

JANE HAINES

October 10, 2013

Fort Ord Reuse Authority Board of Directors  
920 2nd Avenue  
Marina, CA 93933

Re: October 11 Agenda - Item 8c - Consistency Determination:  
2010 Monterey County General Plan

Dear FORA Board of Directors:

The 2010 Monterey County General Plan is inconsistent with the 1997 Base Reuse Plan (BRP) because it omits applicable BRP programs. Certification of consistency between the two plans should be delayed until the omitted programs are added to the General Plan. Otherwise, the plans are inconsistent and the California Environmental Quality Act (CEQA) will require environmental review of impacts that could result from the inconsistencies.

This letter will explain which BRP programs have been omitted from the 2010 General Plan and how omitting those programs will result in potentially significant environmental impacts.

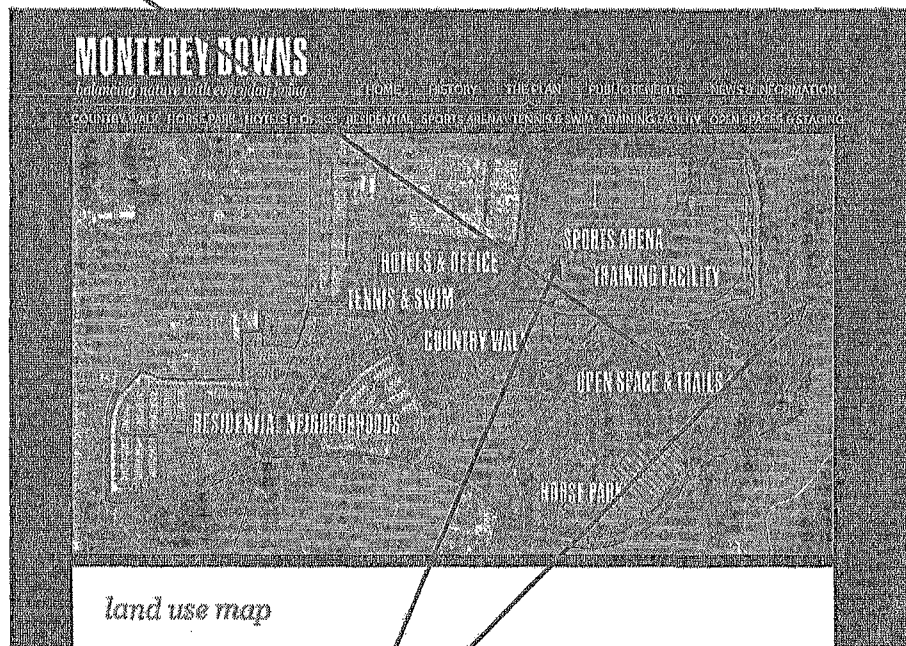
FORA's October 11 and the County's September 17 staff reports discount the publics' comments on the inconsistencies by saying that implementation is a different matter than consistency. However, I and others are commenting about the *omission* of BRP programs from the 2010 Monterey County General Plan. The omission of applicable programs is *not* an implementation issue.<sup>1</sup> It is a consistency issue as well as a CEQA issue.

The following page uses the proposed Monterey Downs project to illustrate the potentially significant environmental impacts from omitting three applicable programs, assuming that Seaside will annex Monterey County land for Monterey Downs, although of course the impacts would also occur to other County projects too. There will be arrows pointing to various locations on the Monterey Downs land use map. The arrows are connected to boxes which explain the BRP program that was omitted from the County's 2010 General Plan, and how omission of that program is likely to cause a significant adverse environmental impact.

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<sup>1</sup> Implementation is defined in the Oxford dictionary as "the process of putting a decision or plan into effect." Consistency is defined as "conformity in the application of something, typically that which is necessary for the sake of logic, accuracy, or fairness."

**Recreation/Open Space Land Use Program A-1.2.** This Open Space & Trails parcel is 72.5 acres entitled Parcel E19a.2 . The HMP designates it for Habitat Reserve. BRP Recreation/Open Space Land Use Program A-1.2 states: "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." (A natural ecosystem deed restriction is intended to mitigate the cumulative effects of development on sensitive soils, including Arnold and Oceano soils. Parcel E19a.2 is comprised of Arnold soil.) Without Recreation/Open Space Land Use Program A-1.2, Monterey County will not have to record a Natural Ecosystem Easement deed restriction on Parcel E19a.2. Thus, the natural ecosystem on Parcel E19a.2 will not be protected. Program A-1.2 is on page 270 of Volume II of the BRP, but it is omitted from the Monterey County 2010 General Plan.



**Noise Program B-1.2.** The Sports Arena Training Facility adjoins CSUMB. Students who are studying or in lectures could be distracted by shouting, loud speakers and other noisy activities at the Sports Arena. BRP Noise program B-1.2 on page 412 of BRP Volume II states: "Whenever practical and feasible, the County shall segregate sensitive receptors, such as residential land uses, from noise generators through land use." Noise program B-1.2 is omitted from the Monterey County 2010 General Plan. It must be included to protect CSUMB against distracting noises from the Sports Arena.

**Recreation/Open Space Land Use Program B-2.1.** Nearly the entire eastern edge of Monterey Downs adjoins a habitat management area. (Continued next page.)

**(Recreation/Open Space Land Use Program B-2.1 continued)**, BRP Recreation/Open Space Land Use program B-2.1 is partially included in the 2010 Monterey County General Plan although the final two sentences are omitted. The final two sentences prohibit general purpose roads within a 150 feet buffer area adjoining habitat management areas. BRP Recreation/Open Space Land Use Program B-2.1 states on pg. 270 of BRP Vol. II: "The County of Monterey shall review each future development project for compatibility with adjacent open space land uses and require that suitable open space buffers are incorporated into the development plan of incompatible land uses as a condition of project approval. ***When buffers are required as a condition of approval adjacent to habitat management areas, the buffer shall be at least 150 feet. Roads shall not be allowed within the buffer area except for restricted access maintenance or emergency access roads.***" (Emphasis added to final two sentences to identify the two sentences omitted from the 2010 Monterey County General Plan Recreation/Open Space Land Use Program B-2.1.) Without the complete text of Program B-2.1 to protect it, the adjoining habitat management area can be adversely impacted.

The above omissions do **not** pertain to implementation. Rather, they pertain to **inconsistency** between the BRP and the 2010 Monterey County General Plan. They and other omitted or misstated BRP policies<sup>2</sup> make the 2010 Monterey County General Plan inconsistent with the BRP.

#### **FORA Master Resolution Section 67675.4**

In addition to the inconsistency issues described above, I want to mention Master Resolution section 67675.4 which required FORA to set a date for Monterey County to submit to FORA its zoning ordinances and other implementing actions pertaining to Fort Ord land after the 2001-2002 certification of consistency between Monterey County's General Plan with the BRP.

Section 67675.4 states:

*(a) Within 30 days after the certification of a general plan or amended general plan, or any portion thereof, the board shall, after consultation with the county or a city, establish a date for that county or city to submit the*

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<sup>2</sup> Additional omissions and errors can be identified by comparing BRP Hydrology and Water Quality programs B-2, B-1.3, B-1.4, B-1.5, B.1.6 and B-1.7 on page 353 (and 347) of BRP Volume II with pages FO-38, 39 in the Monterey County General Plan (MCGP). Additional omissions and errors are in BRP Hydrology and Water Quality program C-6.1 on page 4-66 of BRP Vol. II which does not appear on page FO-41 of the MCGP, which is where it would be located if it were included. Also, compare the words "concurrently with development approval" in Pedestrian and Bicycles program B-1.2 on page 310 of BRP Vol. II with the omission of those words in program B-1.2 on page FO-29 in MCGP. Also, compare Biological Resources program A-8.1 on page 381 of BRP Vol. II with program A-8.1 on pg. FO-46 of the MCGP. In each instance, a program required by the BRP for Monterey County is either partially or wholly omitted in the 2010 MCGP, or written in a manner inconsistent with the gist of the corresponding BRP program.

*zoning ordinances, zoning district maps, and, where necessary, other implementing actions applicable to the territory of Fort Ord.*

*(b) If the county or city fails to meet the schedule established pursuant to subdivision (a), the board may waive the deadlines for board action on submitted zoning ordinances, zoning district maps, and, where necessary, other implementing actions, as set forth in Section 67675.5.*

Apparently, FORA never required Monterey County to submit its zoning ordinances and other implementing actions, because the 2012 Scoping Report lists the following incomplete implementation of Monterey County zoning ordinances and other implementing actions:

- appropriate infill residential zoning for CSUMB to expand its housing stock (Scoping Report pg. 4-5)
- amend zoning in the Greater Monterey Peninsula Area Plan (Scoping Report pg. 4-8)
- amend zoning ordinance in regard to all Fort Ord areas other than East Garrison (Scoping Report pgs. 4-7, 4-13, 4-20, 4-29)
- amend County Code Chapter 11.24 to regulate card rooms and to prohibit gambling within Fort Ord (Scoping Report pg. 4-27)
- amend County Subdivision Ordinance which identifies a standard of 3 acres per 1,000 people (Scoping Report pg. 4-40)
- amend County's review procedures to ensure compatibility with the historic context and associated land uses as a condition of project approval (Scoping Report pg. 4-158).

Thus, I am requesting that FORA do what it apparently failed to do in 2001-2002, which is to require Monterey County to submit its zoning ordinances and other implementing actions to FORA within 30 days after the certification of the General Plan. The submittal should include the above-mentioned zoning ordinances.

#### **Conclusion**

I request FORA to require Monterey County to add the omitted applicable BRP programs to the 2010 Monterey County General Plan and to correct related errors before FORA makes a finding of consistency. I also request FORA to comply with Master Resolution section 67675.4.

Sincerely,

Jane Haines



SIERRA CLUB VENTANA CHAPTER

P.O. BOX 5667, CARMEL, CALIFORNIA 93921

CHAPTER OFFICE • ENVIRONMENTAL CENTER (831) 624-8032

10 October 2013

Dear Fort Ord Reuse Authority Board Members;

The Sierra Club recommends that the FORA Board find the 2010 Monterey County General Plan, and the included Fort Ord Master Plan (FOMP), inconsistent with the Fort Ord Reuse Plan (FORP) based on evidence that the General Plan does not reflect the appropriate language and programs of the FORP Final Environmental Impact Report (EIR). In point of fact, parts of the FOMP precisely *reverse* specific changes made in and for the FORP Final EIR. Following CEQA law, the Sierra Club expects that the 2010 Monterey County General Plan reflects rather than alters the provisions of the FORP Final EIR before it would be found to be consistent with the FORP.

The Sierra Club further recommends that the FORA Board defer a finding of consistency until the County of Monterey Land Use Plan map (Figure 6a) accurately reflects the FORP County of Monterey Land Use Concept Map 4.1-7 and the FORP Land Use Concept Map 3.3-1. Ensuring that planning maps are carefully aligned in detail and designation will not only support a finding of consistency, but may serve to avoid later conflicts that arise from the differences between the documents.

By way of illustration, this letter will address three specific differences between the 2010 General Plan and the FORP, including:

- 1) The omission in the FOMP of the FORP Recreation/Open Space Land Use Program A-1.2 – Natural Ecosystem Easement Deed Restriction (FORP Volume 2, p. 270).
- 2) The reversed articulation of the Recreation/Open Space Land Use Program A-1.
- 3) The mismatched land use designation between the County of Monterey Land Use Plan (Figure 6a) and the FORP County of Monterey Land Use Concept Map 4.1-7/ FORP Land Use Concept Map 3.3-1.

These examples are meant to provide clear differences, but are not meant to represent a complete list of differences between the General Plan and the FORP EIR.

#### Program Omission

As is clearly shown in the FORP Final Draft EIR (p. 4-14, see attached except of same), the following program in underlined, which means that it was an edit meant to be included in the Final Draft EIR.

Program A-1.2: 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.

Appropriately, Program A-1.2 also appears in Volume Two: Reuse Plan Elements of the FORP (see page 270).

At the 17 September 2013 Board of Supervisor's meeting, Monterey County staff acknowledged that Recreation/Open Space Land Use Program A-1.2 – Natural Ecosystem Easement Deed Restriction was left out of the FOMP brought forward to the Board. The staff representative went on to note that despite this omission, the county was in the process of having these easements reviewed and approved by FORA, so the county was carrying out this program (captured on the video from the 17 September 2013 Board of Supervisor's meeting, 1:40:10 in the web video record). However, he offered no supporting evidence to

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support this claim. Regardless, the omission still represents a specific and significant alteration of the Final EIR.

The stated omission of a specific Land Use program – a program that is separate from and in addition to the Habitat Management restrictions – renders the FOMP inadequate to carry out the self-same provision of the FORP.

Further, Program A-1.2 is quite specific in the action it proscribes for establishing “criteria and standards for the uses of land, water, air, space, and other natural resources within the area of the base.” (Govt. Code § 67675(c) (1)). This distinguishes it from the latitude that accompanies shifts in land use density with regard to the “integrated arrangement and general location and extent of land, water, air, space, and other natural resources within the area of the base.” Excluding such a specific provision renders the FOMP out of substantial conformance with the FORP.

### Reversed Articulation of Program

Recreation/ Open Space Land Use Policy A-1, as stated in the FOMP (p. FO-21), misquotes the policy in the FORP and thereby changes its specificity. In order to be in conformance with the FORP, the policy should read: “The County of Monterey shall *protect* irreplaceable natural resources and open space at former Fort Ord.” (my italics to emphasize the language that was neglected in the FOMP).

Because the wording in the FOMP – “...encourage the conservation and preservation of...” – is more general and does not convey the same level of responsibility as the FORP language does, it represents a notable difference in the policy language. This is underscored by the fact that this is the precise change that was made in the Final Environmental Impact Report: “encourage the conservation and preservation of” is marked by strikethrough text, and “protect” is added, as shown by underlining (p. 4-14, FORP: Final Environmental Impact Report). As with the addition of Program A-1.2 mentioned above, this change in language is also reflected on p. 270 in Volume Two of the FORP.

Monterey County staff’s response to the Board of Supervisors regarding this point (captured on the video from the 17 September 2013 Board of Supervisor’s meeting, 1:40:00 in the web video record) was that the “protect” language *was changed* to the “encourage” language. It is not clear how the precise language that was altered for the Final EIR could or would have been returned to the very same language that was altered. It is also not clear which succession of document represent this reversion. Again, Monterey County staff offered not evidence to support their claim.

