Rosalyn Charles

From: Haines Jane [janehaines@redshift.com]
Sent: Thursday, November 07, 2013 8:15 AM
To: FORA Board
Cc: Michael Houlemard; Spencer Craig
Subject: FORA Nov. 8 agenda item 6a
Attachments: Nov8.pdf

Dear FORA Directors,

The attached letter pertains to item 6a on the November 8 FORA agenda -- Consistency Determination: 2010 Monterey County General Plan.

Sincerely,
Jane Haines

601 OCEAN VIEW BLVD., APT. 1 PACIFIC GROVE, CA 93950
TEL 831 375-5913 EMAIL JANEHAINES@REDSHIFT.COM

JANE HAINES

November 7, 2013

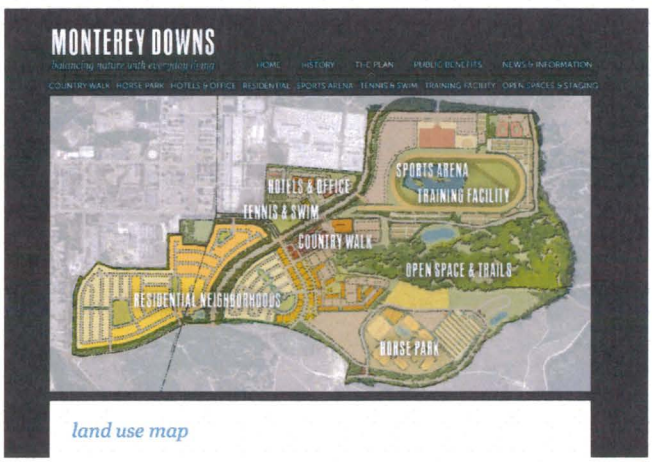
Fort Ord Reuse Board of Directors board@fora.org
920 2nd Avenue
Marina, CA 93933

Re: November 8 Agenda - Item 6a - 2010 Monterey County General Plan Consistency Determination

Dear FORA Board of Directors:

The November 5 defeat of Measures K and M shows that the voters want the 1997 Base Reuse Plan implemented. However, the 2010 Monterey County General Plan fails to implement important programs from the 1997 Base Reuse Plan, including programs applicable to land currently under Monterey County jurisdiction which Seaside wants to annex for the Monterey Downs project. This exclusion of important applicable programs necessitates that the 2010 General Plan not be found consistent with the 1997 Base Reuse Plan.

My October 10 letter, included in your packet on pages 24-27 and incorporated herein, shows that the 2010 Monterey County General Plan omits Base Reuse Plan Recreation/Open Space Land Use Program A-1.2, a program that would apply to the central eastern parcel within the Monterey Downs project and would require an easement deed restriction to run with the land to protect the parcel's sensitive soils. Also omitted is Noise Program B-1.2 that would apply to the Monterey Downs Sports Arena in the northern central portion of the land to protect the adjacent land owner (CSUMB)



land use map

against loud noises. Also omitted are two important sentences in Recreation/ Open Space Land Use Program B-2.1 which would bar roads through a 150 feet wide buffer area on the central east 72.5 acre parcel adjoining adjacent habitat management areas.

The 1997 Base Reuse Plan expressly makes those omitted programs applicable to Monterey County lands. (1997 Base Reuse Plan pages 270 and 460.)

FORA's Master Resolution, section 8.02.010 (a)(3), states that "in the review, evaluation, and determination of consistency regarding legislative land use decisions, the Authority Board ***shall disapprove*** (emphasis added) any legislative land use decision for which there is substantial evidence supported by the record, that...[the legislative land use decision] is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of this Master Resolution."

Since the 2010 Monterey County General Plan completely omits two applicable programs and an essential component of a third program, and the Master Resolution states that the Authority Board ***shall disapprove*** (emphasis added) a consistency finding when substantial evidence shows the general plan is not in substantial conformance with applicable programs, your Board will violate Master Resolution section 8.02.010(a)(c) if you find the 2010 Monterey County General Plan consistent with the 1997 Base Reuse Plan.

