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By E-mail

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Re: Funding and implementation of common roads, water projects, and habitat management after FORA sunsets

Dear Supervisors Parker and Ms. Adams:

On behalf of LandWatch Monterey County, I attended the Board of Supervisors Fort Ord Committee meeting on August 9, 2010. At the meeting, Supervisor Parker asked that LandWatch outline in writing the suggestions I made regarding financing future roads, water augmentation, and habitat.

There are two methods to finance and implement whatever collective action is desired or legally required after FORA sunsets: by entering into contracts or by creating new agencies. LandWatch proposes that the land use agencies use the contract method wherever possible in order to maximize their autonomy and flexibility. The alternative, relying on new agencies to make decisions later, postpones some hard choices and leaves land use jurisdictions entangled – and effectively perpetuates FORA.

In summary, this letter makes the following points:

A. The most difficult funding problem facing the County and the cities with land use authority is finding a replacement for the current Community Facilities District (CFD) taxes imposed on the six already-entitled development projects, because that tax cannot continue after the 2020 FORA sunset eliminates the CFD's legislative body.

B. The best solution would be to negotiate CFD-replacement payments from the six entitled development projects, which would require those projects simply to pay the same amount as the CFD tax, but to the land use agency rather than to FORA.

C. If CFD-replacement payments cannot be negotiated, then a limited CFD should be continued in order to avoid forfeiture of the $72 million CFD taxes projected from the six entitled projects. To do this, the Mello-Roos Act's CFD transfer provisions should be amended to permit transfer of the existing CFD to a new JPA. That JPA would act only as a funding conduit to the land use agencies and would defer to the land use agencies as to the priority and implementation of the commonly-funded infrastructure projects.

   The required amendment of the Mello-Roos Act should also permit de-annexation of the Fort Ord areas that are currently without development entitlements. Otherwise the CFD and its sponsoring agency would have to persist indefinitely to collect required revenues upon the issuance of the final Fort Ord development permit. If the unentitled future projects can be de-annexed from the CFD map, the land use agencies could instead each raise revenues from these future projects using their own new means, e.g., impact fees, taxes, or ad hoc development agreements.

D. All of the funding for a specified set of *potential* future common infrastructure projects (limited to, at most, the roads, water, and habitat projects in FORA's current Capital Improvement Plan), whether raised via the CFD tax or via new means, should be allocated pursuant to a Memorandum of Agreement entered into now, as part of the transition plan. Otherwise the land use agencies would remain entangled in a FORA-like agency indefinitely. This letter proposes funding allocation methods for common road, water, and habitat projects.

   Unless there is a compelling analysis that the land use agencies are *legally* obliged to undertake particular road, water, and habitat projects, and/or to do so as members of a common agency, each land use agency should remain free to decide whether and when to commit itself to these projects, subject to a joint MOA that specifies *now* how to allocate fair-share funding for future projects of common benefit.

E. The FORA transition process should be informed by a careful analysis of the post-FORA *legal* obligations to implement and fund common infrastructure and habitat management. In particular, the land use agencies should understand the nature and the basis of any continuing obligation to implement adopted CEQA mitigation; Base Reuse Plan and Master Resolution policies, development restrictions, and planned infrastructure; the Implementation Agreements; and the deed covenants. FORA has not provided this analysis.

F. FORA staff's assumption that the Base Reuse Plan and its CEQA mitigation requires only the provision of 2,400 afy of water supply augmentation is incorrect. Regardless of the transition plan for FORA, land use agencies may not approve

development that relies on groundwater pumping from the 180-foot, or 400-foot aquifers in Fort Ord or that relies on pumping in excess of a demonstrated sustainable yield from the Deep Aquifer.

Discussion of these points is set out below.

