m | r | wolfe
& associates, p.c.
attorneys-at-law

March 11, 2019

By E-mail
Board of Directors
Fort Ord Reuse Authority
920 2nd Ave. Suite A
Marina, CA 93933
board@fora.org
michael@fora.org
dominique@fora.org

Re: Proposed legislation to amend FORA Act

Dear Members of the Board:

LandWatch Monterey County ("LandWatch") offers the following comments on the draft legislation to amend the FORA Act that was discussed by the FORA Legislative Committee at its meeting today ("Proposed Amendments").

The Proposed Amendments are inconsistent with the legislative mandate to sunset FORA in 2020. Nor are they responsive to the requests for autonomy in future planning and infrastructure development expressed by the land use jurisdictions.

In effect, the Proposed Amendments strip FORA of its ability to amend and enforce the Reuse Plan but leave a "FORA CFD Board" entity with plenary authority to determine "regional needs," to program regional infrastructure and spending to meet these needs, to compel land use agencies to fund these needs, and to control the revenue raising enactments of the land use agencies. *The FORA CFD Board's authority to manage all this would be unfettered because the remaining provision of the Reuse Plan are unclear and unenforceable and because the Proposed Amendments would provide a broad CEQA exemption that is worded to go well beyond mere organizational changes*.

Also, we note that the Proposed Amendments were not available for review until this weekend and that the Legislative Committee voted to forward them to the FORA Board after a short meeting held this Monday morning at 8 am. We understand that the FORA Board may act through a special meeting some time this week to recommend the Proposed Amendments to Senator Monning. This abbreviated review fails to provide an opportunity for public participation or careful deliberation by FORA and its member agencies.

These points are discussed below.

A. The go-forward entity should not have open-ended authority to determine "regional needs," to program regional infrastructure, to compel land use agencies to fund these needs, or to control the revenue raising enactments of the land use agencies.

1. The FORA CFD Board would have final authority on "regional needs" and the infrastructure plans to meet these needs.

As written, the proposed legislation would effectively extend FORA for an indefinite period, with continued authority to determine and fund "regional needs," including, *but not limited to*, habitat management, transportation, transit, and water supply augmentation. (See Proposed Amendments, § 67700(h)(3), (k)(1) [emphasis added].)

Even if the open-ended phrase "but not limited to" were removed, the broad authority to determine, fund, and program future habitat management, transportation, transit, and water supply augmentation is inconsistent with the stated desires of the member agencies to have autonomy as to these future infrastructure and spending decisions.

The default infrastructure plan to meet these "regional needs" would be the Capital Improvement Plan (CIP) as of 2020. (Proposed Amendments, § 67700(h)(3).) The passive voice language that would permit future modification of the 2020 CIP to reflect new agreements by land use jurisdictions obscures the fact that it would be the FORA CFD Board that had the final authority to modify the 2020 CIP. (Proposed Amendments, § 67700(h)(3).) As a CFD legislative body, only the FORA CFD Board would have the authority under the Mello-Roos Act to determine for what purposes CFD taxes were imposed and how the CFD revenues were spent.

Thus, under the Proposed Amendments and the Mello-Roos Act, the FORA CFD Board alone would have plenary authority to determine "regional needs," to devise the infrastructure and spending plan to meet these needs, and then to program and disburse the funding for these needs.[1]

2. The FORA CFD Board would compel land use agencies to fund the "regional needs" and infrastructure plans.

The land use jurisdictions would be *obligated* to continue to fund these "regional needs" on a pro rata basis, either through the CFD or through some "substitute funding

[1] The fact that the go-forward entity is named the "Fort Ord Reuse Authority Community Facilities District" (Proposed Amendments, § 67700a1) does not disguise the fact that this entity would continue to control the critical FORA functions of determining regional needs, determining the required infrastructure, imposing funding requirements, approving funding mechanisms, and programming that funding.

mechanism," which mechanisms must be *approved by FORA*. (Proposed Amendments, § 67700(j)(1), (k)(2).)

The Proposed Amendments do not state what role the FORA CFD Board would have in programming and disbursing the revenues from the substitute funding mechanisms. However, the FORA CFD Board would have approval authority over these substitute funding mechanisms, based on its "reasonable satisfaction" that the mechanisms "continue funding regional needs . . . on a pro rata basis." (Proposed Amendments, § 67700(k)(2).) Thus, the FORA CFD Board could not approve a land use authority's substitute funding mechanism unless the FORA CFD Board determined that the FORA CFD Board could ensure that substitute funding mechanism's revenues would be dedicated to meeting the regional needs it identified.