The November 8 staff report asserts that "there are several defensible rationales for making an affirmative consistency determination" and the resolution in your Board packet asserts that "FORA's consistency determination must be based upon the overall congruence between the submittal and the Reuse Plan, not on a precise match between the two." No legal authority supports those assertions. "Defensible rationale" and "overall congruence" are legally improper standards for finding consistency when the controlling regulation says "shall disapprove."

The November 5 Election Results

The November 5 election results retain the 1997 Base Reuse Plan. It is a plan that was based on a million dollar study and forged from a lengthy process of political and legal compromise. The Plan has not been implemented according to the plain meaning of its text, nor has Chapter 8 of the Master Resolution been enforced according to the plain meaning of its text.

The November 5 election results will hopefully cause the FORA Board to return to the plain meaning of the Reuse Plan and the plain meaning of Chapter 8:

- The text of the 1997 Reuse Plan says that "The County of Monterey shall cause to be recorded a Natural Ecosystem Easement deed restriction that will run with the land in perpetuity for all identified open space lands." (Volume II of Base Reuse Plan, pg. 270.)
- The text of Chapter 8 says that "In the review, evaluation, and determination of consistency regarding legislative land use decisions, the Authority Board shall disapprove any legislative land use decision for which there is substantial evidence supported by the record, that [the land use decision] is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of the Master Resolution."

Substantial evidence consists of page 270 of the 1997 Reuse Plan compared to page FO-21 of the 2010 Monterey County General Plan. Page 270 includes the open space program; page FO-21 does not.

Chapter 8 says that when the legislative decision is not in substantial conformance with an applicable program of the Reuse Plan, the FORA Board "shall" disapprove a consistency finding. What could be more clear than that?

The staff report on page 6 of your packet states that "strict timelines" in State law require FORA to act on the County's request for a consistency finding. State law allows 90 days from the date of submittal. The date of submittal was September 24, 2013. That means that as of your meeting tomorrow (November 8), forty-five days will remain before your Board must act.

Forty-five days is sufficient time for FORA staff to compile an explanation based on ***the actual text*** of the 1997 Reuse Plan, the ***actual text of*** 2010 General Plan, and the ***actual text*** of Chapter 8 to explain to your Board why FORA staff recommends that your Board find consistency when the ***actual text*** of those three documents mandates your Board to disapprove finding consistency. Your staff report contains terms like "several defensible rationales" and "overall congruence." However, I've been unable to find those terms in any statute, regulation or case law applicable to a consistency finding by FORA.

Tomorrow, three days after the voters spoke, presents an opportunity to the FORA Board to finally require accountability from FORA staff to implement the plain meaning of FORA governing documents. I request that at tomorrow's hearing, your Board do so.

Sincerely,

Rosalyn Charles

From: Rita Dalessio [puffin46@gmail.com]
Sent: Thursday, November 07, 2013 2:05 PM
To: FORA Board
Cc: Rita Dalessio; Scott Waltz
Subject: Sierra Club letter opposing finding of consistency
Attachments: FORA ltr re GPU 11.7.13 (3).pdf

Dear FORA Board,

The attached letter states the Sierra Club's position with regard to item 6a on the November 8 FORA agenda.

Sincerely,

Rita Dalessio
Conservation Chair

SIERRA CLUB VENTANA CHAPTER

P.O. BOX 5667, CARMEL, CALIFORNIA 93921

CHAPTER OFFICE • ENVIRONMENTAL CENTER (831) 624-8032

November 7, 2013

Dear Fort Ord Reuse Authority Board of Directors:

The Sierra Club objects to a finding of consistency between the Fort Ord Master Plan in the 2010 Monterey County General Plan and the Fort Ord Reuse Plan for the reasons stated in our 10 October 2013 letter which appears on pages 21 to 23 of the November 8 Board Packet.