### Mismatched maps

The Reassessment process has sought to highlight the importance of FORP maps that align with the specific provisions of the FORP and subsequent determinations of consistency. The Category II considerations in the Reassessment Report are testimony to this point. Withholding a finding of consistency *until* the FOMP Figure 6a accurately reflects both FORP County of Monterey Land Use Concept Map 4.1-7 and FORP Land Use Concept Map 3.3-1 would ensure the land use designations accurately describe the provisions of the FORP. For an extended, but not exhaustive list of the errors in the FOMP Figure 6a, see attached 16 September 2013 letter to the Monterey County Board of Supervisors.

The response of the Monterey County staff to each of the errors identified on FOMP Figure 6a is available by viewing the web video from the 17 September 2013 Board of Supervisor’s meeting. The primary defense offered by the County staff was that FOMP Figure 6a, as is, was found consistent in 2001. The Sierra Club would point out that increased attention to accuracy, despite past oversights, serves to guide all parties more effectively in the realization of the FORP.

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The points above are illustrations of apparent errors in the current version of the FOMP, but they likely do not exhaust the changes that would be required before a vote of consistency by the FORA Board would be merited. For instance, the header near the bottom of p. FO-4 reads "Design Principals" when it should read "Design Principles".

The Sierra Club looks forward to further work on the Fort Ord Master Plan so that, as described in the Master Resolution, its substantial conformance with the Fort Ord Reuse Plan is assured.

Sincerely,

Scott Waltz, Ph.D.  
Sierra Club, Ventana Chapter  
(SW/RD)

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Urban Village and Employment Center with approximately 85 acres dedicated to Office/R&D and Business Park/Light Industrial land uses. These manufacturing and possibly labor-intensive uses could create nuisances including increased noise, traffic, and air pollution, which may adversely affect the recreational opportunities and experiences at the Youth Camp District. The ~~MOU-POST~~ facility would also potentially conflict with the Youth Camp District due to noise and public safety risks.

The following policies and programs developed for the ~~Draft Fort Ord Reuse Plan~~ for Monterey County relate to both the protection of open space and compatibility of open space areas with adjacent areas:

#### Land Use Element

**Recreation/Open Space Land Use Policy A-1:** The County of Monterey shall protect encourage the conservation and preservation of irreplaceable natural resources and open space at former Fort Ord.

Program A-1.1: The County of Monterey shall identify natural resources and open space, and incorporate them into Greater Monterey Peninsula Area Plan and zoning designations.

Program A-1.2: 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.

**Recreation/Open Space Land Use Policy B-2:** The County of Monterey shall use open space as a buffer between various types of land use.

Program B-2.1: The County of Monterey shall review each development project at former Fort Ord with regard to the need for open space buffers between land uses.

**Recreation /Open Space Land Use:** Program E-1.6: The Youth Camp District in the Reservation Road Planning Area is intended for rehabilitation of the existing travel camp. The County of Monterey shall assure that this planned use is compatible with adjacent land uses which may include a public safety agency training facility with shooting ranges in the East Garrison area located to the East.

**Institutional Land Use Policy A-1:** The County of Monterey shall review and coordinate with the universities, colleges and other school districts or entities the planning of both public lands designated for university-related uses and adjacent lands.

Program A-1.4: The County of Monterey shall minimize the impacts of proposed land uses which may be incompatible with public lands, such as major roadways near residential or university areas, location of the York School augmentation area adjacent to the habitat management area, and siting of the Monterey Peninsula College's MOU law enforcement training program in the BLM Management/Recreation Planning Area.

Further policies regarding the general protection of open space areas can be found in Section 4.3 - Recreation and Open Space Element of the ~~Draft Fort Ord Reuse Plan~~. Additional policies and





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16 September 2013

Dear Monterey County Board of Supervisors:

The Fort Ord Master Plan (FOMP), Chapter 9.E of the 2010 Monterey County General Plan includes a number of significant errors, including mistaken map designations, misaligned land use descriptions, at least one misquoted policy, and the wholesale omission of a program that was described in both the Fort Ord Reuse Plan (FORP) and the FORP Reassessment report. The Sierra Club requests that the Board of Supervisors delay a vote on consistency with the FORP until the errors in the FOMP are corrected. The Sierra Club also requests that the County staff prepare a complete report, with substantiating evidence, regarding all discrepancies between the corrected FOMP and the FORP.

What follows is an identification of the more obvious errors in the publically posted web-version of the FOMP.

**Map Concerns**

Despite the fact that the text of the FOMP notes that: "...the Land Use Map contained in this plan is the County of Monterey Land Use Plan (Figure 6a) adopted by FORA into the Reuse Plan" (p. FO-4), there are a number of obvious discrepancies between Figure LU6a and FORP County of Monterey Land Use Concept Map 4.1-7/ FORP Land Use Concept Map 3.3-1, including the following:

Although a boot-shaped parcel corresponding to Army Parcel # L.20.2.2 and L.20.2.3.1 is designated Public Facility/Institutional on the FORP Land Use Concept Map 3.3-1 and County of Monterey Land Use Concept Map 4.1-7, the same parcel in Figure LU6a Fort Ord Master Plan-Land Use Plan is labeled Habitat Management and Planned Development Mixed Use.

The square-ish polygon west of Laguna Seca Recreation Area corresponding to Army Parcel # L.20.6 is designated as Open Space/Recreational on 3.3-1 and 4.1-7, but is labeled as Habitat Management in Figure LU6a.

The strip of 7.2 acres that corresponds to Army Parcel # L20.18, acknowledged as Low Density Residential on 3.3-1 and 4.1-7 is represented as roadway in Figure LU6a.

Although the parcel corresponding to Army Parcel # E11b.2 is wholly designated as Development on 3.3-1 and 4.1-7, Figure LU6a labels a significant strip along the west edge as Habitat Management.

These errors render FOMP Figure LU6a inconsistent with FORP maps 3.3-1 and 4.1-7.

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The Board of Supervisors may also wish to consider amending the FOMP to take into account the designation of the National Monument, as this change in designation clearly impacts land use decisions.

### **Error in Land Use Description (or Mapping Designations)**

Although the FORP maps 3.3-1 and 4.1-7 label the more general East Garrison land parcels as a Planned Development Mixed Use District, the HMP includes parcels within this general area as habitat reserve, specifically Army Parcels E11b.7.2, E11b.7.1.2, and E11b7.1.1. These three parcels are not distinguished as either Open Space/ Recreational or Habitat Management on either the aforementioned FORP maps or LU6a. However, the general language of the FORP addresses Planned Development/ Mixed Use concept as encompassing the juxtaposition of developed areas with habitat areas. The 2002 Assessment report authored by Zander Associates speaks rather clearly to this:

The Base Reuse Plan designated East Garrison as a Planned Development Mixed-Use District. This designation is intended to encourage the development of pedestrian-oriented community centers that support a wide variety of commercial, residential, retail, professional service, cultural and entertainment activities. The Base Reuse Plan concept for East Garrison envisions central core village with *adjacent office and commercial uses transitioning (e.g. with equestrian staging areas, trailheads) from developed areas to HMP-designated habitat reserve lands.* (my emphasis)

This suggests that either the description of Planned Development/Mixed Use on p. FO-5 of the FOMP should clarify that habitat reserve is a key element in this concept of the associated Planned Development/Mixed Use District designation or that both the FORP maps (map3.3-1 and 4.1-7), as well as the FOMP map (LU6a), should be amended to reveal the habitat reserve designation of habitat parcels.

### **Misquoted Policy**

Recreation/ Open Space Land Use Policy A-1, as stated in the FOMP (p. FO-21), misquotes the policy in the FORP and thereby changes its specificity. In order to be in conformance with the FORP, the policy should read: "The County of Monterey shall *protect* irreplaceable natural resources and open space at former Fort Ord." (my italics to emphasize altered language in the FOMP).

Because the wording in the FOMP – "...encourage the conservation and preservation of..." – is more general and does not convey the same level of responsibility as the FORP language does, it is inconsistent with the FORP.

### **Policy Omission**

The FOMP omits mention of the FORP Recreation/Open Space Land Use Program A-1.2 – Natural Ecosystem Easement Deed Restriction (FORP Volume 4, p. 270). Program A-1.2 states that "The County of Monterey shall cause to be recorded a Natural Ecosystem Easement restriction that will run with the land in perpetuity for *all identified open space lands.*" (my italics

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to emphasize the breadth of this mandate). Recreation/Open Space Land Use Program A-1.2 is also clearly identified in the Reassessment report (p. 3-48: as an unfinished program).

Omission of an entire program identified in the FORP and the Reassessment report would clearly be inconsistent with the FORP.

The points above are illustrations of apparent errors in the current version of the FOMP, but they likely do not exhaust the changes that would be required before a vote by the Board of Supervisors would be merited. For instance, the header near the bottom of p. FO-4 reads "Design Principals" when it should read "Design Principles".

The Sierra Club looks forward to further work on the Fort Ord Master Plan so that, as described in the Master Resolution, its substantial conformance with the Fort Ord Reuse Plan is assured.

Sincerely,

Scott Waltz, Ph.D.  
Sierra Club, Ventana Chapter  
(SW/RD)

# JANE HAINES

November 7, 2013

Fort Ord Reuse Board of Directors  
920 2nd Avenue  
Marina, CA 93933

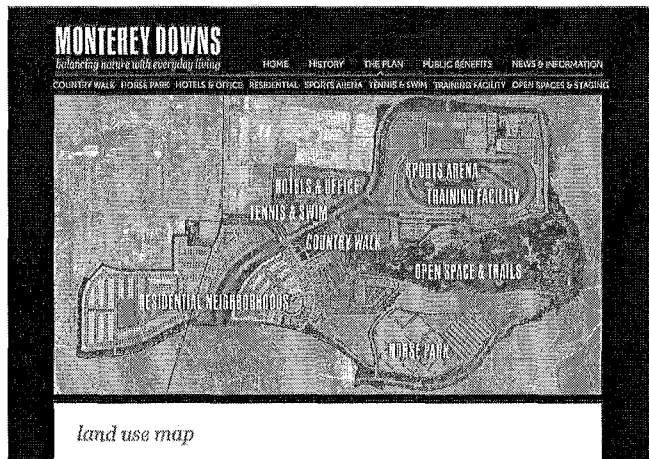
board@fora.org

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)



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,

## JANE HAINES

November 8, 2013

Fort Ord Reuse Board of Directors  
920 2nd Avenue  
Marina, CA 93933

[board@fora.org](mailto:board@fora.org)

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

## JANE HAINES

December 30, 2013  
Alan Waltner, Esq.  
via Michael Houlemard at FORA  
Marina, CA

Dear Mr. Waltner:

I'm the retired land use attorney whose comments on the Monterey County General Plan consistency review you address in your December 26 memorandum to the Fort Ord Reuse Authority. I will provide this letter to Michael Houlemard in an envelope addressed to your San Francisco office and leave it up to Michael and Jon Giffen as to whether or not they forward this to you.

My main purpose for writing is to provide you with the enclosed copy of the 1998 settlement agreement between the Sierra Club and FORA. Your memorandum refers to Chapter 8 of the FORA Master Resolution, which is Exhibit 1 to the settlement agreement. However, I want you to see the entire agreement so you can see that Sierra Club agreed to settle its judicial challenge to the Reuse Plan in exchange for FORA adopting Chapter 8 as an *implementation measure* for the Reuse Plan. (Settlement Agreement, paragraph 2.)

You characterize my first argument as saying that Section 8.02.010 of the Master Resolution modifies the consistency review standards of the FORA Act to require "strict adherence to the 1997 Reuse Plan" before consistency can be found. Although I'm not aware of having phrased it as "strict adherence," I do read Section 8.02.010 literally as saying the FORA Board "shall disapprove" consistency of a general plan when substantial evidence shows the general plan is "not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020." I read subdivision (c) of Section 8.02.010 as saying that substantial compliance is demonstrated when the applicant land use agency has complied with all provisions of Section 8.02.010 in addition

to Section 8.02.020. If that's what you mean by "strict adherence," then yes, that is my argument. It is based on FORA's agreement to adopt Chapter 8 as an *implementation measure* for the Reuse Plan and in that respect does not "modify" the consistency review standards of the FORA Act, but rather denotes how they will be implemented.

You characterize my second argument as saying that evidence of intensity of land uses, density of land uses, and substantial conformance with applicable programs in the Reuse Plan triggers the "shall disapprove" requirement. I'm not aware that I mentioned intensity or density of land uses, but definitely I argued that the Monterey County General Plan's omission of Reuse Plan Recreation/Open Space Land Use Program A-1.2 triggers disapproval, and is also a CEQA violation with foreseeably significant environmental consequences. Program A-1.2 would apply to the 72.5 acre Habitat Reserve Parcel E19.a.2 which Seaside will need to annex from Monterey County for purposes of including the parcel in Seaside's Monterey Downs project. Seaside's General Plan does not include a program such as A-1.2, so if Seaside annexes that parcel without Monterey County having first recorded the Natural Ecosystem Easement deed restriction, the parcel's sensitive Oceano and Arnold soils will lack the protection required by the 1997 FEIR. Similarly, Monterey County General Plan omission of a critical requirement in Program B-2.1 also has foreseeably significant environmental consequences.<sup>1</sup> (See 1997 FEIR pages 4-14 and 4-15 attached.)<sup>2</sup>

You characterize my third argument as saying there is no legal authority supporting a consistency review standard that parallels the consistency standard under the Planning and Zoning Law. I agree with your characterization in that I believe that the "shall disapprove" requirement

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<sup>1</sup> Your memorandum states that my October 10 letter objects that Monterey County has not yet recorded the easement. I can't find that objection in my October 10 letter and it seems unlikely I would have made it because Monterey County has not yet accepted the deed to Habitat Reserve Parcel E19.a.2.

<sup>2</sup> Your memorandum notes that the entirety of the BRP has been incorporated "by reference" into the Monterey County General Plan. I find the General Plan statement that you reference (but without the "by reference"), but the statement is belied by the fact that the Plan omits all or portions of the 8 programs identified in footnote 2 of my October 10 letter in addition to Reuse Plan Recreation/Open Space Land Use Programs A-1.2 and B-2.1 plus Noise Program B-1.2.

in Section 8.02.020 differs significantly from the Planning and Zoning Law consistency standard applicable to consistency with general plans.

