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October 28, 2018

By E-mail
Board of Directors
Fort Ord Reuse Authority
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Re: CEQA compliance for adoption of Revised Transition Plan attached to October 19, 2018 FORA agenda

Dear Members of the Board:

On behalf of LandWatch Monterey County, I write to object to the proposed finding that the Board's adoption of the revised Transition Plan attached to October 29, 2018 agenda ("Revised Transition Plan") would be exempt from CEQA and to FORA's failure to prepare a subsequent EIR before approving it.

I reiterate and incorporate by reference the comments made in LandWatch's October 17, 2018 letter.

The Revised Transition Plan, which is in the form of a proposed resolution, finds that the Revised Transition Plan is exempt from CEQA because it claims that it will not abandon or alter any previously-adopted CEQA mitigation measures:

> The Board hereby finds and determines that in adopting this Transition Plan as required by Government Code section 67700 FORA is addressing the allocation of FORA's assets, liabilities and obligations in advance of FORA's ultimate dissolution without (a) amending any contemplated or approved land uses within the former Fort Ord, (b) abandoning or altering any Base-wide Mitigation Measures or any other mitigations that were required as a part of the adoption of the Reuse Plan, (c) changing the Reuse Plan itself, (d) eliminating any Base-wide Costs or elements of the CIP, or (d) avoiding the satisfaction and fulfillment of any of FORA's other commitments, pledges, or promises (all of which may be collectively referred to herein as the "FORA Program"). Nothing in this Transition Plan is intended to change any part of the FORA Program that would have any impact on the environment. To the contrary and to the extent not already so contained, this Transition Plan requires each jurisdiction to include all mitigations in its Capital Improvement Program (subject to Constitutional or other

> limitations imposed by applicable law on such jurisdiction's funding obligations). Following FORA's ultimate dissolution, any changes to the FORA Program or any part thereof will be made by the respective land use jurisdiction(s) and any successor(s) to FORA only after full compliance with all applicable laws, including but not limited to CEQA. Accordingly, the Board hereby finds and determines that this Transition Plan is not a project under CEQA and/or is exempt as a mere change in the organization of governmental agencies which does not change the geographical area in which previously existing powers were exercised.

(Revised Transition Plan, § 1.2, emphasis added.) The Revised Transition Plan is not exempt from CEQA. There is no mechanism in the Revised Transition Plan that would assure the referenced "mitigations," whatever they are, will in fact be implemented. There is no certainty that improvements will ever be funded or constructed or that development restrictions will continue to be enforced. FORA has still not even identified which CIP projects and which development restrictions are in fact required as mitigation for the Base Reuse Plan ("BRP"). FORA has not secured valid or binding agreements to continue existing mitigation obligations or prepared a CEQA document that assesses the effects of abandoning or changing existing mitigation. Thus, FORA has not complied with CEQA.

Significant changes to the Base Reuse Plan mitigations that would stem from the Revised Transition Plan, significant new circumstances, and significant new information, require that FORA prepare a subsequent EIR to acknowledge new and more severe significant impacts and propose mitigation for them. Relevant changes and new information include the inability to compel the existing mitigation measures; worsening seawater intrusion and overdraft conditions and the failure to develop the expected replacement for groundwater supplies, which were not anticipated by the BRP's EIR; and changes to CEQA's legal requirements that now preclude identifying and mitigating transportation impacts with reference to Level-of-Service criteria and require instead that analysis and mitigation be based on minimizing vehicle miles travelled and trip generation. These points are set out in LandWatch's October 17, 2017 letter and discussed below.

A. The Revised Transition Plan cannot assure that existing FORA plans can be assigned or will be accepted.

As the staff reports for the October 29, 2018 meeting acknowledges, there is no agreement among the member agencies "as to implementation of base-wide costs and mitigation measures, replacement financing mechanisms and revenue sharing arrangements." Oct. 29, 2018 Staff Report, p. 1. The October 12, 2018 staff report also acknowledge a lack of agreement. The Revised Transition Plan proposes to reach such agreements later, possibly through a mediated discussion to reach "Transition Plan Agreements" (also referred to as "Transition Plan Implementing Agreements") with the member agencies. However, those agencies have not agreed to assume responsibility for

implementing the Base Reuse Plan obligations or mitigation, and some have strenuously objected.