A. The most difficult funding issue is finding a replacement for entitled-project CFD taxes.

When FORA terminates, the land use jurisdiction members (the County and the cities of Seaside, Marina, Del Rey Oaks, and Monterey) may agree, or be required, to fund and/or implement certain joint programs or infrastructure projects. For example, the FORA transition task force has suggested that $194.5 million may be required to fund post-2020 programs for transportation ($132 million), habitat ($45 million), and water supply ($17 million). Funding from land use jurisdictions may be reduced if another agency such as MCWD finances water supply projects or if the habitat program is modified to omit a joint HCP component. The funding may also be reduced if the development envisioned by the Base Reuse Plan does not occur and infrastructure needs are reduced correspondingly. As discussed in sections E and F below, FORA has not spelled out a clear legal basis that would *oblige* the land use jurisdictions to complete these programs.

FORA has relied on Mello-Roos Community Facilities District (CFD) taxes to raise revenues for transportation, habitat, and water supply projects. FORA has concluded that the FORA CFD will terminate when FORA sunsets. Thus, the ability to raise revenues from projects that already have development entitlements will terminate, because no new taxes or impact fees can be imposed on entitled development projects with vested rights. FORA has projected that post-2020 CFD taxes on the six entitled development projects would have totaled $72.2 million.[1]

By contrast, FORA projects that only $55.2 million would have been raised through CFD taxes on expected future projects for which no entitlements have been issued. Since there are no entitlements in place yet, the land use jurisdictions have the power to replace these expected revenues by creating their own funding mechanisms,

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[1] These six projects are identified by FORA staff as The Dunes, Seahaven, and Cypress Knolls in Marina; East Garrison in the County; Seaside Resort in Seaside; and the RV Resort in Del Rey Oaks. See Draft Transition Plan Study Session, presentation to FORA Board, page 12, June 8, 2018, available at http://fora.org/Board/2018/Presentations/06/TAC-Board_StudySession_060818.pdf.

FORA staff projects post-2020 CFD taxes would have been $14 million for the County's single project; $55 million for Marina's three projects; $2.6 million for Seaside's single project; and $42,370 for Del Rey Oaks' single project. *Id.* at 13.

Remarkably, although FORA was set to sunset in 2014 when the CFD was adopted, no provision was apparently made to replace CFD taxes after 2014.

which might include nexus-based development impact fees, new jurisdiction-level CFDs, or ad hoc impact fees negotiated through development agreements.

Thus, the primary revenue problem for which there has yet to be any consensus solution is to find some means to replace the $72.2 million in potentially foregone CFD taxes from entitled projects.

B. The preferred solution to replacing entitled-project CFD taxes should be negotiated replacement payments from the six entitled projects.

The options for avoiding forfeiture of the $72 million in CFD taxes from entitled development include:

1. Perpetuating the existing CFD by amending the FORA Act to extending FORA.

2. Perpetuating the existing CFD by amending the Mello-Roos Act to permit transfer of that CFD to a JPA consisting of the land use jurisdictions.

3. Negotiating modifications to the six existing development agreements with Marina, the County, and Seaside to substitute direct payments to these land use jurisdictions of an amount equal to the CFD tax (a "CFD-replacement payment"), to be made when building permits are issued.

LandWatch recommends Option 3, which Marina has already embraced. Renegotiating just the six existing development agreements to require CFD-replacement payments would not require perpetuation of FORA or a JPA. As discussed below, by a single memorandum of agreement (MOA) executed as part of the transition plan, the County and cities could specify how those direct CFD-replacement payments from entitled projects and the revenues from future projects would be used for whatever collective action for roads, water, and habitat is either required or desired.

Options 1 and 2 sustain a government mechanism that over the past 20 years has proven to be wasteful and ineffective. Perpetuating the existing CFD, either through a FORA extension or transfer to a JPA, would leave the land use jurisdictions entangled indefinitely as members of a governing agency until the CFD area is built out. FORA staff have proposed perpetuation of the CFD for both entitled *and future development,* even though the nature and timing of that future development is unknown. FORA staff have suggested an extension to 2028 would suffice, and FORA's financial modeling assumes complete build-out of the Base Reuse Plan by 2028.

However, collection of all CFD taxes from entitled and future development through a complete build-out of the development envisioned by the Base Reuse Plan by 2028 is simply unrealistic in light of the historic snail's pace of development, and in light of the possibility that land use jurisdictions may alter their development plans. Thus, capture of the planned CFD taxes through a FORA extension or a new JPA would likely

require an *indefinite* commitment to that go-forward agency and to joint decision-making on infrastructure commitments and timing.