Sincerely,

Rita Dalessio

Rita Dalessio
Conservation Chair
Sierra Club/Ventana Chapter
(RD/SW)

Cc:
Congressman Sam Farr
State Senator Bill Monning
Assembly member Mark Stone
Larry Silver, California Environmental Law Project

Rosalyn Charles

From: Haines Jane [janehaines@redshift.com]
Sent: Friday, November 08, 2013 8:04 AM
To: FORA Board
Cc: Michael Houlemard; Giffen Jon; Spencer Craig
Subject: second letter re FORA agenda item 6a
Attachments: Nov8.pdf

Dear FORA Board of Directors,

The attached letter explains why I am sending you this second letter regarding today's agenda item 6a.

Sincerely,
Jane Haines

601 OCEAN VIEW BLVD., APT. 1 PACIFIC GROVE, CA 93950
TEL 831 375-5913 EMAIL JANEHAINES@REDSHIFT.COM

JANE HAINES

November 8, 2013

Fort Ord Reuse Board of Directors board@fora.org
920 2nd Avenue
Marina, CA 93933

Re: FORA's proposed resolutions for item 6a on the November 8 agenda

Dear FORA Board of Directors:

I met with FORA's attorney and other FORA staff on November 4 to discuss legal issues pertaining to FORA's consistency findings. It was my understanding that FORA would rewrite its resolutions prior to the November 8 Board meeting so I did not address the issue of FORA's resolutions in my November 7 letter to the FORA Board. Apparently FORA did rewrite the resolutions because last night I found revised resolutions posted on the FORA website. However, the revised resolutions contain the same legal errors that I'd expected would be corrected.

This letter will attempt to explain why FORA's resolutions for finding consistency between a general plan and the Reuse Plan omit legally required findings, and why FORA's past omissions of the legally-required findings have inappropriately resulted in general plans shaping the Reuse Plan rather than the Reuse Plan shaping general plans.

It's complicated, but I will try to explain:

- Chapter 8, section 8.02.010(a), states the standard for determining consistency between a general plan and the Reuse Plan as follows: "In the review, evaluation, and determination of consistency regarding legislative land use decisions, the Authority Board shall disapprove any legislative land use decision for which there is substantial evidence supported by the record, that [any of six criteria are met]."
- The above standard is written in the negative and it greatly limits the FORA Board's discretion. Any substantial evidence showing that the legislative decision meets any of the criteria for disapproval requires that the FORA Board shall disapprove a finding of consistency.

- In contrast, FORA's current and past resolutions have been written in the affirmative to give the FORA Board broad discretion. Any substantial evidence showing that the legislative decision is consistent with the Reuse Plan allows the resolutions' findings to support a finding of consistency.
- The difference between the negative and the affirmative finding is similar to the difference between criminal and civil law. In criminal law, the evidence must prove beyond a reasonable doubt that a person is guilty. In civil law, a person is liable if a preponderance of the evidence shows the person is liable. It is much harder to prove a fact beyond a reasonable doubt than it is to show that the preponderance of the evidence proves the fact. (That is why O.J. Simpson was not criminally liable but was liable for civil damages.)
- In the case of general plan consistency with the Reuse Plan, it is much harder to show that no substantial evidence requires disapproval of a consistency finding than it is to show that substantial evidence supports a consistency finding.

The resolutions' affirmative findings do not meet the criteria for adequate findings set forth by the *California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. *Topanga* holds that findings must bridge the analytic gap between the raw evidence and ultimate decision. It states: "If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and ***between findings and ultimate action*** (emphasis added), the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action." *Topanga* 11 Cal.3d 506 at 515.

The governing legal authority for the FORA Board to evaluate consistency between a general plan and the Reuse Plan is Chapter 8, Section 8.02.010(a). It states that the FORA Board shall disapprove consistency if any substantial evidence shows that any of six criteria are met. Thus, FORA's resolution must show the analytic route by stating that FORA examined the evidence and found that no substantial evidence supports any of the six criteria for disapproval in Section 8.02.010(a). (Alternatively, the resolution could state that FORA examined the evidence and found that substantial evidence supports one or more of the criteria.)