In short, the land use jurisdictions would remain subject to the FORA CFD Board's plans for all regional needs and would be required to fund those plans through mechanisms approved by FORA.

3. The FORA CFD Board would control revenue enactments by land use jurisdictions.

The FORA CFD Board would have the right to control how the land use jurisdictions set up their future substitute funding mechanisms. (Proposed Amendments, § 67700(k)(2).) These mechanisms might include impact fees, development agreements, City-level CFDs, property taxes, etc. *This is an approval authority that FORA does not have now, and it is an authority that goes well beyond the authority of a normal Community Facilities District. The exercise of this authority to control the fiscal affairs of other land use agencies would take the FORA CFD Board well outside of its existing competence. And it would interfere with the land use jurisdictions' autonomy.*

Many Fort Ord projects have relied on *ad hoc* development agreements that fund infrastructure and other community benefits. Under the Proposed Amendments, the use of such development agreements as a "substitute funding mechanism" in the future would require that the FORA CFD Board be at the bargaining table when these agreements are negotiated because the FORA Board would have to approve the agreements.

Finally, it is not clear that the legislative authority of the land use jurisdictions over their own fiscal affairs can in fact be delegated to another agency. LandWatch suggests that counsel for the land use agencies carefully consider this issue.

B. The Proposed Amendments fail to clarify and substantially confuse the issue of the continuity of the Reuse Plan.

During the Transition Planning process, LandWatch and others have repeatedly raised the issue of the continued applicability of the Reuse Plan. The Proposed Amendments do not clarify this issue.

Instead the Proposed Amendments simply 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).) There is no clear procedure identified for a land use jurisdiction to make such a determination.

And even if the land use jurisdiction decides that the Reuse Plan is no longer applicable, that land use jurisdiction "remains obligated to fund regional needs" through the CFD or through some substitute mechanism the FORA CFD Board has approved. (*Ibid*.) Thus, even if a land use jurisdiction decided not to pursue the development as planned in the 22-year old Reuse Plan, it could still be made to fund the infrastructure and habitat management that FORA determined would be needed for that development.

More problematically, the language stating that the Reuse Plan "shall continue to be applicable to all lands" is unclear as to what particular mandates of the Reuse Plan would remain "applicable." Would this include specific land use designations? Land use intensities? 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? Policies intended to be implemented at the program or plan level such as jobs/housing balances?

It is unclear who would have authority to enforce the continued applicability of the Reuse Plan. In the absence of the currently mandated consistency determinations and in the absence of a clear procedure for a land use agency to determine that the Reuse Plan no longer applies to a land use, no affected landowner, member of the public, or land use jurisdiction would have any remedy for failure to comply with the Reuse Plan.

The FORA CFD Board would have no continuing authority to modify the Reuse Plan to consider changing circumstances or to make consistency determinations. In short, no entity would have any clear authority to enforce a land use jurisdiction's compliance with the Reuse Plan.

The notion that a FORA CFD Board can adequately steward what was intended to be a living regional plan without the authority to modify and enforce that plan is fundamentally flawed. The land use jurisdictions cannot be indefinitely required to develop only in accordance with a set of land use designations, development intensities, infrastructure plans, development unit allocations, and land use policies developed 22 years ago for which there is no remaining authority to enforce or modify.

Even if it were legal to indefinitely permit the dead hand of the Reuse Plan to regulate future development plans forever, it would not be wise policy. Again, the land use jurisdictions have asked for autonomy.

If *specific provisions* of the Reuse Plan are to survive, e.g., the affordable housing and prevailing wage provisions identified in Proposed Amendments section 67700(j)(2),

they should be enumerated. There appears to be no agreement among the land use agencies as to the continuity of other provisions of the Reuse Plan. Without such agreement, the vague language in the Proposed Amendments is a recipe for litigation.

C. Eventual termination of FORA CFD Board is postponed indefinitely until the last unit is built.

The draft language 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 pulls a building permit, *FORA would continue in existence as long as there were a single unbuilt lot in any jurisdiction still subject to the CFD*.