Contrary to Revised Transition Plan section 1.3, and as explained in LandWatch's October 17, 2018 letter, the existing Implementation Agreements do not require continued funding by member agencies of the Basewide Costs and Basewide Mitigation Measures. Despite the language in section 4.1 of the Revised Transition Plan, FORA cannot simply assign an "obligation" to fund or construct the CIP projects. Nor can FORA assign an obligation to continue to observe and enforce development restrictions in the Base Reuse Plan. The Revised Transition Plan section 4.2 effectively acknowledges that funding and construction of improvements is uncertain because it merely "requests" and "recommends" that other agencies enter into a Transition Plan Agreement. Section 4.4 admits that the assignments of obligations may not in fact occur and provides only that FORA seek "judicial clarification" or unspecified legislative amendments to ensure "fulfillment of the mitigations, satisfaction of the obligations, and the completion of the elements of the FORA Program which have not effectively been assigned to or accepted by the objecting jurisdictions." There is no assurance that judicial clarification or unspecified legislative amendments will in fact ensure this.

In short, the Revised Transition Plan proposes to kick the can down the road. This approach does not satisfy CEQA's requirement that mitigation be certain.

B. The Revised Transition Plan fails to acknowledge substantial funding shortfalls for the existing CIP projects; and FORA has not demonstrated that any of the CIP's transportation projects are required as mitigation.

The Revised Transition Plan acknowledges in recital J that when FORA sunsets there will be no legal authority to collect the previously planned $72 million in the FORA CFD taxes from previously entitled development. Although jurisdictions can impose alternative exactions on future development that was not previously entitled, they may not legally impose new exactions on previously entitled development. In recital N, the Revised Transition Plan references the need for unspecified legislation to address this problem. However recital N admits that this may not occur by stating that "in the absence of such legislation, ongoing contributions would need to be made in accordance with the approach embodied in the [existing] Implementation Agreements." As explained in LandWatch's October 17, 2018 letter, the existing Implementation Agreements do not oblige member agencies to fund Basewide Costs and Basewide Mitigation Measures through their own means, either before or after FORA sunsets.

In the absence of that planned $72 million, there can be no certainty that the projects in FORA's CIP will be funded or completed, whether identified as mitigation or not.

Compounding the uncertainty from the loss of the previously expected $72 million in funding, is the fact that FORA has not collected adequate funding from

development projects in the past. FORA has consistently underfunded regional and offsite roads in favor of onsite roads through its "local first" funding allocations. It is unlikely that either FORA or TAMC can ever collect the full nexus-based fair share of the cost of regional and offsite roads from Fort Ord development. This is discussed in section B1 and B2 below.

FORA has declined to identify which, if any, of the roads in the CIP it considers to be CEQA mitigation. However, if any of the roads in the CIP were in fact required CEQA mitigation, they would not be the onsite roads, because the BRP EIR does not identify any significant onsite transportation impacts. Furthermore, onsite congestion caused by existing traffic and the BRP project itself cannot be considered a significant impact requiring mitigation: CEQA is concerned about the effect of a project on the environment, not the effect of the environment on the project, or the effect of the project on itself. *California Building Industry Ass'n v. Bay Area Air Quality Management District* (2015) 62 Cal.5th 1067. So onsite congestion could not legally compel onsite roads as mitigation. However, if it is FORA's position that any offsite or regional roads are required mitigation, then FORA must acknowledge that future funding for these roads from Fort Ord development is uncertain.

1. **FORA's "local first" allocation of transportation funding has starved regional and offsite road projects for the benefit of onsite roads.**

TAMC has concluded that FORA has consistently underfunded regional and offsite roads in favor of onsite roads. (Michael Zeller, memorandum top TAMC Board of Directors, October 24, 2018, "Transportation Agency Role in Fort Ord Reuse Authority Transition Planning," available at https://fora.org/Reports/TTF/102418_TAMC_Transition_Report.pdf. TAMC'S memo says:

> FORA's local first policy prioritizes on site projects in the FORA Capitol [sic] Improvement Program over off site and regional projects. Transportation Agency staff compared FORA's historical funding allocations to projects that would otherwise have been covered by the Regional Development Impact Fee program. From a total of $72.9 million of transportation funding allocations made by FORA since the inception of its fee program, $1.6 million has been allocated to off site and regional projects, due the local first policy. A proportional allocation formula would have resulted in $22 million being allocated to off site and regional projects - such as Highway 156, Davis Road, Reservation Road or the Highway 1 corridor.