Obtaining CFD-replacement payments from entitled projects would leave the land use jurisdiction free to raise needed revenues from *future* projects (i.e., projects not now entitled) through some *other* means, e.g., a combination of local agency impact fees, TAMC impact fees, fees imposed or rates charged by MCWD, fees imposed by a special-purpose habitat JPA, Fort Ord property sales revenues, increased shares of Fort Ord property taxes (if any), and/or even a land use jurisdiction-level CFD by a city or the County. The same MOA that allocates the CFD-replacement payments to the commonly-funded roads, water supply, and habitat could be used to allocate specified revenues from future projects to these common projects.

Importantly, there are only six current entitled projects that need to be addressed. We understand that Marina is negotiating with three of these currently. The County need only negotiate with the East Garrison developers.

C. If the CFD taxes must be perpetuated because CFD-replacement payments cannot be negotiated, the CFD map should be limited to entitled projects and the agency sponsoring the CFD should be limited to acting as a funding conduit.

If it is not possible to negotiate changes to the existing development agreements with the six entitled projects to obtain CFD-replacement payments, then it may be necessary to perpetuate a common agency to avoid forfeiture of those expected revenues. This would require action by the Legislature to amend either the Mello-Roos Act or the FORA Act.

It would be simpler and better to amend the Mello-Roos Act to enable transfer of the existing CFD to a new JPA than to amend the FORA Act to extend FORA. Extending FORA would foster the expectation and temptation to extend other FORA missions. And writing FORA extension legislation would be complex because each section of the Act would have to be modified, replaced, or struck, instead of simply allowing the FORA Act to expire in 2020.

By contrast, the existing CFD could be transferred to a new JPA simply by revising Government Code § 53368.1 to permit FORA to transfer its existing CFD to a JPA consisting of the land use jurisdictions, using the same process now permitted for used for county-to-city CFD transfers. As discussed in the next section, the JPA should act only a conduit to fund those projects that the individual land use agencies decide to undertake, not as the arbiter and implementing agency of those projects. Provision of funding should be conditional on project implementation by one of the land use agencies and should be allocated pursuant to a Memorandum of Agreement entered into as part of the transition plan.

Since legislation would be required to continue the CFD in any event, that legislation should, if possible, also include a provision to *de*-annex those portions of the existing CFD on which there are no current development entitlements. *This would limit the go-forward CFD map to just the six entitled project areas and would ensure that the go-forward JPA and CFD could expire as soon as those existing entitlements are built out.* Unless the un-entitled areas are de-annexed, the go-forward JPA and CFD would have to be perpetuated until the last permit is pulled for the Ord Community, and the land use jurisdictions would not have the flexibility and autonomy to impose alternative fees and taxes. Legislation to permit de-annexation could be added to the Community Facilities Act at Article 3.5, which already permits *annexations* to a CFD. If a CFD map can be expanded, there is no reason in principle that it could not be reduced.

D. Regardless how funding for common projects is *raised* from entitled and future development projects, the land use jurisdictions should agree now by an MOA to an equitable method to *allocate* funds for specified roads, water, and habitat projects, not defer this issue for resolution in the future by some new agency.

Regardless how revenues are raised from entitled and future projects, the equitable funding of required or desired future actions should be determined now by agreement and not simply postponed to future decisions by an extended FORA or a new JPA. Equitable funding of roads, water, and habitat by each development could be assured though an MOA among the land use jurisdictions as discussed below. This method could govern allocation of all revenues raised for common projects, whether by CFD taxes, CFD-replacement payments, or new revenue sources from future projects.

1. Roads

FORA staff have proposed to "assign" the obligation to construct the roads in the current CIP to land use jurisdictions, based on the location of the roadway. This would "obligate" the County to spend $54 million, Marina to spend $9 million, and Seaside to spend $9 million. It is proposed that TAMC continue its responsibility for regional improvements to Highways 1 and 156 applying $36 million raised from Ord Community development.