As this letter's final point, my November 8 letter, which you've apparently read, explains my belief that FORA's general plan consistency determination is an adjudicatory decision and is therefore subject to the *Topanga* holding that the findings must bridge the analytic gap between the raw evidence and the ultimate decision. The Board Report for FORA's upcoming January 10 hearing on the Monterey County General Plan consistency determination contains a proposed resolution to find consistency (resolution available on the FORA website) utilizing the findings I object to, such as the factual finding that "consistency" in this context is defined by OPR's General Plan Guidelines and that substantial evidence shows the General Plan is in substantial conformance with applicable Reuse Plan programs. In my view, those findings do not bridge the analytic gap between a consistency decision and the requirement of Section 8.02.020.

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Attorneys whom I highly respect, respect you highly. That's why I thought it worth the time to write you this letter -- to ensure that you are aware of Sierra Club's stated reason for supporting the Reuse Plan. I'm not affiliated with Sierra Club and I'm on inactive status with the California Bar so I can't give legal advice. I simply wanted to communicate to you on my own behalf what I've stated above.

Sincerely,

Jane Haines

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Agreement is made this 30 day of November, 1998, by and between Petitioner SIERRA CLUB and Respondent FORT ORD REUSE AUTHORITY.

Recitals

A. On July 16, 1997, Petitioner SIERRA CLUB, a California non-profit corporation, filed a Petition for Writ of Mandamus against Respondent FORT ORD REUSE AUTHORITY ("FORA"), a governmental entity organized under the laws of the State of California, challenging actions of FORA in approving the Fort Ord Reuse Plan and the Reuse Plan's concomitant Environmental Impact Report. The Petition for Writ of Mandamus was filed in Monterey County Superior Court and is identified in the official records of the court as Case No. 112014.

B. Pursuant to the provisions of the California Environmental Quality Act, the Petitioner and Respondent have met on numerous occasions over many months in an attempt to resolve the dispute in an amicable and constructive manner.

C. Without admitting liability or guilt, all parties desire to resolve this litigation and avoid incurring further cost, expense, and disruption incident to the litigation. The parties further desire to achieve a full and complete settlement of all claims and causes of action with reference to each other.

D. Settlement of the dispute involves FORA adoption of a legislative action in the form of an amendment to FORA's "Master Resolution." This legislative action has been identified as "Chapter 8 to the Fort Ord Reuse Authority Master Resolution, relating to Base Reuse Planning and Consistency Determinations" and the proposed legislative action has been subject to public hearings and discussions. The most recent draft of this legislative action reflects the results of this hearing process and it is attached to this agreement as Exhibit "A." The form of the deed restriction and notice required by Section 8.01.010 (j) and (k) of Chapter 8 are attached to this agreement as Exhibits "B" and "C." The Sierra Club has reviewed Exhibits "A", "B" and "C" and the Sierra Club has approved these documents and supports the FORA Board of Directors' adoption of this legislation in its current form.

Terms

The parties hereby agree, warrant, and represent as follows:

1. FORA adopted Chapter 8 to the Fort Ord Reuse Authority Master Resolution in substantially the form contained in Exhibit "A" to this Agreement, subject to Sierra Club

SETTLEMENT AGREEMENT AND GENERAL RELEASE

executing a settlement agreement in this litigation agreeing to dismiss the litigation. The deed restriction and notice required by Section 8.01.010 (j) and (k) of Chapter 8 shall be approved and recorded in the form contained in Exhibits "B" and "C" to this agreement.

2. With FORA adoption of Chapter 8 in the form described in Paragraph 1 as an implementation measure for the Reuse Plan, the SIERRA CLUB endorses and supports the Reuse Plan and acknowledges the Reuse Plan as a constraint driven plan that requires that development of Fort Ord as planned in the Reuse Plan will only occur within the resource constraints within Fort Ord and that any new development will be obligated to pay its fair share to regional improvements and infrastructure necessary to serve Fort Ord.

3. In a form acceptable to Authority Counsel of FORA, the SIERRA CLUB will dismiss the litigation referenced in the recitals, with prejudice.

4. FORA agrees that in the event FORA considers any amendment to Chapter 8 of the FORA Master Resolution, FORA shall perform an environmental assessment consistent with the provisions of the California Environmental Quality Act ("CEQA") and the rules and regulations promulgated thereunder prior to consideration of approval of any such amendment. In addition, FORA shall provide the SIERRA CLUB and its attorney of record at least 30 days notice of the preparation of such environmental assessment, which shall include an opportunity to comment on such assessment, and at least 15 days notice of any hearing on any proposed amendment of Chapter 8. The parties further agree that each amendment to Chapter 8 will be reviewed under CEQA as a new project not be subject to the environmental review limitations of Public Resources Code Section 21166.

5. FORA shall forthwith upon the execution of this agreement contribute the amount of \$ \_\_\_\_\_ directly to the SIERRA CLUB'S attorneys towards the total cost the SIERRA CLUB's attorneys fees and legal costs in the preparation and filing of the Petition and in the negotiation of the settlement of this dispute, including the review and comment on the proposed Chapter 8 and the preparation of this agreement. Except as otherwise provided in this paragraph, the parties agree that each party shall be responsible respectively for the payment of their own costs, attorneys' fees, and all other expenses incurred in connection with the above action or any matter or thing respecting the released claims.

6. In consideration of the covenants mutually and individually undertaken in this agreement and except as expressly provided in this agreement, the SIERRA CLUB, its agents, assigns, successors-in-interest, and any other person acting by, through, under or in concert with any of them hereby irrevocably and unconditionally releases FORA, it's members, and any and all

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

of FORA's or its members' agents, assigns, attorneys, executives, managers, officers, trustees, employees, successors-in-interest, including any and all employees of FORA, its members, and any other person acting by, through, or in concert with them, from any and all charges, complaints, claims, allegations, actions, causes of action, liabilities, obligations, costs (other than as set forth above), controversies, damages, rights, of any nature whatsoever, known or unknown, suspected or unsuspected, which SIERRA CLUB has or might have had, or which SIERRA CLUB at any time heretofore had or might have had, claimed to have or may claim to have, against FORA, its members, or any or all of FORA's or its members' agents, assigns, attorneys, managers, executives, officers, employees, successors-in-interest, or any other person at FORA or its members acting by, through, under, or in concert with any of them, which were raised or might have been raised in this litigation arising out of the preparation of the Reuse Plan and the Environmental Impact report prepared in conjunction with the Reuse Plan. This release shall not apply to future actions taken by FORA to amend the Reuse Plan or Chapter 8.

7. Each party expressly waives and relinquishes any and all rights and benefits afforded by California Civil Code Section 1542, which provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Each of the parties hereby expressly waives the provisions of California Civil Code Section 1542, and each party further expressly waives any right to invoke said provisions now or at any time in the near future.

8. The parties recognize and acknowledge that factors which have induced them to enter into this Agreement may turn out to be incorrect or to be different from what they had previously anticipated, and the parties hereby expressly assume any and all of the risks thereof and further expressly assume the risks of waiving the rights provided by California Civil Code Section 1542.

9. Each party represents that in executing this Agreement, the party does not rely upon and has not relied upon any representation, promise, or statement not expressly contained herein and that party has conferred with his, her, or its own attorneys with regard to the basis or effect of this Agreement.

10. Each party denies any wrongdoing in this matter, and the payment of any sums of money in the matter is not to be deemed an admission of guilt or liability. The parties understand

SETTLEMENT AGREEMENT AND GENERAL RELEASE

and agree that this settlement is made to bring an end to the contested and complex litigation which has resulted from the filing of the Monterey County Superior Court Case Number 112014.

11. This Agreement is executed and delivered in the State of California, and the rights and obligations of the parties hereunder shall be construed and enforced in accordance with the laws of the State of California.

12. This Settlement Agreement and General Release is the complete agreement between the parties, and supersedes any prior agreements or discussions between the parties.

13. This Agreement may be executed by the parties in any number of counterparts, which are defined as duplicate originals, all of which taken together shall be construed as one document.

14. Time is of the essence.

15. The parties agree that they have separately and independently thoroughly discussed all aspects of this Agreement with their legal counsel, and that they have carefully read and fully understand all of the provisions contained in this Agreement.

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**PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS.**

SIERRA CLUB

DATED: Dec. 6 1998.

By: Julian Taylor  
Title: Chapter Chair



SETTLEMENT AGREEMENT AND GENERAL RELEASE

FORT ORD REUSE AUTHORITY

DATED: 12/6/ 1998.

By: [Signature]  
Title: EXECUTIVE OFFICER

Approved as to Form and Content:

By: [Signature]  
Authority Counsel

By: [Signature]  
Attorney for Sierra Club

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**EXHIBIT A**

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**A RESOLUTION OF THE FORT ORD REUSE AUTHORITY, AMENDING SECTION  
1.01.050 AND ADDING CHAPTER 8 TO THE FORT ORD REUSE AUTHORITY  
MASTER RESOLUTION, RELATING TO BASE REUSE PLANNING AND  
CONSISTENCY DETERMINATIONS**

Section 1. Section 1.01.050 of the Fort Ord Reuse Authority Master Resolution is amended by adding the following definitions to such section in alphabetical order:

"Affected territory" means property within the Fort Ord Territory that is the subject of a legislative land use decision or an application for a development entitlement and such additional territory within the Fort Ord Territory that may be subject to an adjustment in density or intensity of allowed development to accommodate development on the property subject to the development entitlement.

"Army urbanized footprint" means the Main Garrison Area and the Historic East Garrison Area as such areas are described in the Reuse Plan.

"Augmented water supply" means any source of potable water in excess of the 5,600 acre feet of potable water from the Salinas Basin as allowed under the Reuse Plan.

"Development entitlements" includes but is not limited to tentative and final subdivision maps, tentative, preliminary, and final parcel maps or minor subdivision maps, conditional use permits, administrative permits, variances, site plan reviews, and building permits. The term "development entitlement" does not include the term "legislative land use permits" as that term is defined in this Master Resolution. In addition, the term "development entitlement" does not include:

- 1) Construction of one single family house, or one multiple family house not exceeding four units, on a vacant lot within an area appropriately designated in the Reuse Plan.
- 2) Improvements to existing single family residences or to existing multiple family residences not exceeding four units, including remodels or room additions.
- 3) Remodels of the interior of any existing building or structure.
- 4) Repair and maintenance activities that do not result in an addition to, or enlargement of, any building or structure.
- 5) Installation, testing, and placement in service or the replacement of any necessary utility connection between an existing service facility and development approved pursuant to the Authority Act.
- 6) Replacement of any building or structure destroyed by a natural disaster with a comparable or like building or structure.
- 7) Final subdivision or parcel maps issued consistent with a development entitlement subject to previous review and approval by the Authority Board.
- 8) Building permit issued consistent with a development entitlement subject to previous review by the Authority Board.

"Fort Ord Territory" means all territory within the jurisdiction of the Authority.

"Habitat Management Plan" means the Fort Ord Installation-Wide Multi-Species Habitat Management Plan, dated April, 1997.

"Land use agency" means a member agency with land use jurisdiction over territory within the jurisdiction of the Authority Board.

"Legislative land use decisions" means general plans, general plan amendments, redevelopment plans, redevelopment plan amendments, zoning ordinances, zone district maps or amendments to zone district maps, and zoning changes.

"Noticed public hearing" means a public hearing noticed in the following manner

1. Notice of the public hearing shall be posted on the public meeting room at the FORA office at least 10 days before the date of the hearing; and
2. Notice of the public hearing shall be mailed or delivered at least 10 days prior to the affected land use agency, to any person who has filed an appeal, and to any person who has requested special notice; and
3. Notice of the public hearing shall be published at least 10 days before the date of the hearing in at least one newspaper of general circulation within the area that the real property that is the subject of the public hearing is located.

"Reuse Plan" means the plan for reuse and development of the territory within the jurisdiction of the Authority, as amended or revised from time to time, and the plans, policies, and programs of the Authority Board, including the Master Resolution.

Section 2. Chapter 8 is added to the Fort Ord Master Resolution to read:

**CHAPTER 8.  
BASE REUSE PLANNING AND CONSISTENCY DETERMINATIONS.**

**Article 8.01. GENERAL PROVISIONS.**

**8.01.010. REUSE PLAN**

(a) The Authority Board shall prepare, adopt, review, revise from time to time, and maintain a Reuse Plan for the use and development of the territory within the jurisdiction of the Authority. Such plan shall contain the elements mandated pursuant to the Authority Act and such other elements, policies, and programs as the Authority Board may, in its sole discretion, consider and adopt.

(b) The Reuse Plan, including all elements, policies, and programs adopted in conjunction with the Reuse Plan, and any amendments thereto, shall be the official and controlling plan for the reuse of the Fort Ord territory for the purposes specified or inferred in the Authority Act.

(c) All general and specific plans, redevelopment plans, and all other community and local plans regardless of title or description, and any amendments thereto, and all policies and programs relating to the land use or the construction, installation, or maintenance of capital improvements or public works within the Fort Ord territory, shall be consistent with the Reuse Plan of the Authority and the plans and policies of the Authority, including the Master Resolution. The Authority shall make a determination of consistency as provided pursuant to the provisions of the Authority Act and, after the effective date hereof, this Chapter.

(d) A revision or other change to the Reuse Plan which only affects Fort Ord territory and only one of the member agencies may only be adopted by the Authority Board if one of the following conditions is satisfied:

- (1) The revision or other change was initiated by resolution adopted by the legislative body of the affected land use agency and approved by at least a majority affirmative vote of the Authority Board; or
- (2) The revision or other change was initiated by the Authority Board or any entity other than the affected land use agency and approved by at least a two-thirds affirmative vote of the Authority Board.

(e) All property transferred from the federal government to any user or purchaser, whether public or private, shall only be used in a manner consistent with the Reuse Plan, with the following exceptions:

- (1) Property transferred to California State University or the University of California and such property is used for educationally related or research oriented purposes; or
- (2) Property transferred to the California State Parks and Recreation Department.

(f) No land use agency or any local agency shall permit, approve, or otherwise allow any development or other change of use, or approve any development entitlement, for property within the territory of the Authority that is not consistent with the Reuse Plan.

(g) No land use agency shall issue, approve, or otherwise allow any building permit until all applicable permits, development entitlements, and approvals required under law have been approved, including, but not limited to, the approvals and permits described and enumerated in Section 3.7 of the Final Environmental Impact Report for the Reuse Plan.