(*Id*., p. 1, emphasis added.) FORA's "local first" policy is discussed in the April 27, 2017 FORA Fee Reallocation Study: Deficiency Analysis and Fee Reallocation. (Available at https://www.fora.org/Board/2017/Packet/Additional/051217-Item8c-Attach_B.pdf.). The effect of the "local first" distribution policy on planned FORA payments for onsite, offsite, and regional roads is apparent from comparison of the

"Option A: Local First Distribution" and the "Option B: Cap Adjusted Nexus" columns in Table 22 of that FORA Fee Reallocation Study.

Furthermore, TAMC points out that the bulk of FORA's planned contributions to offsite and regional roads is programmed for post-2020 collection. $31 million of $37 million of planned regional road fair share contributions and $20 million of $23 million payments for offsite roads are planned for the post-2020 period. In short, FORA's local first policy has for 20 years simply ignored funding for regional and offsite roads in favor of building roads on the base itself.

2. It is unlikely that either FORA or TAMC can ever collect the full nexus-based fair share of the cost of regional and offsite roads from Fort Ord development.

As TAMC points out, Fort Ord is not currently subject to the TAMC's Regional Development Impact Fee ("RDIF") because development there pays the CFD taxes instead, a portion of which is supposed to fund transportation. TAMC staff suggest that TAMC could extend its RDIF collection area into Fort Ord in the future, whether FORA continues or not, and says that "this would be advantageous."

But substituting the RDIF for the FORA CFD tax will not make up for FORA's underpayment of impact fees for regional and offsite roads, because the RDIF cannot be imposed on previously entitled but currently unbuilt projects. TAMC cannot collect fees from those projects through the RDIF because the RDIF program was not applicable to those projects when their entitlements vested and no new exactions can be imposed on a vested project. Tens of millions of expected road fees would not be collected from the six currently entitled projects unless FORA and its CFD are extended, or unless there is a legislative amendment that would permit assigning the CFD to another entity, or all the developers voluntarily agree to make payments that they are not legally obliged to make. None of these outcomes is certain. Of the $72 million in lost CFD taxes from these six projects, some significant portion is supposed to have funded roads. In sum, even if TAMC collects the RDIF from future Fort Ord projects, it cannot collect fees from the six previously entitled projects with vested rights.

There is likely no way to make up for FORA's past under-collection of fees for offsite and regional roads from the Fort Ord projects that have already been built. FORA has not collected a full nexus-based share of the cost of regional and offsite roads from previously built projects that have already paid their CFD taxes. Under-collection was the result of two factors.

First, FORA's past "local first" allocation of the CFD fees it has already collected from already-built projects means that FORA has postponed most of its eventually programmed payments for offsite and regional roads (per discussion in section B.1 above). The only way to collect these postponed payments would be to leave FORA's CFD program in place and hope that the post-2020 payments of the CFD taxes by future

projects under buildout conditions actually occurs so that the postponed payments for offsite and regional roads will occur by some date certain, e.g., the proposed 2028 FORA extension date. This is as uncertain as full Fort Ord buildout by 2028 is uncertain. Unless FORA and its CFD tax are perpetuated indefinitely until the final Fort Ord building permit is pulled, FORA will sunset and eliminate the obligation to pay the CFD tax or any other exaction for any remaining vested but unbuilt projects. And having TAMC substitute the RDIF where it can legally do so - for future projects that are not currently vested - cannot make up for FORA's prior underpayment for the offsite and regional roads. The RDIF could legally only exact a nexus-based fair share from future projects for the future projects' own fair share. Under the Mitigation Fee Act, the RDIF could be applied to compel future projects to make up for prior underpayments by the existing, already built projects.