As discussed in section E below, FORA has not provided a convincing legal argument that the land use agencies have an enforceable obligation to construct these roads. However, the land use jurisdictions may want to agree to such obligation now. Alternatively, they may want to agree only to a *conditional* equitable funding arrangement that would reimburse a land use jurisdiction for a portion of the road cost *if and when* it decides to build the road. In either event, the land use agencies should agree now to a formula that unambiguously allocates revenues from Fort Ord development projects for shared roads.

For example, the MOA could provide that for the roads in the current FORA CIP:

- The jurisdiction in which the on-site or off-site road lies may decide if and when to construct it.

- Each Fort Ord development project would make a contribution toward that road through a CFD tax, a CFD-replacement payment, or an impact fee as follows:
    - Currently entitled projects would either pay the CFD tax to a JPA or make a CFD-replacement payment to the land use jurisdiction. From that amount, the CFD JPA or the land use jurisdiction would then allocate to a common fund for road construction projects (an escrow account) the amount of the CFD tax that was allocated toward on-site and off-site roads in the FORA CIP. If the CFD were continued via a JPA, the JPA would only act as a funding conduit; it would not alter the slate of roads, determine their priority, or increase the CFD tax.
    - Future projects not subject to the CFD would pay a nexus-based fee determined by a nexus analysis of the set of on-site and off-site roads in the FORA CIP based on existing and planned development, e.g., based on a TAMC nexus-study.

- The CFD taxes or CFD-replacement payments from the already-entitled projects and the impact fees or other road-related revenues raised from future, currently un-entitled projects would be escrowed when paid and earmarked for specific road projects in proportion to the amounts allocated to each road in the FORA CIP or the nexus study. The amount of the CFD tax or CFD replacement payment attributable to the roads already built as of 2020 would be reallocated pro-rata to the remaining onsite, offsite, and regional roads in the FORA CIP in proportion to their estimated cost, which would help alleviate the historic under-collection of road construction funds through CFD taxes, which were set below the full-nexus amount for commercial projects.

- The escrowed revenues would be disbursed when and if the road is built.

- Portions of the unused fees would be returned to the developer after a fixed period, e.g., 25 years, if the roads for which those portions were collected were not built.

- TAMC would assume responsibility for regional roads (Highways 1 and 156), funded as follows:
    - For the currently entitled projects, land use agencies would remit to TAMC that portion of the CFD or CFD-replacement payment that would have been allocated toward the regional road improvements in the FORA CIP.
    - Future, currently un-entitled projects would pay a nexus-based fee determined by a nexus analysis from TAMC, e.g., the TAMC Regional Development Impact Fee. This fee could be levied directly by TAMC.

Regardless whether the County is obliged to build $54 million in roads or may merely want to build them *if* development warrants them in the future, it makes sense to have an agreement with other land use agencies to pay a fair share of these County roads. Given the transition to VMT-based significance determinations for transportation impacts, traffic congestion is no longer cognizable as a CEQA impact; and thus, future CEQA mitigation is unlikely to provide a basis to insist on fair share payments from other jurisdictions' development projects. The FORA transition provides an opportunity for the County to get agreement for fair share payments but without committing itself to full buildout of the Base Reuse Plan or to loss of autonomy though an indefinite entanglement in FORA or a similar agency.

2. Water

FORA staff have assumed that MCWD will complete the final project(s) required to provide the assumed requirement for 2,400 afy in water augmentation and that MCWD will recover the $17 million cost through capacity charges on new development, higher water rates, or a combination.

As discussed in section E and F, below, FORA has not provided a legal opinion that this is an enforceable obligation on the land use jurisdictions *or*, more importantly, that it is the *full extent* of the enforceable obligation to mitigate development impacts on groundwater supplies.

LandWatch does not propose in this letter to allocate to specific agencies, or to acknowledge any limitation on, the obligation to fund water augmentation infrastructure projects. The purpose of this letter is to address the mechanics of replacing FORA, an agency that has not provided, will not provide, and perhaps cannot provide a water supply to replace reliance on groundwater pumping in Fort Ord, despite the obligation to do so discussed in section E below.

