 2019, the Proposed Amendments would ensure that FORA would continue indefinitely because FORA could only be dissolved when "all CFD revenues have been collected from entitled development" and when "substitute funding mechanisms have been implemented." (Proposed Amendments, § 67700(l)(1)(A).) Since an entitled development only pays the CFD tax when it finally

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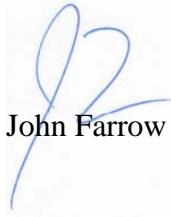
pulls a building permit, and it is not clear when the substitute funding mechanisms will have “been implemented,” FORA would continue in existence as long as there were a single unbuilt lot in any jurisdiction still subject to the CFD or any project potentially subject to a substitute funding mechanism. A CFD tax cannot be collected if the CFD has been terminated.

Conclusion

The Proposed Amendments should be carefully reconsidered and revised with the cooperation and participation of the land use agencies and an opportunity for public review. An unfettered FORA CFD Board should not be permitted to manage regional needs on an ad hoc basis without a living regional plan and at the expense of the autonomy of the land use jurisdictions.

Yours sincerely,

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



John Farrow

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