

January 9, 2014

**Via E-mail**

Fort Ord Reuse Authority Board of Directors  
920 2<sup>nd</sup> Avenue  
Marina, CA 93933

**Re: Consistency of 2010 General with Fort Ord Reuse Plan**

Dear Members of the Board:

On behalf of LandWatch Monterey County, we write to object to the proposed resolution finding the 2010 General Plan to be consistent with FORA's Fort Ord Reuse Plan. As you know, the FORA Act requires that FORA certify consistency with the Fort Ord Reuse Plan before the County's 2010 General Plan's and its Fort Ord Master Plan becomes effective in the Fort Ord area. Government Code, § 67675.7. The proposed resolution finding consistency employs the wrong standard of review for FORA's determination of consistency, and it fails to acknowledge substantial evidence of inconsistencies between the Reuse Plan and the 2010 General Plan. FORA should decline to find the General Plan consistent and direct the County to make necessary revisions before resubmitting the General Plan for consistency review.

**A. FORA Must Disapprove A General Plan If There Is Substantial Evidence That It Is Not In Substantial Conformance With Applicable Programs Specified In the Reuse Plan And Section 8.02.020 of the Master Resolution**

LandWatch concurs with the arguments regarding the plain meaning of section 8.02.010 of the Master Resolution set out in letters by Jane Haines dated October 10, 2013, November 7, 2013, November 8, 2013 and December 30, 2013. That provision provides that FORA "shall disapprove" the County's General Plan if there is substantial evidence that the General Plan is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of the Master Resolution. As Ms. Haines explains, this language calls for a particular standard of review for FORA's adjudication of consistency. Under this standard of review, FORA must disapprove the General Plan if there is some substantial evidence of inconsistency, regardless whether FORA believes there is also some substantial evidence of consistency.

This standard is appropriate for at least two reasons. First, as Ms. Haines points out, FORA itself expressly adopted this standard of review for its consistency determinations in a settlement agreement with the Sierra Club in order to ensure the faithful implementation of the Reuse Plan. The FORA Act clearly gives FORA the discretion to adopt such regulations. Gov. Code, § 67664. Accordingly, Mr. Waltner is incorrect in his December 26, 2013 letter in implying that the FORA Board did not have the authority to adopt this standard of review.

In fact, as Mr. Waltner points out, there is no case law authority that would require FORA to uncritically apply the substantial evidence standard of review used in General Plan consistency determinations under the California Planning and Zoning Law. Accordingly, FORA's adoption of the standard of review in Master Resolution section 8.02.010 is not an "implied modification of the applicable standard of review" as Mr. Walter contends, because FORA has reasonably decided to adopt this standard of review to guide its consistency determinations and because nothing in the statute or case law bars it from doing so. If the current FORA Board wishes to establish a different regulation to guide its consistency review, it may do so, consistent with its obligations under the settlement agreement. But until it does revise its regulation, it must abide by it.<sup>1</sup>

Second, the Master Resolution expressly mandates that the County actually include all applicable open space and conservation policies and programs in its General Plan:

"Prior to approving any development entitlements, each land use agency shall act to protect natural resources and open spaces on Fort Ord territory by including the open space and conservation policies and programs of the Reuse Plan, applicable to the land use agency, into their respective general, area, and specific plans."  
Master Resolution, § 8.02.020(a), emphasis added.

Again, this regulation was adopted by FORA to ensure faithful implementation of the Reuse Plan. In effect, § 8.02.020(a) requires each agency faithfully to identify and incorporate into its General Plan each applicable open space and conservation policy and program in the Reuse Plan.

The policy rationale for the requirement to incorporate each applicable policy or program is clear. Issuance of development entitlements is guided in the first instance by a determination whether those entitlements are consistent with member agencies' general plans. Gov. Code, § 67675.6; Master Resolution § 8.01.030(a). Indeed, FORA has shown extraordinary deference to member agency general plans in its past consistency determinations. This deference is only warranted if the member agency general plan faithfully incorporates each applicable open space and conservation policy and program. Master Resolution sections 8.02.010 and 8.02.020(a), adopted in the Sierra Club settlement agreement, were intended to require that general plans provide a blueprint that ensures that projects consistent with those general plans are also consistent with the Reuse Plan.

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<sup>1</sup> Mr. Waltner also suggests that FORA's adoption of the "strict adherence" standard of review would somehow trespass on the judicial standard of review. Not so. FORA's consistency determination is not a judicial review, it is an administrative adjudication. Courts are comfortable reviewing agency adjudications under a variety of standards of review. For example, depending on the context, courts review agency CEQA determinations under a "fair argument" standard, which is analogous to the "strict adherence" standard advocated by Ms. Haines, and, alternatively, under a substantial evidence standard when warranted.