The land use agencies may acknowledge that they are required not to approve development without a replacement water supply and agree to meet this obligation by agreeing to fund all or part of that replacement supply themselves. To the extent that the land use agencies do agree to fund a replacement water supply, they could agree to do so through an MOA as follows:

- Currently entitled projects would pay the CFD or CFD-replacement payment to the land use jurisdiction, which would allocate that portion for water augmentation that would have been allocated toward water supply augmentation in the FORA CIP.

- Future projects would pay a nexus-based fee for the replacement water supply, determined by a nexus analysis and identification of the cost of that water supply.

- Fees would be escrowed and disbursed when and if the water supply augmentation is built or purchased.

3. Habitat

The land use agencies are each required to implement the management requirements for the Habitat Management Areas under the HMP agreements. Future development projects in certain areas will also need to obtain take permission under the ESA and CESA via Incidental Take Permits predicated on either a basewide or a lesser scale Habitat Conservation Plan (i.e., an HCP for the entire base, for only the land use jurisdiction, or for only the project itself). FORA has reserved 30% of the CFD taxes to implement the combined joint HMP and HCP obligations, assumed to come to $45 million. FORA projects it will have set aside $21 million by 2020.

FORA staff have not identified any legal obligation that the land use agencies act *in concert* to implement the HMP requirements or to obtain HCP/ITP clearance. FORA staff have suggested that there may be economies of scale in joint implementation of HMP and HCP obligations, but they have not quantified those economies. FORA staff have also suggested that some joint agreement may be necessary to ensure availability of mitigation areas for some land use jurisdictions, but they have not explained why this would require a JPA rather than an MOA. Staff have suggested that a joint HCP would be better for the protected species, but they have not provided an analysis that explains those advantages or why a JPA rather than an MOA would be necessary to realize those advantages. Finally, although staff have not discussed this, a JPA may be necessary in order to implement adaptive management measures, which would require changes to plans that could not easily be anticipated or managed through a static MOA.

In sum, the FORA transition planning effort has not provided sufficient analysis of the benefits and scope of cooperative action and there appears to have been no consideration of acting through a habitat MOA rather than through a habitat JPA. The relevant analysis may exist, but it has not been identified and summarized for the transition plan decision makers.

The land use agencies should proceed with whatever joint action is desired or legally required via an MOA as their default choice unless there is a compelling case made for a JPA. If a JPA is justified for either the HMP management or a coordinated HCP, it should be limited to the habitat matters so that its duration and provisions are not confused with any other JPAs that might be needed, e.g., for funding or munitions oversight.

Funding for the future habitat management and HCP efforts should depend on whether there is a case for acting cooperatively.

If there is *no* case for cooperative action, the existing $21 million reserve fund should be returned to the land use jurisdictions, either in proportion to their past contributions or, alternatively, in proportion to their future habitat management responsibilities as measured by some proxy such as HMA acreage. The land use agencies would then be fund its HMP management obligations and any HCP obligations it chose to assume with

- its share of the previously reserved CFD taxes,
- 30% of future CFD taxes receive by the CFD JPA, which the MOA would require be payable to the land use agency as payments are made,
- 30% of CFD-replacement payments, if negotiated from currently entitled projects, and
- any additional exactions from future projects through impact fees, ad hoc fees, or through other means adopted by the land use agency.

If there *is* a case for collective action, whether by MOA or JPA, funding should be allocated to the habitat JPA, or to a common escrow fund for habitat management and/or common HCP implementation if proceeding via MOA, as follows:

- 30% of the CFD from the CFD JPA, if the CFD were continued,
- 30% of the CFD-replacement payments if such payments can be negotiated,
- For projects not covered by the CFD or CFD-replacement payments, a fee or other exaction should be imposed by each land use jurisdiction that reflects an agreement as to a fair share contribution. Use of ad hoc exactions through development agreements or a land use agency-level CFD could avoid the need for a nexus analysis, and the fee could be set at a level reflecting an agreement among the land use agencies that all development projects should share in certain costs regardless of their proximity to habitat land. Alternatively a nexus-based analysis could be used, which might result in different payments by some projects.[2]