(h) The Reuse Plan shall be reviewed periodically at the discretion of the Authority Board. The Authority Board shall perform a full reassessment, review, and consideration of the Reuse Plan and all mandatory elements as specified in the Authority Act prior to the allocation of

an augmented water supply, or prior to the issuance of a building permit for the 6001st new residential dwelling unit (providing a total population of 35,000 persons) on the Fort Ord territory or by January 1, 2013, whichever event occurs first. No more than 6000 new dwelling units shall be permitted on the Fort Ord territory until such reassessment, review, and consideration of the Reuse Plan has been prepared, reviewed, and adopted pursuant to the provisions of the Authority Act, the Master Resolution, and all applicable environmental laws. No development shall be approved by FORA or any land use agency or local agency after the time specified in this subsection unless and until the water supplies, wastewater disposal, road capacity, and the infrastructure to supply these resources to serve such development have been identified, evaluated, assessed, and a plan for mitigation has been adopted as required by CEQA, the Authority Act, the Master Resolution, and all applicable environmental laws.

(i) The failure of any person or entity to receive notice given pursuant to this Chapter shall not constitute grounds for any court to invalidate the action on any legislative act or development entitlement pursuant to this Chapter for which required notice was given.

(j) The Authority shall record a notice on all property in the Fort Ord territory advising all current and future owners of property of the existence of the Reuse Plan and that development of such property shall be limited by the Reuse Plan, the policies and programs of the Authority, including the Master Resolution, and/or the constraints on development identified in the Reuse Plan, including lack of available water supply, wastewater and solid waste disposal capacity, and inadequate transportation and other services and infrastructure.

(k) In the event the Authority receives, purchases, or acquires, by any means, fee interest title to property within the Fort Ord territory, the Authority shall record a covenant running with the land advising all future owners of such property that development and use of the property is subject to the Reuse Plan and that development of such property shall be limited by the Reuse Plan, the policies and programs of the Authority, including the Master Resolution, and/or constraints on development identified in the Reuse Plan, including lack of available water supply, wastewater and solid waste disposal capacity, and inadequate transportation and other services and infrastructure.

**8.01.020. PROCEDURES FOR CONSISTENCY DETERMINATIONS FOR LEGISLATIVE LAND USE DECISIONS.**

(a) Each land use agency shall submit all legislative land use decisions affecting property in the territory of the Authority to the Executive Officer for review and processing.

(b) All submissions regarding a legislative land use decision shall include:

- (1) A complete copy of the legislative land use decision, including related or applicable text, maps, graphics, and studies;
- (2) A copy of the resolution or ordinance of the legislative body approving the legislative land use decision, adopted at the conclusion of a noticed hearing certifying that the portion of a legislative land use decision

- applicable to the Fort Ord territory is intended to be carried out in a manner fully in conformity with the Reuse Plan and the Authority Act;
- (3) A copy of all staff reports and materials presented or made available to the legislative body approving the legislative decision, or any advisory agency relating to the legislative land use decision;
  - (4) A copy of the completed environmental assessment related to the legislative land use decision;
  - (5) A statement of findings and evidence supporting the findings that the legislative land use decision is consistent with the Reuse Plan, the Authority's plans and policies, including the Master Resolution, and is otherwise consistent with the Authority Act; and
  - (6) Such other materials as the Executive Officer deems necessary or appropriate and which have been identified within 15 days of the receipt of the items described in subsection (b) of this Section.

(c) Within 90 days of the receipt of all of the items described in subsection (b) above, or from the date the Executive Officer accepts the submission as complete, whichever event occurs first, the Authority Board shall conduct a noticed public hearing, calendared and noticed by the Executive Officer, to certify or refuse to certify, in whole or in part, the portion of the legislative land use decision applicable to Fort Ord territory. The Authority Board shall adopt a resolution making findings in support of its decision, such decision shall be rendered within the time frame described in this section, and such decision shall be final. In the event the Authority Board fails, within the time frames described in this section, to conduct a public hearing or take action on determining whether the land use decision is consistent with the Plan and the Authority Act, the land use agency may file, upon ten days notice, a request with the Executive Officer to have the matter placed on the next Board agenda for a noticed public hearing to take action to consider the consistency finding and the Board shall take action at such noticed public hearing and such decision shall be final.

(d) In the event the Authority Board finds, on the basis of substantial evidence supported on the record, that the legislative act is consistent with the Reuse Plan and this Chapter, the Authority Board shall certify the legislative act pursuant to the provisions of the Authority Act.

(e) In the event the Authority Board refuses to certify the legislative land use decision in whole or in part, the Authority Board's resolution making findings shall include suggested modifications which, if adopted and transmitted to the Authority Board by the affected land use agency, will allow the legislative land use decision to be certified. If such modifications are adopted by the affected land use agency as suggested, and the Executive Officer confirms such modifications have been made, the legislative land use decision shall be deemed certified. In the event the affected land use agency elects to meet the Authority Board's refusal of certification in a manner other than as suggested by the Authority Board, the legislative body of the affected land use agency shall resubmit its legislative land use decision to the Executive Officer and follow the procedures contained in this Section.

(f) No legislative land use decision shall be deemed final and complete, nor shall any land use entitlement be issued for property affected otherwise permitted by such legislative land use decision unless it has been certified pursuant to the procedures described in this Section.

(g) The Authority Board may only refuse to certify zoning ordinances, zoning district maps, or other legislative land use decision on the grounds that such actions do not conform with, or are inadequate to carry out, the provisions of the general plan, certified as consistent with the Reuse Plan pursuant to the provisions of this Section, applicable to the affected property.

(h) Nothing in this Section or in this Chapter shall apply to or be construed as adversely affecting any consistency determination previously obtained by a land use agency and certified by the Authority Board pursuant to the Authority Act.

**8.01.030. REVIEW OF DEVELOPMENT ENTITLEMENTS.**

(a) After the portion of a general plan applicable to Fort Ord territory has become effective, development review authority within such portion of territory shall be exercised by the land use agency with jurisdiction lying within the area to which the general plan applies. Each land use agency may issue or deny, or conditionally issue, development entitlements within their respective jurisdictions so long as the land use agency has a general plan certified pursuant to Section 8.01.020 and the decisions issuing, denying, or conditionally issuing development entitlements are consistent with the adopted and certified general plan, the Reuse Plan, and is in compliance with CEQA and all other applicable laws.

(b) All decisions on development entitlements of a land use agency affecting property within the territory of the Authority may be reviewed by the Authority Board on its own initiative, or may be appealed to the Authority Board, subject to the procedures specified in this Section. No development entitlement shall be deemed final and complete until the appeal and review procedures specified in this Section and Sections 8.01.040 and 8.01.050 of this Chapter have been exhausted.

(c) The land use agency approving a development entitlement within the jurisdiction of the Authority shall provide notice of approval or conditional approval to the Executive Officer. Notice of approval or conditional approval of a development entitlement shall include:

- (1) A complete copy of the approved development entitlement, including related or applicable text, maps, graphics, and studies.
- (2) A copy of all staff reports and materials presented or made available to any hearing body that reviewed the development entitlement.
- (3) A copy of the completed environmental assessment related to the development entitlement.



**8.01.040. REVIEW OF DEVELOPMENT ENTITLEMENTS BY INITIATIVE OF THE AUTHORITY BOARD.**

Within 35 days of the receipt of all of the notice materials described in subsection (d) of Section 8.01.030, the Authority Board, on its own initiative, may consider a resolution setting a hearing on a development entitlement affecting Fort Ord territory. The Authority Board may continue the matter of setting a hearing once for any reason. In the event the Authority Board does not act to set the matter for hearing within the 35 day time period or at the continued meeting, whichever event is last, the decision of the land use agency approving the development entitlement shall be deemed final and shall not be subject to review by the Authority Board pursuant to this Section. Nothing in this section shall be construed as abrogating any rights that any person may have to appeal development entitlements to the Authority Board pursuant to Section 8.01.050. In the event the Authority Board sets the matter for hearing, such hearing shall commence at the first regular meeting of the Authority Board following the date the Authority Board passed its resolution setting the matter for hearing or at a special hearing date prior to such regular meeting. The Authority Board may continue the matter once. In the event the Authority Board fails to take action on the development entitlement within such time period, the development entitlement shall be deemed approved.

**8.01.050. REVIEW OF DEVELOPMENT ENTITLEMENTS BY APPEAL TO AUTHORITY BOARD.**

(a) Within 10 days of a land use agency approving a development entitlement, any person aggrieved by that approval and who participated either orally or in writing, in that agency's hearing on the matter, may file a written appeal of such approval with the Executive Officer, specifically setting forth the grounds for the appeal, which shall be limited to issues raised at the hearing before the land use agency. The person filing the appeal shall pay a filing fee in an amount equal to the fee for appeal of combined development permits as established by the Monterey County Board of Supervisors for the cost of processing the appeal. The Executive Officer shall set, schedule, and notice a public hearing before the Authority Board. In the event the Authority Board fails to act on the development entitlement within the time periods specified in this Section to conduct a public hearing and take action within 60 days on determining whether the development entitlement is consistent with the Reuse Plan and the Authority Act, the land use agency may file, upon ten days notice, a request with the Authority Board to have the matter placed on the next Board agenda for a noticed public hearing to take action to consider the development entitlement.

(b) At the time and place noticed by the Executive Officer, the Authority Board will conduct a hearing on the development entitlement. The Authority Board may continue the matter once for any reason.

(c) Said continued hearing must be rescheduled to a date that is not later than 35 days from the date of the initial hearing date. In the event the Authority Board determines the development entitlement is not consistent with the Reuse Plan, the development shall be denied

and the Authority Board's decision shall be final. In the event the Authority Board determines the development entitlement is consistent with the Reuse Plan, the Authority Board shall approve the development entitlement.

**8.01.060. SUPERCESSION.**

In the event of a conflict or inconsistency between this Chapter of the Master Resolution and the Reuse Plan, the Development and Resource Plan, and other adopted FORA policies and procedures in regards to legislative land use decisions and/or development entitlements affecting lands within the affected territory, the provisions of this Chapter shall govern.

**8.01.070. FORA AS RESPONSIBLE AGENCY UNDER CEQA.**

In taking action on all legislative land decisions and for review of all development entitlements, the Authority Board shall act as a responsible agency under CEQA.

**8.01.080. ADMINISTRATIVE APPEALS.**

Any administrative decision made by the Executive Officer may be appealed to the Authority Board within 15 days by completing and filing a notice of appeal at the Office of the Executive Officer.

**Article 8.02. CONSISTENCY DETERMINATION CRITERIA.**

**8.02.010. LEGISLATIVE LAND USE DECISION CONSISTENCY.**

(a) 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

- (1) Provides a land use designation that allows more intense land uses than the uses permitted in the Reuse Plan for the affected territory;
- (2) Provides a development more dense than the density of use permitted in the Reuse Plan for the affected territory;
- (3) Is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of this Master Resolution.
- (4) Provides uses which conflict or are incompatible with uses permitted or allowed in the Reuse Plan for the affected property or which conflict or are incompatible with open space, recreational, or habitat management areas within the jurisdiction of the Authority;
- (5) Does not require or otherwise provide for the financing and/or installation, construction, and maintenance of all infrastructure necessary to provide adequate public services to the property covered by the legislative land use decision; and

- (6) Does not require or otherwise provide for implementation of the Fort Ord Habitat Management Plan.

(b) FORA shall not preclude the transfer of intensity of land uses and/or density of development involving properties within the affected territory as long as the land use decision meets the overall intensity and density criteria of Sections 8.02.010(a)(1) and (2) above as long as the cumulative net density or intensity of the Fort Ord Territory is not increased.

(c) The Authority Board, in its discretion, may find a legislative land use decision is in substantial compliance with the Reuse Plan when the Authority Board finds that the applicant land use agency has demonstrated compliance with the provisions specified in this section and Section 8.02.020 of this Master Resolution.

**8.02.020. SPECIFIC PROGRAMS AND MITIGATION MEASURES FOR INCLUSION IN LEGISLATIVE LAND USE DECISIONS.**

(a) 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.

- (1) Each land use agency shall review each application for a development entitlement for compatibility with adjacent open space land uses and require suitable open space buffers to be incorporated into the development plans of any potentially incompatible land uses as a condition of project approval.
- (2) When buffers are required as a condition of approval adjacent to Habitat Management areas, the buffer shall be designed in a manner consistent with those guidelines set out in the Habitat Management Plan. Roads shall not be allowed within the buffer area adjacent to Habitat Management areas except for restricted access maintenance or emergency access roads.

(b) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that will ensure consistency of future use of the property within the coastal zone through the master planning process of the California Department of Parks and Recreation, if applicable. All future use of such property shall comply with the requirements of the Coastal Zone Management Act and the California Coastal Act and the coastal consistency determination process.

(c) Monterey County shall include policies and programs in its applicable general, area, and specific plans that will ensure that future development projects at East Garrison are compatible with the historic context and associated land uses and development entitlements are appropriately

conditioned prior to approval.

(d) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that shall limit recreation in environmentally sensitive areas, including, but not limited to, dunes and areas with rare, endangered, or threatened plant or animal communities to passive, low intensity recreation, dependent on the resource and compatible with its long term protection. Such policies and programs shall prohibit passive, low density recreation if the Board finds that such passive, low density recreation will compromise the ability to maintain an environmentally sensitive resource.

(e) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that shall encourage land uses that are compatible with the character of the surrounding districts or neighborhoods and discourage new land use activities which are potential nuisances and/or hazards within and in close proximity to residential areas. Reuse of property in the Army urbanized footprint should be encouraged.

(f) Each land use agency with jurisdiction over property in the Army urbanized footprint shall adopt the cultural resources policies and programs of the Reuse Plan concerning historic preservation, and shall provide appropriate incentives for historic preservation and reuse of historic property, as determined by the affected land use agency, in their respective applicable general, area, and specific plans.

(g) The County of Monterey shall amend the Greater Monterey Peninsula Area Plan and designate the Historic East Garrison Area as an historic district in the County Reservation Road Planning Area. The East Garrison shall be planned and zoned for planned development mixed uses consistent with the Reuse Plan. In order to implement this aspect of the plan, the County shall adopt at least one specific plan for the East Garrison area and such specific plan shall be approved before any development entitlement shall be approved for such area.