The language perpetuating FORA until "substitute funding mechanisms have been implemented" (Proposed Amendments, § 67700(l)(1)(A)) is unclear as to whether this means until the substitute funding mechanism is *enacted* or until all of the substitute funding is *collected, programmed, and disbursed*.

D. Authority to shrink CFD boundaries is not specified.

Although the Mello-Roos Act permits annexation to a CFD, there is no current authority under Mello-Roos to de-annex lands to shrink the borders of a CFD. The Proposed Amendments contemplate that FORA could do this by revising the CFD boundaries as replacement funding mechanisms were adopted. (Proposed Amendments, § 67700(h)(4).) As LandWatch has advocated previously, this authority should be set out specifically.

E. A CEQA exemption is not required for changes in organization.

It is unclear why FORA now seeks to designate its Transition Plan both as "not a project" subject to CEQA and as "exempt" from CEQA. (Proposed Amendments, § 67700(d).)

FORA has already adopted the Transition Plan in its December 19, 2018 Resolution 18-11. That resolution states that no EIR or other CEQA document was required because the Transition Plan is "not a project" subject to CEQA, citing the definitions of "project" in 14 CCR section 15378(b) and Public Resources Code section 21065, which exclude organizational activities that will "not cause a foreseeable physical impact on the environment."

To the extent that the Transition Plan *is* merely an organizational change without the potential for physical impacts, there is no *need* for a statutory exemption. Exemptions

are not applicable to or needed for activities that are not a project under 14 CCR section 15378(b) and Public Resources Code section 21065.

The Proposed Amendment would also characterize *all future* "changes in organization from and after June 30, 2020, to implement the Transition Plan" as "not a project" and exempt. (Proposed Amendments, § 67700(d).) To the extent that the future changes in organization to implement the Transition Plan were in fact merely changes in organization with no potential for a foreseeable physical impact, then they would meet the "not a project" test and no exemption would be needed.

However, it remains unclear what might be included in future "changes in organization . . . to implement the Transition Plan." This language could easily be misinterpreted to include all sorts of actions intended "to implement the Transition Plan" that are not merely changes in organization without physical impacts.

For example, the FORA CFD Board might argue in the future that it is merely implementing an organizational change when it supports or enters into an agreement that includes a funding commitment to one or more specific infrastructure projects in Fort Ord that may cause physical changes in the environment. In the normal course of events, such a funding commitment is subject to CEQA review at the program or plan level. It is not sufficient that individual projects eventually be subject to piece-meal project-specific environmental review as proposed in sections 1.2 and 2.2.7 of the Transition Plan. A funding commitment that enables one set of infrastructure projects, as opposed to some other set of projects or possibly no projects at all, must be subjected to environmental review *at the plan level*. Otherwise, there would be no opportunity to consider alternatives and mitigation at the plan level, where it matters most in the regional planning context.

Furthermore, it is not clear whether the proposed Transition Plan Implementation Agreements ("TPIAs") would be treated as "not a project" or exempt. The language in section 4.1 of the Transition Plan describing the possible provisions of these TPIAs includes not just funding agreements, which *should* be subject to CEQA if they constitute project commitments, but also includes the catch-all phrase "such other matters as may be required to implement this Transition Plan." LandWatch opposes a CEQA exemption that covers the TPIAs without additional provisions that narrow the exempted activities to just those activities that meet the "not a project" test.

In sum, the fundamental problems with the Proposed Amendments with respect to CEQA are that the first sentence covering past actions is unnecessary and the second sentence covering future actions is too broad. The proposed Amendments should be revised to define and specify the limits of the future action that would not be subject to CEQA as follows:

> ~~The Transition Plan, and its adoption, are not projects for purposes of the California Environmental Quality Act and shall be exempt therefrom.~~ Changes in

organization from and after June 30, 2020~~,~~ to implement the Transition Plan ~~shall also~~ are not ~~be~~ a project for purposes of the California Environmental Quality Act provided that such changes do not cause a foreseeable physical impact on the environment.~~and shall be exempt therefrom.~~

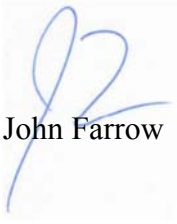
In the absence of any remaining enforceable constraint on the FORA CFD Board from the Reuse Plan, compliance with CEQA may represent the only real check on its authority to impose infrastructure projects on other land use agencies.

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 created 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

JHF:hs