[2] Note that in determining a nexus, it may be possible to exact a fee even from jurisdictions that do not contain habitat lands on the theory that these jurisdictions had and retain an obligation to mitigate base-wide habitat impacts. It might be argued that portions of these jurisdictions' land *could* have been identified as habitat land in the HMP and that their land was identified as 100% developable only because other jurisdictions were assigned a greater proportion of habitat land with its protection burdens. This is a matter for negotiation among the land use agencies.

E. FORA should provide a clear legal analysis of the post-FORA obligations of the land use agencies.

As noted, FORA staff have simply assumed that the land use agencies would be obliged to undertake the roads, water augmentation, and habitat projects contained in the FORA CIP after FORA sunsets. In response to LandWatch's Public Records Act requests for legal analysis of post-FORA obligations, FORA identified only Jon Giffen's January 10, 2018 memo captioned "Assignability of Implementation Agreements (Part 1)," available at the FORA transition website at http://b77.402.myftpupload.com/wp-content/uploads/011018_Board_Memo-CFD-Dev_Fees-LAFCO.pdf. FORA advised LandWatch on August 9, 2018 that further analysis has not been completed.

Giffen's initial analysis seems problematic. First, Giffen expressly considers only whether the Implementation Agreements are "assignable," *not whether the Implementation Agreements create enforceable obligations by the land use jurisdictions that would survive FORA.*

Second, Giffen merely *implies* that the Implementation Agreements create a continuing obligation for the land use jurisdictions to fund the Basewide Costs and Basewide Mitigation Measures. His argument is that the land use jurisdictions "could not reasonably have expected that FORA's credit would assure [their] full completion" because Section 6(f) contains provisions that contemplate that possibility. But Section 6(f) merely obligates the land use jurisdictions to "initiate a process to *consider*" other financing mechanisms if FORA cannot pay Basewide Costs and undertake Basewide Mitigation Measures, and Section 6(f) specifically provides that it does *not* require the "Jurisdictions to adopt any specific financing mechanisms *or contribute any funds to alleviate FORA's funding insufficiency*." In short, Section 6(f) does not create an enforceable obligation for the land use jurisdictions themselves to fund FORA *even when FORA exists*, much less after it sunsets.

More generally, the Implementation Agreements only obligate the land use jurisdictions to (1) levy *FORA's* development fees and assessments on future property owners "in accordance with FORA's adopted fee policy" and (2) to impose deed restrictions that require future land owners pay a Fair and Equitable Share of Basewide Costs and Basewide Mitigation Measures through some type of financing mechanism. Nothing in the Implementation Agreements appears to impose an obligation on the land use jurisdictions *themselves* to pay for Basewide Costs and Basewide Mitigation Measures or to develop and implement a funding mechanism that could be imposed on landowners after the demise of FORA.

Giffen notes that an assignment cannot occur without a willing assignee but then concludes that FORA is not actually looking to assign FORA's rights and obligations but is contemplating its dissolution under the FORA Act and LAFCO law. Nonetheless, Giffen says that LAFCO will be able to "pass along to the appropriate successor entity (ies) authority to continue the levying and collection of special taxes, fees, and

assessments on property once within FORA's jurisdiction after FORA ceases to exist." This analysis seems to acknowledge that there will *be* no assignment of the Implementation Agreements at all. More problematically, the analysis only addresses the *authority* to raise revenues, not the *obligation* to do so *or* the obligation to fund and implement road, water, and habitat projects. Furthermore, the analysis simply *assumes* that there will be a successor agency to FORA and that somehow the CFD can be transferred to that agency, even though neither the FORA Act nor the Mello-Roos Act now provide for this. The only successor agency that has been identified other than a FORA extension is a JPA. But if the land use jurisdictions refuse to join that JPA because, for example, they conclude the Basewide Costs and Basewide Mitigation cannot be imposed on them without such a JPA, then there will *be* no entity to which to assign FORA's rights to continue collecting the CFD. There is no legal analysis that suggests that the land use agencies could be compelled to participate in a go-forward agency with specific duties.