Thus, contrary to Mr. Waltner's December 26 letter, it is not sufficient that the County's general plan purports generally to incorporate the Reuse Plan. If that were all that is required, the recitation of applicable policies and programs in the member agency general plans would not be required at all. Indeed, the language on which Mr. Walter apparently relies, "[t]his plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area," could be interpreted as a finding that the omitted and misstated policies are not applicable. Thus, instead of a guarantee that the misstated and omitted policies will be honored, this provision could be interpreted as a promise to ignore them.

Again, as Ms. Haines has pointed out, the proposed FORA resolution finding consistency sets forth the wrong standard of review for the FORA Board's adjudication. In particular, recital "L" is incorrect in implying that that consistency may be found merely on a finding that there is substantial evidence of consistency. The correct standard should be articulated with reference to Master Resolution section 8.02.010, which requires a finding of inconsistency if there is substantial evidence that the General Plan does not include all applicable open space and conservation policies and programs.

**B. There Is Substantial Evidence That The 2010 General Plan is Not In Substantial Conformance With Applicable Programs Specified In the Reuse Plan and Section 8.02.020 of the Master Resolution**

The relevant question in FORA's consistency review of the County's General Plan is not whether some future development project will or will not comply with applicable open space and conservation policies and programs, but whether the General Plan document meets the mandate of Master Resolution section 8.02.020 to include those policies and programs. Ms. Haines and the Sierra Club have clearly presented substantial evidence that the 2010 General Plan fails adequately to reflect critical policies and programs in the Reuse Plan.

- The General Plan fails to include the Reuse Plan's applicable Recreation/Open Space Land Use Program A-1.2 requiring recordation of a Natural Ecosystem Easement deed restriction. See Haines letters of October 10, 2013 and November 7, 2013; Sierra Club letter of October 10, 2013. LandWatch appreciates the County's statement that it is "committed to complying" with the Reuse Plans Ecosystem Easement Deeds Program 1-1.2. See Benny Young letter, October 23, 2013. If so, the County should not object to memorialize that commitment through inclusion of the applicable language in the 2010 General Plan. However, a commitment made outside the General Plan that applicable policies will be honored in the future is not relevant to whether the General Plan itself properly reflects the Reuse Plan
- The General Plan omits the applicable Reuse Plan Noise Program B-1.2 requiring segregation of noise generating uses from sensitive receptors. See Haines letters

of October 10, 2013 and November 7, 2013. The County has not addressed this omission. The program is clearly intended to protect sensitive users from significant noise impacts.

- The General Plan omits a material portion of Recreation/Open Space Land Use Program B-2.1 requiring habitat buffers to be at least 150 feet and requiring that the buffers not contain roadways. See Haines letters of October 10, 2013, and November 7, 2013; Sierra Club letter of October 10, 2013. The County has not addressed this omission. The policy is clearly intended to protect habitat from development impacts.
- General Plan Recreation/Open Space Policy Land Use Policy A-1 misquotes the applicable Reuse Plan policy by changing “shall protect” to “shall encourage the conservation and preservation. . .” See Sierra Club letter of October 10, 2013. The County claims that this word change was only intended to protect resources on three particular sites that have already been protected “through implementation” affecting these three sites. It is not clear that the intent of the language was so limited. In any event, there may yet be future implementation actions affecting these sites and there is no reason that the County should object to using the specific language that was adopted in the Reuse Plan CEQA review.

In sum, because the issue at hand is whether the General Plan contains applicable policies and programs, the relevant evidence here is simply the evidence that one document includes the applicable policy or program and the other does not. Therefore Mr. Waltner is incorrect that Ms. Haines has not identified the substantial evidence upon which she is relying.

Again, the issue before FORA is not the consistency of a specific development project but the consistency of two planning documents. However, it is foreseeable that the failure to attain consistency between these documents will have real world impacts. The Reuse Plan policies at issue were specifically adopted to address environmental impacts of future development, and the provisions and specific wording of these policies were salient in FORA’s CEQA conclusions about the Reuse Plan. As noted, Sierra Club points out that the Reuse Plan’s language for Recreation/Open Space land Use Policy A-1 was crafted in the Final EIR for the Reuse Plan in order to mitigate impacts. The County admits in its October 23<sup>rd</sup> letter that it incorrectly adopted the Reuse Plan language identified at the time of the Draft EIR for the Reuse Plan. If FORA approves language that is inconsistent with the Reuse Plan provisions, it cannot assume that the changes have no environmental consequence, and must undertake a new CEQA review.

### **C. Conclusion**

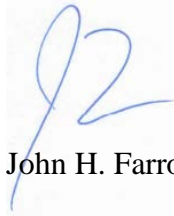
LandWatch joins the Sierra Club and Ms. Haines in opposing the proposed consistency determination. The County must modify its General Plan so that it faithfully reflects all applicable open space and conservation policies and programs.

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Thank you for the opportunity to provide these comments.

Yours sincerely,

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



John H. Farrow

JHF: am  
cc: Amy White