(h) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that shall support all actions necessary to ensure that sewage treatment facilities operate in compliance with waste discharge requirements adopted by the California Regional Water Quality Control Board.

(i) Each land use agency shall adopt the following policies and programs

- (1) A solid waste reduction and recycling program applicable to Fort Ord territory consistent with the provisions of the California Integrated Waste Management Act of 1989, Public Resources Code Section 40000 *et seq.*
- (2) A program that will ensure that each land use agency carries out all action necessary to ensure that the installation of water supply wells comply with State of California Water Well Standards and well standards established by the Monterey County Health Department; and
- (3) A program that will ensure that each land use agency carries out all actions necessary to ensure that distribution and storage of potable and non-

potable water comply with State Health Department regulations.

(j) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans to address water supply and water conservation. Such policies and programs shall include the following:

- (1) Identification of, with the assistance of the Monterey County Water Resources Agency and the Monterey Peninsula Water Management District, potential reservoir and water impoundment sites and zoning of such sites for watershed use, thereby precluding urban development;
- (2) Commence working with appropriate agencies to determine the feasibility of developing additional water supply sources, such as water importation and desalination, and actively participate in implementing the most viable option or options;
- (3) Adoption and enforcement of a water conservation ordinance which includes requirements for plumbing retrofits and is at least as stringent as Regulation 13 of the Monterey Peninsula Water Management District, to reduce both water demand and effluent generation.
- (4) Active participation in the support of the development of "reclaimed" or "recycled" water supply sources by the water purveyor and the Monterey Regional Water Pollution Control Agency to ensure adequate water supplies for the territory within the jurisdiction of the Authority.
- (5) Promotion of the use of on-site water collection, incorporating measures such as cisterns or other appropriate improvements to collect surface water for in-tract irrigation and other non-potable use.
- (6) Adoption of policies and programs consistent with the Authority's Development and Resource Management Plan to establish programs and monitor development at territory within the jurisdiction of the Authority to assure that it does not exceed resource constraints posed by water supply.
- (7) Adoption of appropriate land use regulations that will ensure that development entitlements will not be approved until there is verification of an assured long-term water supply for such development entitlements.
- (8) Participation in the development and implementation of measures that will prevent seawater intrusion into the Salinas Valley and Seaside groundwater basins.
- (9) Implementation of feasible water conservation methods where and when determined appropriate by the land use agency, consistent with the Reuse Plan, including: dual plumbing using non-potable water for appropriate functions; cistern systems for roof-top run-off; mandatory use of reclaimed water for any new golf courses; limitation on the use of potable water for golf courses; and publication of annual water reports disclosing water consumption by types of use.

(k) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that will require new development to demonstrate that

all measures will be taken to ensure that storm water runoff is minimized and infiltration maximized in groundwater recharge areas. Such policies and programs shall include:

- (1) Preparation, adoption, and enforcement of a storm water detention plan that identifies potential storm water detention design and implementation measures to be considered in all new development, in order to increase groundwater recharge and thereby reduce potential for further seawater intrusion and provide for an augmentation of future water supplies.
- (2) Preparation, adoption, and enforcement of a Master Drainage Plan to assess the existing natural and man-made drainage facilities, recommend area-wide improvements based on the approved Reuse Plan, and develop plans for the control of storm water runoff from future development. Such plans for control of storm water runoff shall consider and minimize any potential for groundwater degradation and provide for the long term monitoring and maintenance of all storm water retention ponds.

(l) Each land use agency shall adopt policies and programs that ensure that all proposed land uses on the Fort Ord territory are consistent with the hazardous and toxic materials clean-up levels as specified by state and federal regulation.

(m) Each land use agency shall adopt and enforce an ordinance acceptable to the California Department of Toxic Substances Control ("DTSC") to control and restrict excavation or any soil movement on those parcels of the Fort Ord territory which were contaminated with unexploded ordnance and explosives. Such ordinance shall prohibit any digging, excavation, development, or ground disturbance of any type to be caused or otherwise allowed to occur without compliance with the ordinance. A land use agency shall not make any substantive change to such ordinance without prior notice to and approval by DTSC.

(n) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that will help ensure an efficient regional transportation network to access the territory under the jurisdiction of the Authority, consistent with the standards of the Transportation Agency of Monterey County. Such policies and programs shall include:

- (1) Establishment and provision of a dedicated funding mechanism to pay for the "fair share" of the impact on the regional transportation system caused or contributed by development on territory within the jurisdiction of the Authority; and
- (2) Support and participate in regional and state planning efforts and funding programs to provide an efficient regional transportation effort to access Fort Ord territory.

(o) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that ensure that the design and construction of all major arterials within the territory under the jurisdiction of the Authority will have direct connections to the regional network consistent with the Reuse Plan. Such plans and policies shall include:

- (1) Preparation and adoption of policies and programs consistent with the Authority's Development and Resource Management Plan to establish programs and monitor development to assure that it does not exceed resource constraints posed by transportation facilities;
- (2) Design and construction of an efficient system of arterials in order to connect to the regional transportation system; and
- (3) Designate local truck routes to have direct access to regional and national truck routes and to provide adequate movement of goods into and out of the territory under the jurisdiction of the Authority.

(p) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans to provide regional bus service and facilities to serve key activity centers and key corridors within the territory under the jurisdiction of the Authority in a manner consistent with the Reuse Plan.

(q) Each land use agency shall adopt policies and programs that ensure development and cooperation in a regional law enforcement program that promotes joint efficiencies in operations, identifies additional law enforcement needs, and identifies and seeks to secure the appropriate funding mechanisms to provide the required services.

(r) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that ensure development of a regional fire protection program that promotes joint efficiencies in operations, identifies additional fire protection needs, and identifies and seeks to secure the appropriate funding mechanisms to provide the required services.

(s) Each land use agency shall include policies and programs in their respective applicable general, area, and specific plans that will ensure that native plants from on-site stock will be used in all landscaping except for turf areas, where practical and appropriate. In areas of native plant restoration, all cultivars, including, but not limited to, manzanita and ceanothus, shall be obtained from stock originating on Fort Ord territory.

#### 8.02.030. DEVELOPMENT ENTITLEMENT CONSISTENCY

(a) In the review, evaluation, and determination of consistency regarding any development entitlement presented to the Authority Board pursuant to Section 8.01.030 of this Resolution, the Authority Board shall withhold a finding of consistency for any development entitlement that:

- (1) Provides an intensity of land uses which is more intense than that provided for in the applicable legislative land use decisions which the Authority Board has found consistent with the Reuse Plan;

- (2) Is more dense than the density of development permitted in the applicable legislative land use decisions which the Authority Board has found consistent with the Reuse Plan;
- (3) Is not conditioned upon providing, performing, funding, or making an agreement guaranteeing the provision, performance, or funding of all programs applicable to the development entitlement as specified in the Reuse Plan and in Section 8.02.020 of this Master Resolution and consistent with local determinations made pursuant to Section 8.02.040 of this Resolution.
- (4) Provides uses which conflict or are incompatible with uses permitted or allowed in the Reuse Plan for the affected property or which conflict or are incompatible with open space, recreational, or habitat management areas within the jurisdiction of the Authority;
- (5) Does not require or otherwise provide for the financing and installation, construction, and maintenance of all infrastructure necessary to provide adequate public services to the property covered by the applicable legislative land use decision.
- (6) Does not require or otherwise provide for implementation of the Fort Ord Habitat Management Plan.
- (7) Is not consistent with the Highway 1 Scenic Corridor design standards as such standards may be developed and approved by the Authority Board.

**8.02.040. ADOPTION OF REQUIRED PROGRAMS.**

No development entitlement shall be approved or conditionally approved within the jurisdiction of any land use agency until the land use agency has taken appropriate action, in the discretion of the land use agency, to adopt the programs specified in the Reuse Plan, the Habitat Management Plan, the Development and Resource Management Plan, the Reuse Plan Environmental Impact Report Mitigation and Monitoring Plan and this Master Resolution applicable to such development entitlement.

**Article 8.03. ENVIRONMENTAL QUALITY.**

**8.03.010. ENVIRONMENTAL QUALITY AND PURPOSE.**

The purposes of this article is to provide guidelines for the study of proposed activities and the effect that such activities would have on the environment in accordance with the requirements of the California Environmental Quality Act ("CEQA").

**8.03.020. DEFINITIONS.**

Except as otherwise defined in this section, words and phrases used in this article shall have



the same meaning given them by Chapter 2.5 of the California Environmental Quality Act and by Article 20 of the State CEQA Guidelines.

**8.03.030. STATE CEQA GUIDELINES ADOPTED.**

The Authority hereby adopts the State CEQA Guidelines ("Guidelines") as set forth in Title 14, Section 15000 et seq. of the California Administrative Code and as may be amended from time to time. This adoption shall not be construed so as to limit the Authority's ability or authority to adopt additional implementing procedures in accordance with Section 15022 of such Guidelines, or to adopt other legislative enactments the Board may deem necessary or convenient for the protection of the environment.

**8.03.040. EXECUTIVE OFFICER'S RESPONSIBILITY.**

- (a) The Executive Officer shall, consistent with FORA obligations:
- (1) Generate and keep a list of exempt projects and report such list to the Board.
  - (2) Conduct initial studies.
  - (3) Prepare negative declarations.
  - (4) Prepare draft and final environmental impact reports.
  - (5) Consult with and obtain comments from other public agencies and members of the public with regard to the environmental effect of projects, including "scoping" meetings when deemed necessary or advisable.
  - (6) Assure adequate opportunity and time for public review and comment on a draft environmental impact report or negative declaration.
  - (7) Evaluate the adequacy of an environmental impact report or negative declaration and make appropriate recommendations to the Board.
  - (8) Submit the final appropriate environmental document to the Board who will approve or disapprove a project. The Board has the authority to certify the adequacy of the environmental document.
  - (9) File documents required or authorized by CEQA and the State Guidelines.
  - (10) Collect fees and charges necessary for the implementation of this article in amounts as may be specified by the Board by resolution and as may be amended from time to time.
  - (11) Formulate rules and regulations as the Executive Officer may determine are necessary or desirable to further the purposes of this article.

**8.03.050. COMPLETION DEADLINES.**

(a) Time limits for completion of the various phases of the environmental review process shall be consistent with CEQA and Guidelines and those time limits are incorporated in this article by reference. Reasonable extensions to these time limits shall be allowed upon consent by any applicant.

- (b) Time limits set forth in this section shall not apply to legislative actions.
- (c) Any time limits set forth in this section shall be suspended during an administrative appeal.

**8.03.060. PUBLIC NOTICE OF ENVIRONMENTAL DECISION.**

(a) Notice of the decision of whether to prepare an environmental impact report, negative declaration, or declare a project exempt shall be available for public review at the Office of the Executive Officer. Notices of decisions shall be provided in a manner consistent with CEQA and the Guidelines.

(b) Notice that the Authority proposes to adopt a negative declaration shall be provided to the public at least ten (10) days prior to the date of the meeting at which consideration of adoption of the negative declaration shall be given.

(c) Notice of decisions to prepare an environmental impact report, negative declaration, or project exemption shall be given to all organizations and individuals who have previously requested such notice. Notice shall also be given by publication one time in a newspaper of general circulation in Monterey County.

**8.03.070. APPEAL OF ENVIRONMENTAL DECISION.**

(a) Within fifteen (15) days after the Executive Officer provides notice of a decision, any interested person may appeal the decision to the Board by completing and filing a notice of appeal at the Office of the Executive Officer.

(b) The appellant shall pay a fee in the amount as specified in Section 8.01.050 (a) of this Resolution.

(c) The Board shall hear all appeals of decisions on any environmental issue. The hearing shall be limited to considerations of the environmental or procedural issues raised by the appellant in the written notice of appeal. The decision of the Executive Officer shall be presumed correct and the burden of proof shall be on the appellant to establish otherwise. The Board may uphold or reverse the environmental decision, or remand the decision back to the Executive Officer if substantial evidence of procedural or significant new environmental issues are presented.

(d) The decision of the Board will be final.

8.03.080. CONFLICT DETERMINATIONS.

This article establishes procedural guidelines for the evaluation of the environmental factors concerning activities within the jurisdiction of the Authority and in accordance with State Guidelines. Where conflicts exist between this article and State Guidelines, the State Guidelines shall prevail except where this article is more restrictive.

Section 3. This resolution shall become effective upon adoption.

PASSED AND ADOPTED this \_\_\_ day of \_\_\_\_\_, 1998, upon motion of Member \_\_\_\_\_, seconded by Member \_\_\_\_\_, and carried by the following vote:

AYES:

NOES:

ABSENT:

**EXHIBIT B**

## DEED RESTRICTION AND COVENANTS

This Deed Restriction and Covenants is made this \_\_\_\_\_ day of \_\_\_\_\_, 199 \_\_, by the Fort Ord Reuse Authority ("Owner"), a governmental public entity organized under the laws of the State of California, with reference to the following facts and circumstances:

A. Owner is the owner of the real property described in Exhibit "A" to this Deed Restriction and Covenants ("the property"), by virtue of a conveyance of the property from the United States Government and/or the United States Department of the Army to Owner in accordance with state and federal law, the Fort Ord Base Reuse Plan ("the Reuse Plan"), and the policies and programs of the Fort Ord Reuse Authority.

B. Future development of the property is governed under the provisions of the Reuse Plan and other applicable general plan and land use ordinances and regulations of the local governmental entity on which the property is located consistent with the Reuse Plan.

C. The Reuse Plan provides that the property can only be used and developed in a manner consistent with the Reuse Plan.

D. The Reuse Plan recognizes that development of all property conveyed from FORA is constrained by limited water, sewer, transportation, and other infrastructure services and by other residual effects of a former military reservation, including unexploded ordnance.

E. It is the desire and intention of Owner, concurrently with its acceptance of the conveyance of the property, to recognize and acknowledge the existence of these development constraints on the property and to give due notice of the same to the public and any future purchaser of the property.

F. It is the intention of the Owner that this Deed Restriction and Covenants is irrevocable and shall constitute enforceable restrictions on the property.