This letter does not purport to resolve the question of the continuing obligations of the land use agencies. The FORA transition planning process should provide clear and authoritative legal analysis of this issue. It should also provide legal analysis of the following questions:

1. What Base Reuse Plan EIR CEQA mitigation obligations will remain post-FORA?

- Are the road, infrastructure plans, and HMP/HCP plans that are identified as CEQA mitigation still mandated?
- If so, who is responsible to implement this mitigation?
- What is the consequence of a failure to reach agreement on implementation of these infrastructure and habitat plans?
- What *development restrictions* identified as CEQA mitigation (as opposed to infrastructure requirements) will remain in effect post-FORA? For example, will the DRMP development caps, the policies requiring assured long term water supply within the safe yield of the aquifer as a condition of development, the policies calling for oak woodlands plans, etc. remain enforceable?
- What obligation would an agency have if it chooses to alter or ignore these development restrictions?
- What CEQA analysis and findings regarding mitigation must FORA make in approving a transition plan for submittal to LAFCO if there is evidence that the plan would abandon or alter previously adopted mitigation?

2. What force will the Base Reuse Plan itself, independent of its CEQA mitigation provisions, have post-FORA?

- The Reassessment Report lists dozens of policies not yet implemented at pp. 3-32 to 3-70. See http://www.fora.org/Reports/FinalReassessment/3_TopicsandOptions.pdf. Some policies require affirmative acts such as building infrastructure or adopting plans, whereas other policies simply restrict future acts. Some policies are perpetual and others can be implemented in a final action.
- What policies not yet fully implemented or of a continuing nature must be implemented in the future, if any?
- What specific policies were identified as CEQA mitigation and are subject to CEQA's requirements regarding fulfillment of mitigation?
- If policies must be implemented either because they are CEQA mitigation or because they are enforceable parts of the Base Reuse Plan, what entities have responsibility to implement them?
- What entities have authority to enforce policies if they are not implemented? Land use authorities? Do landowners have standing to enforce, e.g., as parties benefitted through covenants running with the land? Do private parties have standing to enforce CEQA mitigation?

3. What force will the Master Resolution have post-FORA?

- Would it have at least as much force as the Base Reuse Plan itself (if any) since it was adopted as part of the Base Reuse Plan?
- Would section 8 have any more force than the rest of the Master Resolution since it also represents a contractual obligation to the Sierra Club?
- Does the Master Resolution bind only FORA, or is it binding on the land use agencies post-FORA?
- Much of section 8 of the Master Resolution concerns consistency determinations by FORA and imposes a stringent standard of review for consistency determinations. Would that survive in any future land use agency consistency determinations?
- Section 8 of the Master Resolution mandates that each land use agency adopt certain policies contained in the Base Reuse Plan. Will that survive?
- Section 8 bars development approvals unless the land use agency has taken appropriate action to adopt the programs specified in the Reuse Plan, the Habitat Management Plan, the Development and Resource Management Plan, the Reuse Plan Environmental Impact Report Mitigation and Monitoring Plan and the Master Resolution applicable to such development entitlement. Will that survive?

4. What force will the Implementation Agreements have post-FORA.

- Can the Implementation Agreements be "assigned" as was mentioned in the June 5, 2018 Draft Transition Plan at page 22?
- What powers would be conferred and duties imposed by the Implementation Agreements if they were assigned?
- What rights and duties would continue if the Implementation Agreements were not assigned?

5. What force will deed restrictions have?

- Section 8 of Master Resolution obligates deed restrictions binding on future owners that provide that development shall be limited by the Base Reuse Plan including its constraints related to lack of water transportation and infrastructure.
- The Implementation Agreements also mandate deed restrictions related to infrastructure financing.
- Will those deed restrictions be required for *post-FORA* land transfers?
- Will the pre-2020 deed restrictions already in place continue to apply? Note that the only published decision enforcing the covenants does not address FORA's termination.
- If so, will the deed restrictions rely on the specific restrictions set out in in the Base Reuse Plan, HMP, and CEQA mitigation as of 2020?
- Who is entitled to enforce the deed restrictions? Property owners? Non-owners? Private persons? Land use authorities?