Instead, FORA's resolutions state that FORA finds substantial evidence to support finding that the General Plan and Reuse Plan are consistent. That affirmative finding does not bridge the analytic gap between evidence and the ultimate decision in the manner required by Section 8.02.010(a).

Probably the above distinction seems trivial to you, but consider this. If the standard is whether any evidence supports finding that the 2010 Monterey County General Plan is consistent with the Base Reuse Plan, the answer is obviously "yes, it does." There is plenty of evidence that the 2010 Monterey County General Plan is consistent with the Reuse Plan.

On the other hand, if the standard is whether any evidence shows that the 2010 General Plan does not meet the third criteria (substantial conformance with applicable programs specified in the Reuse Plan), the answer is obviously that the evidence clearly shows that the General Plan omits two applicable Reuse Plan programs and an important component of a third applicable program.

Thus, the difference between utilizing an affirmative or a negative standard will determine whether or not FORA must disallow a finding of consistency (which it must in the case of the negative finding), or whether FORA can find that the 2010 General Plan is consistent with the Reuse Plan (which it must in the case of the affirmative finding).

Pursuant to *Topanga*, FORA will abuse its discretion if it utilizes an affirmative finding in its resolution, because the affirmative finding does not address the analytic route that Section 8.02.010(a) requires FORA to follow from consideration of the evidence to the ultimate decision.

In sum, FORA's resolutions must be rewritten to show the analytic route prescribed by Master Resolution Section 8.02.010(a). Rather than affirmatively finding that the General Plan is, or is not, consistent with the Reuse Plan, the resolution must find either that no substantial evidence shows that the General Plan is not in substantial conformance with applicable Reuse Plan programs (in which case FORA must find the plans to be consistent), or that substantial evidence shows that the General Plan is not in substantial conformance with applicable Reuse Plan programs (in which case FORA must disallow a finding of consistency).

In their current form, the resolutions require your Board to find the 2010 General Plan is consistent the Reuse Plan. However, the current form of the resolutions lacks findings that bridge the analytic gap between the raw evidence and your ultimate decision. Thus, the resolutions must be redrafted to bridge that gap, or otherwise making your decision based on the resolutions in their current form will be an abuse of discretion.

If Fort Ord is to be redeveloped in accordance with the Reuse Plan, step #1 is to correct FORA's past procedure for finding general plan consistency.

Sincerely,

Jane Haines

Rosalyn Charles

From: darrell mcgowan [darrellmcgowan1@gmail.com]
Sent: Friday, November 08, 2013 4:06 PM
To: FORA Board
Subject: Potholes on 7th ave

Hello,

Who is in charge of street repair on 7th Ave between Colonel Durham St and Gigling Rd? That stretch of road is full of POTHOLES! Can someone please fix this road. Thank You, Darrell McGowan 596-6080

Rosalyn Charles

From: DavidWayneBrown@aol.com
Sent: Friday, November 08, 2013 5:57 PM
To: darrellmcgowan1@gmail.com; FORA Board
Cc: llong@ci.marina.ca.us
Subject: Re: Potholes on 7th ave

Dear Mr. McGowan:

By copy of your letter forwarded to Marina City Manager Layne Long, I am requesting that he address your inquiry. City Council members are not allowed to address these types of inquiries, under the Council-Manager form of city government.

Sincerely,

David W. Brown
Marina City Councilmember

In a message dated 11/8/2013 4:10:31 P.M. Pacific Standard Time, darrellmcgowan1@gmail.com writes:

> Hello,
>
> Who is in charge of street repair on 7th Ave between Colonel Durham St and Gigling Rd? That stretch of road is full of POTHOLES! Can someone please fix this road. Thank You, Darrell McGowan 596-6080