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NOW, THEREFORE, Owner hereby irrevocably covenants that the property subject to this Deed Restriction and Covenants is held and shall be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the following restrictions and covenants on the use and enjoyment of the property, to be attached to and become a part of the deed to the property. The Owner, for itself and for its heirs, assigns, and successors in interest, covenants and agrees that:

I. Development of the property is not guaranteed or warranted in any manner. Any development of the property will be and is subject to the provisions of the Reuse Plan, the policies and programs of the Fort Ord Reuse Authority, including the Authority's Master Resolution, and other applicable general plan and land use ordinances and regulations of the local governmental entity on which the property is located and compliance with CEQA.

2. Development of the property will only be allowed to the extent such development is consistent with applicable local general plans which have been determined by the Authority to be consistent with the Reuse Plan, including restraints relating to water supplies, wastewater and solid waste disposal, road capacity, and the availability of infrastructure to supply these resources and services, and does not exceed the constraint limitations described in the Reuse Plan and the Final Program Environmental Impact Report on the Reuse Plan.

3. \_\_\_\_\_  
\_\_\_\_\_

4. This Deed Restriction and Covenants shall remain in full force and effect immediately and shall be deemed to have such full force and effect upon the first conveyance of the property from FORA, and is hereby deemed and agreed to be a covenant running with the land binding all of the Owner's assigns or successors in interest.

5. If any provision of this Deed Restriction and Covenants is held to be invalid or for any reason becomes unenforceable, no other provision shall be thereby affected or impaired.

6. Owner agrees to record this Deed Restriction and Covenants as soon as possible after the date of execution.

IN WITNESS WHEREOF, the foregoing instrument was subscribed on the day and year first above written.

\_\_\_\_\_  
OWNER

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ACKNOWLEDGMENT  
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**EXHIBIT C**

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## NOTICE OF APPLICATION OF PLAN AND DEVELOPMENT LIMITATIONS

This Notice of Plan Application and Development Limitations is made this \_\_\_\_ day of \_\_\_\_\_, 199\_\_, by the Fort Ord Reuse Authority ("Authority"), a governmental public entity organized under the laws of the State of California, with reference to the following facts and circumstances:

A. Authority, consistent with its charge and obligations under the Fort Ord Reuse Authority Act, Title 7.85, Section 67650, et seq., of the California Government Code, has prepared and adopted a Fort Ord Reuse Plan (the "Reuse Plan") as the controlling planning document regulating and limiting development of property within the territory of the former Fort Ord Military Reservation.

B. Future development of the property is governed under the provisions of the Reuse Plan, the policies and programs of the Authority, including the Authority's Master Resolution, and other applicable general plan and land use ordinances and regulations of the local governmental entity on which the property is located.

C. The Reuse Plan provides that the property can only be used and developed in a manner consistent with the Reuse Plan.

D. The Reuse Plan recognizes that development of all property conveyed from FORA is constrained by limited water, sewer, transportation, and other infrastructure services.

E. It is the desire and intention of Authority to give due notice of the existence of these development constraints on the property within the territory of the former Fort Ord Military Reservation to the public and any future purchaser of the property.

NOW, THEREFORE, Authority hereby gives notice to the public and any and all future owners of property located on territory within the boundaries of the former Fort Ord Military Reservation, that

1. Development of the property is not guaranteed or warranted in any manner. Any development of the property will be and is subject to the provisions of the Reuse Plan, the policies and programs of the Fort Ord Reuse Authority, including the Authority's Master Resolution, and other applicable general plan and land use ordinances and regulations of the local governmental entity on which the property is located and compliance with CEQA.

2. Development of the property will only be allowed to the extent such development is consistent with applicable local general plans which have been determined by the Authority to be consistent with the Reuse Plan, including restraints relating to water supplies, wastewater and solid waste disposal, road capacity, and the availability of infrastructure to supply these resources and services, and does not exceed the constraint limitations described in the Reuse Plan and the Final Program Environmental Impact Report on the Reuse Plan.



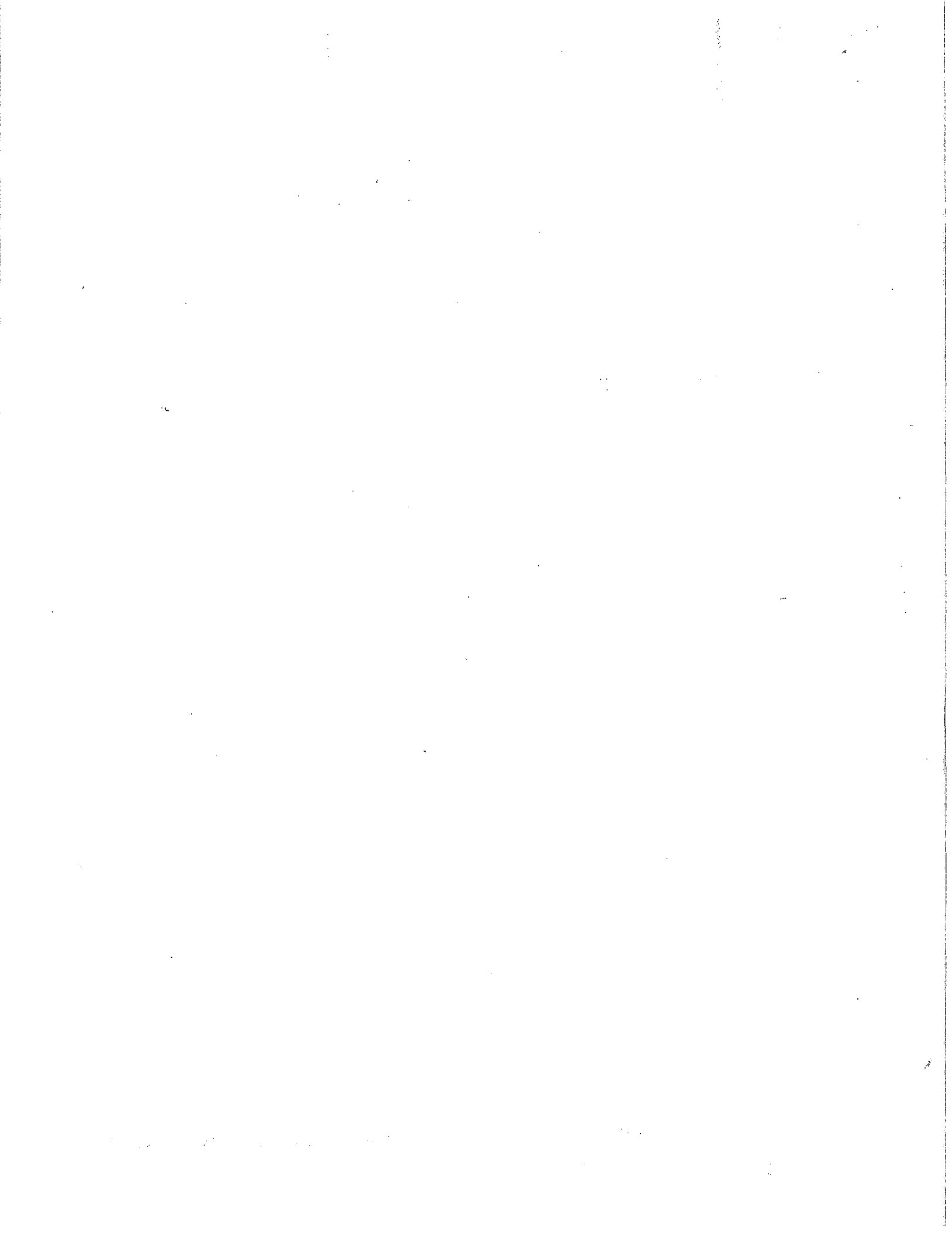
3.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
IN WITNESS WHEREOF, the foregoing instrument was subscribed on the day and year first above written.

\_\_\_\_\_  
Authority

ACKNOWLEDGMENT

FAWPWIN60VIXNFORAIDEED.RES



Urban Village and Employment Center with approximately 85 acres dedicated to Office/R&D and Business Park/Light Industrial land uses. These manufacturing and possibly labor-intensive uses could create nuisances including increased noise, traffic, and air pollution, which may adversely affect the recreational opportunities and experiences at the Youth Camp District. The ~~MOU~~-POST facility would also potentially conflict with the Youth Camp District due to noise and public safety risks.

The following policies and programs developed for the ~~Draft Fort Ord Reuse Plan~~ for Monterey County relate to both the protection of open space and compatibility of open space areas with adjacent areas:

#### Land Use Element

**Recreation/Open Space Land Use Policy A-1:** The County of Monterey shall protect ~~encourage the conservation and preservation of~~ irreplaceable natural resources and open space at former Fort Ord.

Program A-1.1: The County of Monterey shall identify natural resources and open space, and incorporate them into Greater Monterey Peninsula Area Plan and zoning designations.

Program A-1.2: 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.

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**Recreation/Open Space Land Use Policy B-2:** The County of Monterey shall use open space as a buffer between various types of land use.

Program B-2.1: The County of Monterey shall review each development project at former Fort Ord with regard to the need for open space buffers between land uses.

**Recreation /Open Space Land Use:** Program E-1.6: The Youth Camp District in the Reservation Road Planning Area is intended for rehabilitation of the existing travel camp. The County of Monterey shall assure that this planned use is compatible with adjacent land uses which may include a public safety agency training facility with shooting ranges in the East Garrison area located to the East.

**Institutional Land Use Policy A-1:** The County of Monterey shall review and coordinate with the universities, colleges and other school districts or entities the planning of both public lands designated for university-related uses and adjacent lands.

Program A-1.4: The County of Monterey shall minimize the impacts of proposed land uses which may be incompatible with public lands, such as major roadways near residential or university areas, location of the York School augmentation area adjacent to the habitat management area, and siting of the Monterey Peninsula College's MOU law enforcement training program in the BLM Management/Recreation Planning Area.

Further policies regarding the general protection of open space areas can be found in Section 4.3 - Recreation and Open Space Element of the ~~Draft Fort Ord Reuse Plan~~. Additional policies and

programs to protect natural habitat resources and implement the HMP are listed in Section 4.4.3 - Biological Resources section of the Conservation Element.

While these policies and programs require the identification of open space and natural habitat areas and review of compatibility with adjacent uses, they provide no mechanism for assuring that incompatible land uses will not be introduced. Therefore, significant adverse impacts on adjacent open space areas may occur. Implementation of the following mitigation measure would reduce potential impacts to the extent that they would be considered less than significant.

**Mitigation:** Amend Program B-2.1 within the Fort Ord Reuse Plan to state: The County of Monterey shall review each future development project for compatibility with adjacent open space land uses and require that suitable open space buffers are incorporated into the development plan of incompatible land uses as a condition of project approval. When buffers are required as a condition of approval adjacent to habitat management areas, the buffer shall be at least 150 feet. Roads shall not be allowed within the buffer area except for restricted access maintenance or emergency access roads.

## 2. Impact: Development in the Coastal Zone

Implementation of the proposed project would result in development of the coastal zone. In the Fort Ord Dunes State Park Planning Area, the ~~Draft Fort Ord Reuse Plan~~ proposes a 59-acre multi-use area, a 23-acre future desalination plant, and ~~803~~ 949 acres reserved for park and open space. This coastal area, which contains significant environmental and natural resources, would be managed by the California Department of Parks and Recreation (CDPR) for habitat restoration and limited visitor-serving activities. ~~Development of the proposed multi-use area, which would potentially include a 40-room lodge (including Stilwell Hall) and other associated facilities, has the potential to destroy or disturb a portion of these resources.~~ The following policy and programs relate to protection and appropriate use of the coastal area:

### Land Use Element

**Recreation/Open Space Land Use Policy E-1:** The County of Monterey shall limit recreation in environmentally sensitive areas, such as dunes and areas with rare, endangered, or threatened plant or animal communities to passive, low-intensity recreation, dependent on the resource and compatible with its long term protection.

Program E-1.1: The County of Monterey shall assist the CDPR to develop and implement a Master Plan for ensuring the management of the former Fort Ord coastal dunes and beaches for the benefit of the public by restoring habitat, recreating the natural landscape, providing public access, and developing appropriate day use and overnight lodging facilities (limited to a capacity of 40 rooms).

Program E-1.2: The County of Monterey shall assist CDPR to carry out a dune restoration program for the Fort Ord Dunes State Park.

Additional policies and programs to protect natural habitat in the coastal zone and to implement the HMP are described in Section 4.10 and are listed in the Biological Resources section of the Conservation Element. Any development in the coastal zone would need to be consistent with the

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January 8, 2014

Board of Directors  
Fort Ord Reuse Authority  
920 2nd Avenue  
Marina, CA 93933

**Re: January 10, 2104 Meeting, Agenda Item # 8b: Certification of the 2010  
Monterey County General Plan**

Dear Chairperson Edelen and Members of the Board:

This office represents the Ventana Chapter of the Sierra Club with respect to the Fort Ord Reuse Authority's ("FORA") pending certification of the 2010 Monterey County General Plan pursuant to Government Code § 67675.3 and FORA Master Resolution sections 8.01.020 and 8.02.010.

I am writing to clarify, amplify, and add to several comments that the Sierra Club and others have previously submitted regarding inconsistencies between the 2010 County General Plan and the Base Reuse Plan. The Sierra Club objects to FORA certifying the 2010 County General Plan because the 2010 County General Plan is not "consistent" with the Base Reuse Plan for a number of reasons. This letter will explain both specific inconsistencies and the legal standard that governs FORA's determination of "consistency."

- 1. The 2010 County General Plan Is Inconsistent with the 1997 Base Reuse Plan Because it Weakens or Omits Applicable Base Reuse Plan Policies and Programs.**
  - a. The County General Plan/Fort Ord Master Plan Weakens or Omits Three of the Reuse Plan's Recreation/Open Space Land Use Policies or Programs: Policy A-1, Program A-1 and Program B-2.1.**

The Land Use Element of the Base Reuse Plan establishes Recreation/Open Space Land Use objectives, policies and programs that pertain to base land east of Highway 1 within Monterey County's jurisdiction. (Reuse Plan, pp. 213, 262-264, 270-272.) The Reuse Plan Recreation/Open Space Land Use objectives, policies and programs include four "objectives," seven "policies," and nineteen "programs." (Reuse Plan, pp. 270-272.)

The 2010 County General Plan contains a section entitled "Fort Ord Master Plan, Greater Monterey Peninsula Area Plan." (County General Plan/Fort Ord Master Plan, p. FO-1.) The Land Use Element of the County General Plan/Fort Ord Master Plan restates, with three notable exceptions, virtually all of the Reuse Plan's Recreation/Open Space Land Use objectives, policies and programs. (County General Plan/Fort Ord Master Plan, pp. FO-21 - FO-24.) The three exceptions are Policy A-1, Program A-1 and Program B-2.1.