6. How will the allocation of land sales revenues and property taxes change?

- Will they revert to the land use agencies? If so, how would they be allocated? If not, what entity would be entitled to them?
- The May 30, 2018 EPS memo purports to address property tax revenues post-FORA and concludes that the cities property taxes will not materially increase, although the County will receive an additional $17 million, *assuming* rapid and complete buildout. See page 8 and Table 10 in http://b77.402.myftpupload.com/wp-content/uploads/053018_EPS_Transition_Memorandum.pdf.
- The April 10, 2018 Willdan report addresses both property taxes and land sales revenues and has been interpreted to suggest that local cities will receive a windfall upon FORA's termination. This conclusion may not be warranted since it may depend critically on land sale revenues that would only materialize at full buildout and only with land unencumbered

by blight removal costs. See pdf pages 2, 112-151 at https://www.ci.seaside.ca.us/ArchiveCenter/ViewFile/Item/455.

7. Is FORA's identification of "entitled" parcels correct?

- FORA has assumed that no new fees or taxes can be imposed on "entitled development" and has estimated that the potentially forfeited post-2020 revenues from the six entitled projects would total $72.2 million.

- Unless and until there is an event that *vests* an entitlement in a private party (e.g., a permit or Vesting Tentative map issued or a DDA signed), an agency would not have foregone the right to impose future taxes or fees. A mere legislative land use act, like a specific plan adoption, does not vest rights without something more. In light of this, does FORA's analysis incorrectly assume that all phases of all projects for which a specific plan has been approved are "entitled?" If so, FORA may have overstated the potential revenue forfeiture from entitled projects.

F. Water supply considerations

As noted, FORA has simply assumed that the land use agencies are obliged to fund completion of the remainder of the 2,400 afy water supply augmentation *and* assumed that this represents the full extent of the CEQA mitigation requirement under the Base Reuse Plan. As discussed in section E, FORA has provided no analysis that the land use agencies are obligated to assume any of the Base Reuse Plan CIP obligations or CEQA mitigation post-FORA.

More problematically, the assumption that the proposed 2,400 afy in water augmentation projects constitutes the fulfillment of required CEQA mitigation is simply incorrect and is clearly inconsistent with the Base Reuse Plan EIR. The clear duty of the land use agencies under the Base Reuse Plan and its CEQA mitigation is not to approve development that relies on groundwater pumping from the 180-foot, or 400-foot aquifers in Fort Ord or to rely on pumping in excess of a demonstrated sustainable yield from the Deep Aquifer.

Specifically, the adopted CEQA mitigation in the Base Reuse Plan EIR mandates that future development not be approved unless and until there is a replacement water supply that does not require pumping from the 180-foot, or 400-foot aquifers in Fort Ord and that does not require pumping in excess of a demonstrated sustainable yield from the Deep Aquifer. Other agreements also limit increased pumping from the Deep Aquifer. The continued reliance on a purported water right of 6,600 afy of pumped groundwater to support Ord Community development misreads the 1993 Army/MCWRA agreement, the

requirements of the Base Reuse Plan EIR, and the agreements limiting increased pumping from the Deep Aquifer.

The local agencies should be prepared to acknowledge that a transition plan will obligate agencies making commitments that would alter the adopted mitigation to ensure that alternative mitigation is adopted that would be as effective. This may require funding commitments or restrictions on future development or both.

LandWatch understands that the FORA transition will require additional clarification of a number of issues that this letter does not address. However, LandWatch believes that a contract-based agreement on the scope and funding of shared road and water supply infrastructure and habitat management programs is essential to a FORA transition that will actually disengage the land use agencies from an indefinite commitment to a FORA-like agency.
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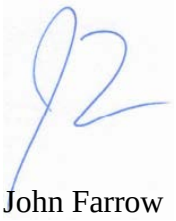
Yours sincerely,

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



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