Second, FORA's decisions to cap its total transportation payments under its existing Implementation Agreements, and to set the CFD for commercial development at an even lower level, means that FORA's CFD taxes, even if eventually collected from every project under full buildout conditions, will not pay for the total nexus-based costs of the planned roads.[1] As shown in Table 20 of the FORA Fee Reallocation Study, the full nexus-based share for the planned onsite, offsite, and regional roads would require $204 million from Fort Ord development. But the amount that is actually included in the FORA CIP to be paid through future CFD taxes is only $114 million. So every project that has already paid its CFD tax has underpaid for its fair share of the cost of all roads, especially the commercial projects, and these already-built projects will never have to make another payment for roads. Thus, even if FORA and its current CFD tax were left in place forever, the current CFD tax will not cover the nexus-based fair share for regional and offsite roads.

In sum, by capping the CFD tax at a level that does not include the actual nexus-based fair share for all roads in the CIP and by allocating the CFD tax collections to build onsite roads first, FORA has set up a system that will never likely pay a fair share for offsite and regional roads. If FORA believes that the BRP EIR mitigation actually requires funding any offsite or regional roads as mitigation, then FORA should prepare a subsequent EIR to address the significant post-1997 information that actually funding these roads is now unlikely.

[1] The decision to cap road fees in the Implementation Agreements is discussed at pages 1-2 of the FORA Fee Reallocation Study: Deficiency Analysis and Fee Reallocation.

C. The Revised Transition Plan would not be exempt from CEQA if the BRP EIR actually required roads as mitigation, and an SEIR would be required with respect to transportation issues.

1. The Revised Transition Plan does not identify transportation mitigation that remains to be completed, if any; and it remains unclear whether FORA believes any roads are required mitigation, and if so, on what basis.

Section 1.2 of the Revised Transition Plan "requires each jurisdiction to include all mitigations in its Capital Improvement Program (subject to Constitutional or other limitations imposed by applicable law on such jurisdiction's funding obligations)." However, the Revised Transition Plan does not specify what those mitigations are. The Revised Transition Plan continues to conflate Basewide Costs and Basewide Mitigation measures as a convenient way to avoid distinguishing what improvements and development restrictions are actually mandated by CEQA.

As explained in LandWatch's October 17, 2018 letter, the definition of Basewide Mitigation Measures in the Implementation Agreements, now adopted in the Revised Transition Plan Glossary, is entirely ambiguous:

> Basewide Mitigation Measures include: basewide transportation costs; habitat management capital and operating costs; water line and storm drainage costs; FORA public capital costs; and fire protection costs. The Basewide Mitigation Measures are more particularly described in the Fort Ord Comprehensive Business Plan, described in Section 1 {f), the Development and Resource Management Plan, and the Findings attached to the Base Reuse Plan.

(Revised Transition Plan, Glossary.) Many of these measures are clearly not intended to mitigate significant environmental impacts under CEQA but are merely the development infrastructure that the BRP proposes. The definition confuses the BRP project itself with its required mitigation. For example, the referenced "Section 1 {f)" of the Comprehensive Business Plan (available at https://www.fora.org/Reports/BRP/BRP_v3_AppendixB-Business-Operation-Plan.pdf) includes not just CEQA mitigation but infrastructure that may be desired for "marketability" and to facilitate development; and it does not identify the improvements with any specificity. It is unclear from the definition's reference to multiple sources to identify mitigation measures whether a project qualifies as "mitigation" only if it is specified in *each* source or whether it qualifies if it is merely identified, in very general terms, in *one* source.

Clarity is essential because FORA staff have in the past mischaracterized infrastructure projects such as onsite roads as CEQA mitigation in order to persuade member agencies to include them in the CIP. As discussed above, it is clear that onsite roads are not legally required mitigation. Indeed, the Mitigation Monitoring Plan for the

BRP EIR does not identify any roads as mitigation. BRP PEIR, Table 2.5-1. If in fact FORA believes that any offsite or regional roads are required mitigation, FORA should identify them. There can be no certainty as to continuing mitigation unless and until FORA identifies which specific offsite and regional roads, if any, are in fact required mitigation under the BRP.

2. If FORA does believe that any roads are required mitigation, FORA must address the uncertainty of transportation mitigation caused by the Revised Transition Plan in a CEQA document; it cannot delegate that to agencies in the future.

As discussed, there is no certainty that FORA can assign the obligation to implement mitigation, either in the form of infrastructure improvements or development restrictions. Despite this, section 2.2.6 of the Revised Transition Plan purports to assign such obligations. If it is FORA's position that the construction of any particular roadway is required mitigation for the BRP, then FORA must prepare a CEQA document that identifies this roadway and addresses the uncertainty of mitigation caused by the Revised Transition Plan.