Reuse Plan Recreation/Open Space Land Use Policy A-1 provides: "The County of Monterey *shall protect* irreplaceable natural resources and open space at former Fort Ord." (Reuse Plan, p. 270 (emphasis added).)<sup>1</sup> Corresponding Policy A-1 in the Land Use Element of the County General Plan/Fort Ord Master Plan reads: "The County of Monterey *shall encourage the conservation and preservation of* irreplaceable natural resources and open space at former Fort Ord.) (County General Plan/Fort Ord Master Plan, p. FO-21.) As a result, the County General Plan/Fort Ord Master Plan replaces the words "shall protect" with the words "shall encourage the conservation and preservation of."

Reuse Plan Recreation/Open Space Land Use Program A-1.2 provides: "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." (Reuse Plan, p. 270.) The Land Use Element of the County General Plan/Fort Ord Master Plan omits this program entirely.

Reuse Plan Recreation/Open Space Land Use Program B-2.1 provides:

The County of Monterey shall review each future development projects for compatibility with adjacent open space land uses and require that suitable open space buffers are incorporated into development plans of incompatible land uses as a condition of project approval. *When buffers are required as a condition of approval adjacent to habitat management areas, the buffer shall be at least 150 feet. Roads shall not be allowed within the buffer area except for restricted access maintenance or emergency access roads.*

(Reuse Plan, p. 270 (emphasis added).)<sup>2</sup>

Corresponding Program B-2.1 in the Land Use Element of the County General Plan/Fort Ord Master Plan includes the first sentence of Reuse Plan Program B-2.1, but omits the second and third sentence, providing:

The County of Monterey shall review each future development projects for compatibility with adjacent open space land uses and require that suitable open space buffers are incorporated into development plans of incompatible land uses as a condition of project approval.

(County General Plan/Fort Ord Master Plan, p. FO-21.)

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<sup>1</sup>Policy A-1, in turn, implements Objective A, which provides: "Encourage land uses that respect, preserve and enhance natural resources and open space at the former Fort Ord." (Reuse Plan, p. 270.)

<sup>2</sup>This program implements Policy B-2 ("The County of Monterey shall use open space as a buffer between various types of land use) and Objective B ("Use open space as a land use link and buffer.") (Reuse Plan, p. 270.)

Several members of the public previously commented to FORA that the County General Plan/Fort Ord Master Plan fails to include numerous specific Reuse Plan policies and programs, including Policy A-1, Program A-1.2 and Program B-2.1.<sup>3</sup> In response, Alan Waltner (FORA's legal consultant) argues that the County General Plan/Fort Ord Master Plan County General Plan "incorporate by reference" all Reuse Plan policies and programs, whether they are specifically identified in the County General Plan/Fort Ord Master Plan or not.<sup>4</sup>

With due respect to Mr. Waltner, he is incorrect on this point. I start my analysis by quoting the text of the County General Plan/Fort Ord Master Plan that is relevant to the issue of "incorporation by reference" of the Reuse Plan, as follows:

#### **DESCRIPTION**

The purpose of this plan is to designate land uses and incorporate objectives, programs, and policies to be consistent with the Fort Ord Reuse Plan (Reuse Plan) adopted by the Fort Ord Reuse Authority (FORA) in 1997. This plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area. In addition, this plan contains additional Design Objectives and land use description clarification to further the Design Principles contained in the adopted Reuse Plan.

The Fort Ord Master Plan consists of this document, the Greater Monterey Peninsula Area Plan, and the Monterey County General Plan. Where there is a conflict or difference between a goal or policy of the Fort Ord Master Plan (FOMP) and the General Plan or Greater Monterey Peninsula Area Plan, the more restrictive policy will apply, except that land use designations will be governed by the FOMP in the Fort Ord area.

#### **THE PLAN**

*This plan incorporates the following Fort Ord Reuse Plan Elements, either directly or by reference to the adopted Reuse Plan, specific to those portions of Fort Ord under County jurisdiction and located east of Highway 1:*

- Land Use Element
- Circulation Element
- Recreation and Open Space Element
- Conservation Element
- Noise Element
- Safety Element

(Page FO-1 (emphasis added).)

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<sup>3</sup>See e.g., Jane Haines' letters to FORA dated October 10, 2013, November 7, 2013, and November 8, 2013, and Sierra Club's letter to FORA dated October 10, 2013.

<sup>4</sup> Memorandum from Alan Waltner to FORA dated December 26, 2013.

## LAND USE ELEMENT

The Fort Ord Land Use Element is part of the Greater Monterey Peninsula Area Plan and the Monterey County General Plan and consists of those portions of the County of Monterey Land Use Plan - Fort Ord Master Plan (Figure LU-6a) that pertain to the areas of Fort Ord currently under the jurisdiction of the County and located east of Highway 1, and includes the following text. The Land Use Element contains land use designations specific to Fort Ord. These land use designations are consistent with the land use designations (as base designations) included in the adopted FORA Reuse Plan. For each of the Planning Districts, overlay designations are included that provide additional description and clarification of the intended land uses and additional design objectives for that specific Planning District. *The Fort Ord land use designations also include the applicable land use Goals, Objectives, Policies, and Programs directly from the Reuse Plan. These will constitute all the policies and programs to be applied to the Fort Ord Land Use Element. Background information, land use framework and context discussions, as they relate to the subject area, are hereby incorporated by reference into the Fort Ord Land Use Element from the FORA adopted Reuse Plan.* In addition, the Land Use Map contained in this plan is the County of Monterey Land Use Plan (Figure 6a) adopted by FORA into the Reuse Plan.

(Page FO-31 (emphasis added).)

As pertinent to Policy A-1, Program A-1.2 and Program B-2.1 of the Reuse Plan Recreation/Open Space Land Use Element, the County General Plan/Fort Ord Master Plan contains several directives. First, the introductory "Description" states the purpose of the plan is: "to designate land uses and incorporate objectives, programs, and policies to be consistent with the Fort Ord Reuse Plan (Reuse Plan) adopted by the Fort Ord Reuse Authority (FORA) in 1997" and that the "plan incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area." If that were the end of it, Mr. Waltner's argument would have some force. But there is much more to it.

The "Plan" portion of the introduction indicates that the plan "incorporates" listed elements of Reuse Plan "either directly or by reference." Then, in order to determine which portions of the listed elements are incorporated, and whether the incorporation is done "directly" or "by reference," the reader must turn from the general language in the introductory sections to the more specific language in the individual elements.

As quoted above, the introductory language of the Land Use Element of the County General Plan/Fort Ord Master Plan states:

The Fort Ord land use designations also include the applicable land use Goals, Objectives, Policies, and Programs *directly* from the Reuse Plan. These will



constitute *all the policies and programs* to be applied to the Fort Ord Land Use Element. Background information, land use framework and context discussions, as they relate to the subject area, *are hereby incorporated by reference* into the Fort Ord Land Use Element from the FORA adopted Reuse Plan.

(FO-31.)

This language tells the reader exactly which portions of the Reuse Plan Land Use Element are incorporated “directly” and which are incorporated “by reference.” The “Goals, Objectives, Policies, and Programs” are incorporated “directly” and the “Background information, land use framework and context discussions” are incorporated “by reference.”

True to its word, and as noted above, the Land Use Element of the County General Plan/Fort Ord Master Plan proceeds to “directly” incorporate - word for word - virtually all of the Reuse Plan Recreation/Open Space Land Use objectives, policies and programs except Policy A-1, Program A-1.2 and portion of Program B-2.1. (County General Plan/Fort Ord Master Plan, pp. FO-21 - FO-24.)

We now return to Mr. Waltner’s argument. If the general language in the introductory “Description” of the County General Plan/Fort Ord Master Plan stating that “This plan incorporates all applicable policies and programs contained in the adopted Reuse Plan” were sufficient to incorporate the entire Reuse Plan “by reference” then virtually all of the remaining language of the Fort Ord Master Plan and its Land Use Element discussed above would be superfluous and meaningless.

Indeed, if Mr. Waltner were correct, there would be no need for the County General Plan/Fort Ord Master Plan, in its introductory “Plan” description on page FO-1 to distinguish between “direct” incorporation and incorporation “by reference.” There would be no need for the more specific directives in the Land Use Element of the County General Plan/Fort Ord Master Plan to tell the reader exactly which portions of the Land Use Element of the Reuse Plan are “directly” incorporated and which are incorporated “by reference.” And finally, there would be no reason for the Land Use Element of the County General Plan/Fort Ord Master Plan, its most specific statement on the topic, to recapitulate - word for word - virtually all of the Reuse Plan Recreation/Open Space Land Use objectives, policies and programs except Policy A-1, Program A-1.2, and Program B-2.1.

In short, Mr. Waltner’s construction of the Fort Ord Master Plan with respect to Reuse Plan Recreation/Open Space Land Use Program A-1.2 must be rejected because it violates the fundamental rule of statutory construction is that “[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1155.)

It must also be rejected because it violates the rule of statutory construction that where general and specific provisions of a law address the same subject matter, the more specific provisions govern over the more general provisions. (*Elliott v. Workers’ Compensation Appeals Bd.*

(2010) 182 Cal.App.4th 355, 365 [“We further point out that as a matter of statutory construction, a specific provision relating to a particular subject will govern that subject as against a general provision”]; Code of Civil Procedure § 1859.)

With respect to Program B-2.1 of the Reuse Plan, the evidence of the County’s intent to exclude a portion of the Reuse Plan’s Recreation/Open Space Land Use programs is even more specific, and therefore, more irrefutable, than it is with respect to Program A-1 because, rather than omitting the program entirely, the County finely parsed the program, keeping the first sentence of Program B-2.1, but omitting the second and third sentences.

Finally, and perhaps most importantly, the County’s rewording of Policy A-1 to replace the words “shall protect” with the words “shall encourage the conservation and preservation of” cannot be considered meaningless, as Mr. Waltner would have it, because the new language deprives this policy of its legal “teeth.” As Mr. Waltner concedes in his December 26, 2013, memorandum, under well-established case law applying the “vertical consistency” requirement of the state Planning and Zoning Law, courts usually defer to a local agency’s determination that a land use entitlement is “consistent” with a local general plan where the agency must balance the achievement of many competing general plan goals and objectives. But where a general plan policy is stated in mandatory language, such as “shall protect,” the courts will enforce such requirements without regard to the usual deference to agency discretion associated with the “substantial evidence standard of review. (See e.g., *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup’rs* (1998) 62 Cal.App.4th 1332, 1336, 1338, ,1342.)

In sum, the County’s selective recapitulation of the Reuse Plan’s Recreation/Open Space Land Use policies and programs is meaningful in the extreme, precisely because the clear intent and the clear legal effect of this effort is to transform the mandatory requirements of Policy A-1, Program A-1.2, and Program B-2.1 into discretionary standards that are difficult for the public to enforce.

**b. The County General Plan/Fort Ord Master Plan Omits Reuse Plan Hydrology and Water Quality Programs B-1.3 and B-2.7.**

The Conservation Element of the Base Reuse Plan includes a number of Hydrology and Water Quality goals, objectives, policies and programs that apply to base land within Monterey County’s jurisdiction east of Highway 1. (Reuse Plan, pp. 353-3554.) The County General Plan/Fort Ord Master Plan omits a number of these policies and programs, including Reuse Plan Hydrology and Water Quality Programs B-1.3, B-2.7, and B-6.1, all of which contain mandatory requirements.

Reuse Plan Hydrology and Water Quality Program B-1.3 provides: “The County shall adopt and enforce a water conservation ordinance for its jurisdiction within Fort Ord, which is at least as stringent as Regulation 13 of the MPWMD.” (Reuse Plan, p. 353.)

Reuse Plan Hydrology and Water Quality Program B-2.7 provides:

“The City/County, in order to promote FORA’s DRMP, shall provide FORA with an annual summary of the following: 1) the number of new residential units, based on building permits and approved residential projects, within its former Fort Ord boundaries and estimate, on the basis of the unit count, the current and projected population. The report shall distinguish units served by water from FORA’s allocation and water from other available sources; 2) estimate of existing and projected jobs within its Fort Ord boundaries based on development projects that are on-going, completed, and approved; and 3) approved projects to assist FORA’s monitoring of water supply, use, quality, and yield.”

(Reuse Plan, pp. 353, 347.)

Reuse Plan Hydrology and Water Quality Program C-6.1 provides:

The City shall work closely with other Fort Ord jurisdictions and the CDPR to develop and implement a plan for stormwater disposal that will allow for the removal of the ocean outfall structures and end the direct discharge of stormwater into the marine environment. The program must be consistent with State Park goals to maintain the open space character of the dunes, restore natural land forms, and restore habitat values.

(Reuse Plan, pp. 354, 347.)

These programs implement Hydrology and Water Quality Policy B-1 (“The County shall ensure additional water to critically deficient areas”), which implements Objective B (“Eliminate long-term groundwater overdrafting as soon as practicably possible”).

In addition to the County General Plan/Fort Ord Master Plan’s introductory language regarding incorporation by reference, the Conservation Element of the County General Plan/Fort Ord Master Plan contain additional relevant language, stating:

Those relevant portions of the adopted Reuse Plan are hereby incorporated into the Monterey County Fort Ord Conservation Element by this reference. For convenience, relevant Goals, Objectives, Policies and Programs pertaining to the subject area are provided herein.

(County General Plan/Fort Ord Master Plan, p. FO-34.)

Any remaining doubt that Mr. Waltner’s simple “incorporation by reference” argument is incorrect is eliminated by considering the Hydrology and Water Quality sections of the Conservation Elements of the Reuse Plan and the County General Plan/Fort Ord Master Plan. The County General Plan/Fort Ord Master Plan liberally reorganizes, rewrites, add new programs to and omits programs from the comparable text in the Reuse plan. Most, importantly, the County General Plan/Fort Ord Master Plan omits Reuse Plan Hydrology and Water Quality Programs B-1.3, B-2.7,

and B-6.1, all of which contain mandatory requirements. In addition, the County General Plan/Fort Ord Master Plan adds new Programs A-1.1, A-1.2, and A-1.3, which are not found in the Reuse Plan. (See County General Plan/Fort Ord Master Plan, pp. FO-37 - FO-31.)

