



October 18, 2018

Mayor Ralph Rubio, Chair
Fort Ord Reuse Authority (FORA) Board of Directors
920 2nd Avenue, Suite A
Marina, CA 93933

Dear Chair Rubio and Board of Directors:

LandWatch rejects the claim that the FORA transition plan is exempt from the California Environmental Quality Act. The following comments supplement those of John Farrow in his October 17, 2018 letter to you (attached).

Water

Regarding water, there can be no assurance that FORA transition plan will implement the mitigation in the Base Reuse Plan (BRP) EIR. That mitigation is in the form of BRP policies and programs that requires the agencies to do the following:

- Determine safe yield;
- Prohibit development that relies on groundwater pumping in excess of safe yield; and
- Develop an alternative water supply in order to support Fort Ord development and to shut down the Fort Ord wells.

Despite these policies, FORA and the land use agencies have incorrectly assumed that there is a permanent groundwater supply of 6,600 acre-feet per year (afy) to support future development and relied on FORA's allocation of that 6,600 afy to approve development projects. The transition plan purports to perpetuate the 6,600 afy allocation even though the allocation would conflict with BRP policies and programs and even though FORA has no legal authority to impose even this allocation constraint on post-FORA development. The transition plan cannot actually limit future groundwater pumping by Marina Coast Water District or others unless they agree to such limits. They have not.

FORA has not complied with CEQA because CEQA requires FORA to:

- Evaluate the changes the transition plan will make to previously adopted mitigation, including the BRP policies and programs identified as mitigation for water supply impacts.
- Prepare a subsequent EIR to evaluate the impacts of the transition plan on water supply and propose new mitigation to prevent future impacts to the groundwater supply.

Transportation Infrastructure

Regarding transportation infrastructure, the BRP calls for building a certain set of roads to support the eventual scope of development that was then planned. The BRP EIR identifies the significance of transportation impacts from this planned development based on the congestion measure called "level of service" (LOS). The BRP EIR concludes that on-site impacts would be less than significant because the planned roads will provide acceptable levels of service. It concludes that off-site transportation impacts cannot be rendered less than significant, but proposes fair-share payments to certain regional road projects as well as the enforcement of certain policies to reduce transportation demand.

FORA has never ensured that development pays its fair share for off-site roads but has instead prioritized building on-site roads. Even though FORA's Capital Improvements Plan (CIP) is not limited to roads that were identified as CEQA mitigation in the BRP EIR, FORA claims that all of its CIP projects are required as mitigation. This is incorrect.

Two important post-1997 changes to CEQA limit the obligation to build roads to mitigate transportation impacts in the future, especially to build on-site roads within Fort Ord:

- SB 743 bars the use of congestion measures, specifically "level of service," to determine impacts or to require mitigation. Impacts and mitigation must be based on vehicle miles traveled and similar metrics because CEQA is concerned with limiting auto travel, not accommodating more of it. It will no longer be possible to rely on CEQA mitigation to compel a project to pay for roads simply to prevent congestion.
- The California Supreme Court held in 2015 that CEQA is concerned only with the effect of the project on the environment, not the effect of the environment on the project. (California Building Industry Association vs. Bay Area Air Quality Management District (2015) 62 Cal.4th 369.) This means that CEQA mitigation cannot be required for on-site congestion.

The transition plan purports to compel the County and cities to fund and build the entire set of roads contained in the FORA CIP, even though it is clear that FORA does not have the authority to compel that outcome. FORA has not obtained agreements from the County and the cities to fund and build the CIP roads. Marina at least has refused to commit funds through a transition plan to projects it is not legally obligated to fund, and other agencies are likely to take the same position.

FORA has failed to comply with CEQA because FORA has failed to:

- Identify whether and under what circumstances any specific transportation project might have been required by the BRP EIR, a matter that is in substantial dispute;
- Identify when those roads, if any, might be required by new development or acknowledge that they may never be required given the reality that development triggering the need for these roads has not occurred;
- Acknowledge that post-1997 changes to CEQA will effectively preclude requiring development projects to construct roads as CEQA mitigation;
- Provide any mechanism to ensure that the BRP policies intended to reduce travel demand will be enforced in the future; and
- Evaluate transportation impacts of the transition plan based on vehicle miles traveled and other permissible criteria of significance.

Conclusion

FORA's member agencies should not approve the transition plan as proposed. FORA has not complied with CEQA either with respect to water supply or transportation impacts. There is no reason the member agencies should bind themselves under the transition plan to fund and construct the FORA CIP road projects when they are not legally compelled to do so and when they will not be able to rely on CEQA mitigation to force developers to pay for those roads in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. DeLapa". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping tail.

Michael D. DeLapa
Executive Director