The Revised Transition Plan admits that there may be no Transition Plan Agreement, yet sections 2.1.5 and 2.2.6 blithely purport to assign responsibility for funding and completing transportation infrastructure projects to the member agencies; and the Revised Transition Plan assumes that the roads will all be built on the schedule in FORA's CIP. Section 4.2 then attempts to assign to other jurisdictions the obligation to prepare a CEQA analysis, at some indefinite point in the future, of the consequence of choosing not implement the unspecified mitigation obligations:

> If any jurisdiction chooses not to perform, include, or address any such project, such jurisdiction shall comply with the requirements of all applicable laws, including but not limited to by making such analysis and taking such action as CEQA may require in connection with such change.

(Revised Transition Plan, §4.2.) But even if a moment in time could be identified for the jurisdiction's "choice" not to build a road, CEQA analysis is not required when an agency decides not to take action or approve a project. Public Resources Code, §21080(b)(5); Guidelines, §15270(b).

FORA cannot delegate to other agencies FORA's own, current obligation to undertake CEQA review for the Revised Transition Plan. It is FORA's decision to approve a transition plan that would abandon, change, or render uncertain previously adopted BRP mitigation, if in fact there is any. CEQA review is required for the adoption of the Revised Transition Plan because the Revised Transition Plan is a project that may result in physical changes to the environment. This matter cannot be deferred for the Transition Plan Agreements because FORA is obliged under CEQA to address the effects of its Revised Transition Plan *before* it adopts it.

Furthermore, the Revised Transition Plan has not addressed the significant new information regarding transportation mitigation, if any, which would include CEQA's replacement of Level-of-Service significance criteria with vehicle-miles-travelled criteria and FORA's historic under-collection of fair share fees for transportation infrastructure. If there is any remaining transportation mitigation, the Revised Transition Plan is not exempt from CEQA with regard to its effects on transportation and FORA must prepare a subsequent EIR before adopting it.

D. The Revised Transition Plan is not exempt from CEQA and an SEIR is required with respect to water supply issues.

The Revised Transition Plan fails to identify which BRP policies, development restrictions, and infrastructure are mitigation for water supply impacts or to ensure that those policies, development restrictions, and infrastructure remain committed. For example, there is no evidence or analysis that FORA can "assign" to MCWD the obligation to construct a water supply augmentation project or to enforce existing water supply allocations. There is no evidence or analysis that FORA can "assign" to MCWD the obligation to enforce or implement BRP policies that require determination of a safe yield; the obligation to bar development approval if water supply for that development would exceed safe yield; or the obligation to construct the expected alternative water supply that would replace groundwater pumping on the former Fort Ord. Unlike FORA, MCWD does not have land use authority and it cannot stop land use jurisdictions from approving projects. There is no evidence that MCWD is even considering a halt to <u>increased</u> groundwater pumping, much less considering construction of a water supply to replace groundwater pumping in the former Fort Ord. Again, FORA's decision to approve a transition plan that would abandon, change, or render uncertain previously adopted BRP mitigation compels FORA to undertake CEQA review before it adopts the Revised Transition Plan.

Furthermore, for the reasons set forth in LandWatch's October 17, 2018 letter, the Revised Transition Plan is not exempt from CEQA with regard to its effects on water supply. It is no longer possible for FORA to rely on the water supply analysis in the 1997 Fort Ord Reuse Plan EIR due to changes in circumstances, new information, and failure to implement the Fort Ord Reuse Plan itself. FORA must prepare a subsequent EIR before adopting the Revised Transition Plan.

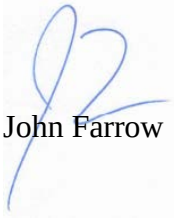
<u>Conclusion</u>

LandWatch urges FORA to consider this information and the underlying records provided with LandWatch's October 17, 2008 letter and cited in this letter carefully before acting. LandWatch offers to meet with FORA decision makers and senior officials to discuss the issues in this letter and how to resolve them, before the FORA

Board acts. FORA has time to address its omissions because it has more than two months before it needs to submit a plan to LAFCO.

Yours sincerely,

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



John Farrow

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