Once again, if Mr. Waltner's "incorporation by reference" theory were correct, all of these changes would be both unnecessary and meaningless.

## **2. The Legal Standard Governing FORA's Determination of "Consistency."**

The legal standard governing FORA's determination whether the County General Plan/Fort Ord Master Plan is "consistent" with the Base Reuse Plan is set forth in Master Resolution § 8.02.010, 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

- (1) Provides a land use designation that allows more intense land uses than the uses permitted in the Reuse Plan for the affected territory;
- (2) Provides for a development more dense than the density of use permitted in the Reuse Plan for the affected territory;
- (3) Is not in substantial conformance with applicable programs specified in the Reuse Plan and Section 8.02.020 of this Master Resolution.
- (4) Provides uses which conflict or are incompatible with uses permitted or allowed in the Reuse Plan for the affected property or which conflict or are incompatible with open space, recreational, or habitat management areas within the jurisdiction of the Authority;
- (5) Does not require or otherwise provide for the financing and/or installation, construction, and maintenance of all infrastructure necessary to provide adequate public services to the property covered by the legislative land use decision; and
- (6) Does not require or otherwise provide for implementation of the Fort Ord Habitat Management Plan.

Mr. Waltner's December 26, 2013 memorandum makes several arguments regarding this standard.

First, Mr. Waltner sets out to rebut the notion that this standard requires the County General Plan/Fort Ord Master Plan to "strictly adhere" to the Base Reuse Plan. This "strict adherence" standard appears to be a rhetorical straw man, and therefore a distraction, because I have not seen any comment that urges such a position.

The Sierra Club's position is that because the standard set forth in section 8.02.010 uses the words "shall disapprove," it is mandatory. The Sierra Club's position is also that the way section 8.02.010 uses the concept of "substantial evidence" in conjunction with the words "shall

disapprove” requires that, if the record contains “substantial evidence” that any of the six criteria in section 8.02.010 are met, FORA must disapprove the County General Plan’s “consistency” with the Reuse Plan even if there is also substantial evidence supporting a conclusion that none of the criteria are met.

Second, Mr. Waltner argues that the term “consistent” as used in the Military Base Reuse Authority Act and Master Resolution must have the same meaning as the term has in the state Planning and Zoning Law (and as construed by the case law applying that statute.) Assuming this is correct, it does not rebut Sierra Club’s position. In fact, it supports it because, as discussed below, the case law applying the vertical consistency requirement of the state Planning and Zoning Law recognizes that the courts will enforce the mandatory procedural requirements of local general plans. Section 8.02.010 is a mandatory procedural requirement of the Master Resolution. Thus, Mr. Waltner’s primary error is in construing FORA’s “consistency” determination as identical to a county determination that a land use entitlement is consistent with the substantive standards of a general plan, but without regard to the specific, mandatory, procedural requirement in section 8.02.010.

In the Planning and Zoning case law, a local agency’s determination that a land use entitlement is “consistent” with a local general plan will be upheld by the court’s if there is substantial evidence in the record that the entitlement will not frustrate the achievement of the general plan’s goals, except where the language of general plan is mandatory. The following is an excerpt from a leading case on this issue:

A project is consistent with the general plan “if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.” [citation] A given project need not be in perfect conformity with each and every general plan policy. . . .

The Board’s determination that Cinnabar is consistent with the Draft General Plan carries a strong presumption of regularity. [citation] This determination can be overturned only if the Board abused its discretion—that is, did not proceed legally, or if the determination is not supported by findings, or if the findings are not supported by substantial evidence. [citation] As for this substantial evidence prong, it has been said that a determination of general plan consistency will be reversed only if, based on the evidence before the local governing body, “a reasonable person could not have reached the same conclusion.”

*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup’rs* (1998) 62 Cal.App.4th 1332, 1336, 1338 (“*Families Unafraid*”).

The Court in *Families Unafraid* also held that where a general plan policy is “mandatory” as opposed to a general statement of goals or objectives, then it must be followed, stating:

There was also a question of density consistency in *Sequoyah*. (23 Cal.App.4th at p.

718.) But the general plan in *Sequoyah* afforded officials “some discretion” in this area, and their density allowances aligned with this discretionary standard. (*Ibid.*)

By contrast, the land use policy at issue here is fundamental (a policy of contiguous development, and the Draft General Plan states that the “Land Use Element is directly related to all other elements contained within the General Plan”); the policy is also mandatory and anything but amorphous (LDR “shall be further restricted to those lands contiguous to Community Regions and Rural Centers” [both of which are specified ‘town-by-town’ in the Draft General Plan], and “shall not be assigned to lands which are separated from Community Regions or Rural Centers by the Rural Residential land use designation”).

Moreover, Cinnabar’s inconsistency with this fundamental, mandatory and specific land use policy is clear-this is not an issue of conflicting evidence. (Cf. *Corona*, *supra*, 17 Cal.App.4th at p. 996 [in rejecting a challenge of general plan inconsistency, the court there stated: “In summary, the General Plan is not as specific as those in the cases on which the [challenger] relies and does not contain mandatory provisions similar to the ones in those cases.”].)

*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup’rs* (1998) 62 Cal.App.4th 1332, 1341-42.

In the area of administrative law, the term “substantial evidence” is a “term of art” that has been defined, dissected, and construed in literally thousands of appellate decisions. The most common application of the “substantial evidence” standard results in courts giving deference to agency fact findings, because the court reviews the record to determine if it contains “substantial evidence” supporting the agency’s determination; and if it finds such “substantial evidence,” the court must uphold the agency’s determination even if there is “substantial evidence” supporting the opposite conclusion.

For example, when reviewing a legal challenge to an EIR under CEQA, courts review the record to determine if it contains “substantial evidence” supporting the EIR’s factual conclusions. If it does, any challenge to those factual conclusions must be rejected, even if there is also substantial evidence supporting the opposite factual conclusion. This is the usual application where the “substantial evidence” standard results in the courts giving deference to agencies’ factual conclusions. (See e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 [“In applying the substantial evidence standard, ‘the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.’ [citation] The Guidelines define ‘substantial evidence’ as ‘enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.’ (Guidelines, § 15384, subd. (a).)”

There are exceptions, however, to the usual application of the “substantial evidence” test. For instance, when reviewing a legal challenge to a Negative Declaration under CEQA, the courts

look at the record to see if it contains “substantial evidence” supporting the challenger’s contention that the project may have a significant adverse effect on the environment. If it does, the challenge to the Negative Declaration’s factual conclusions that the project will not have significant adverse effect must be sustained and the Negative Declaration overturned.

[W]hen the reviewing court: “perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency’s action is to be set aside because the agency abused its discretion by failing to proceed ‘in a manner required by law.’” [citation] More recently, the First District Court of Appeal summarized this standard of review, stating: “A court reviewing an agency’s decision not to prepare an EIR in the first instance must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact; in such a case, the agency has not proceeded as required by law. [Citation.] Stated another way, the question is one of law, i.e., ‘the sufficiency of the evidence to support a fair argument.’ [Citation.] Under this standard, *deference to the agency’s determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.* [Citation.]” (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318, 8 Cal.Rptr.2d 473, italics added.) Thus, the applicable standard of review appears to involve a question of law requiring a certain degree of independent review of the record, rather than the typical substantial evidence standard which usually results in great deference being given to the factual determinations of an agency. We agree with and adopt the First District’s *Sierra Club* standard of review as quoted above.

*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; CEQA Guideline § 15064(f)(1) [“[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.”])

This application of the “substantial evidence” standard results in the courts giving no deference to agencies’ factual conclusions. Instead, the courts give deference to the purposes and policies of the law that requires applying the substantial evidence standard. Under CEQA, the policy of the law is to favor preparation of an EIR, and the courts employ the substantial evidence standard toward that end. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, supplemented, (1975) 13 Cal.3d 486 [“[S]ince the preparation of an EIR is the key to environmental protection under CEQA, accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact[.]”])

Here, the policy of the Master Resolution is to require “disapproval” of the County General Plan if the record contains “substantial evidence” that any of the six criteria in section 8.02.010 are met. If there is such “substantial evidence,” FORA must disapprove the County General Plan

“consistency” with the Reuse Plan even if there is also substantial evidence supporting a conclusion that none of these criteria are met. Thus, this language in section 8.02.010 uses the term “substantial evidence” in a way that is markedly different than the way the term “substantial evidence” is used in the case law applying the “consistency” requirement of the Planning and Zoning Law.

Finally, Mr. Waltner’s analysis ignores the important fact that the FORA agreed to the specific procedural requirements in section 8.02.010 as part of an agreement to settle litigation. This new language would be unnecessary and meaningless if it did not alter the FORA’s obligations when making consistency determinations regarding local general plans.

**3. Application of the Legal Standard Governing FORA’s Determination of “Consistency” to the County General Plan’s Inconsistencies.**

In footnote 4 of his December 26, 2013, memorandum, Mr. Waltner suggests that the use of the word “and” to connect paragraphs (5) and (6) of subdivision (a) of section 8.02.010 of the Master Resolution may require the Board to find that all six criteria are met before it may disapprove the County General Plan. This suggestion is incorrect.

It is well-settled that the word “and” may have a disjunctive meaning where the context indicates that is the legislative intent. (See e.g., *People v. Skinner* (1985) 39 Cal.3d 765, 769 [“It is apparent from the language of section 25(b) that it was designed to eliminate the *Drew* test and to reinstate the prongs of the *M’Naghten* test. However, the section uses the conjunctive “and” instead of the disjunctive “or” to connect the two prongs. Read literally, therefore, section 25(b) would do more than reinstate the *M’Naghten* test. It would strip the insanity defense from an accused who, by reason of mental disease, is incapable of knowing that the act he was doing was wrong”].)

The courts will not enforce the literal language of a law where doing so would achieve an absurd result. (*Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 1003 [“The plain meaning of a statute has been disregarded when the plain meaning ‘would have inevitably resulted in ‘absurd consequences’ or frustrated the ‘manifest purposes’ of the legislation as a whole”]; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [“The apparent purpose of a statute will not be sacrificed to a literal construction”].)

A quick review of the six criteria in section 8.02.010 reveals that construing the word “and” as conjunctive rather than disjunctive would be the absurd. For example, construing the word “and” as conjunctive would allow local agencies to draft their general plan to comply with criteria (6) (i.e., “require or otherwise provide for implementation of the Fort Ord Habitat Management Plan”) but fail entirely to comply with all of the other criteria (which relate to fundamental policies and programs of the Reuse Plan such as density and intensity of land uses and which land uses are allowable) but the Board would be powerless to disapprove a local general plan’s consistency with the Reuse Plan.

Finally, the discussions in sections 1 and 2 above demonstrate that the inconsistencies between the County General Plan/Fort Ord Master Plan and the Reuse Plan are legally meaningful.



Therefore, there is “substantial evidence” that the County General Plan/Fort Ord Master Plan “is not in substantial conformance with applicable programs specified in the Reuse Plan.”

**4. The Issues Raised in Footnote 3 of Mr. Waltner’s December 26, 2013 Memorandum Are Not “Substantial Questions.”**

Footnote 3 of Mr. Waltner’s December 26, 2013, memorandum states:

There are also substantial questions as to whether the 1997 FORA Board could adopt provisions in the Master Resolution that conflict with the FORA Act, establish review standards binding on a reviewing Court, or limit the police power discretion of subsequent FORA Boards. These issues are reserved for subsequent elaboration if needed.

For the reasons discussed in this section, these issues do not affect the Board’s consistency determination.

**a. “Whether the 1997 FORA Board could adopt provisions in the Master Resolution that conflict with the FORA Act”**

This rhetorical question posed by Mr. Waltner assumes that 1997 FORA Board adopted provisions in the Master Resolution that conflict with the FORA Act. It did not. Therefore, the question posed is irrelevant.

The Board has broad discretion to adopt quasi-legislative rules to carry out its mandate to implement the Fort Ord Reuse Authority Act (Gov’t Code § 67650 et seq.). The Mater Resolution is such a rule.

The California Supreme Court has stated the fundamental rule governing this question as follows:

It is a “black letter” proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind — quasi-legislative rules — represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature’s lawmaking power. (See, e.g., 1 Davis & Pierce, *Administrative Law*, *supra*, § 6.3, at pp. 233–248; 1 Cooper, *State Administrative Law* (1965) Rule Making: Procedures, pp. 173–176; Bonfield, *State Administrative Rulemaking* (1986) Interpretive Rules, § 6.9.1, pp. 279–283; 9 Witkin, *Cal. Procedure* (4th ed. 1997) Administrative Proceedings, § 116, p. 1160 [collecting cases].) Because agencies granted such substantive rulemaking power are truly “making law,” their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the

lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

We summarized this characteristic of quasi-legislative rules in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65, 219 Cal.Rptr. 142, 707 P.2d 204 (*Wallace Berrie*): “ [I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is “within the scope of the authority conferred” [citation] and (2) is “reasonably necessary to effectuate the purpose of the statute” [citation].’ [Citation.] ‘These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity....’ [Citation.] Our inquiry necessarily is confined to the question whether the classification is ‘arbitrary, capricious or [without] reasonable or rational basis.’ (*Culligan, supra*, 17 Cal.3d at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593 [citations].)”

*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11.

Here, no one has suggested how the Master Resolution might arguably conflict with the Fort Ord Reuse Authority Act. The procedures and standards for determining consistency set forth in Mater Resolution sections 8.01.020 and 8.02.010 are “within the scope of the authority conferred” and “reasonably necessary to effectuate the purpose of the statute.”

The only exception to the highly deferential standard of review that courts use to review the validity of agency-adopted quasi-legislative rules is where the agency has allegedly adopted regulations that “alter or amend the statute or enlarge or impair its scope;” in which case “the standard of review is one of respectful nondeference.” *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022. The Board’s adoption, in 1997, of the mandatory procedural requirements in Master Resolution section 8.02.010 does not “alter or amend the statute or enlarge or impair its scope.”

This is especially true if one agrees with Mr. Waltner that “consistent” in section 67675.3 has the same meaning it has in the Planning and Zoning Law . This is because, as discussed above, under that statute agencies have broad discretion to craft their general plans in ways that either maximize their discretion or, by using mandatory language, to severely restrict their own discretion when determining “consistency.” (See e.g., *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup’rs* (1998) 62 Cal.App.4th 1332, 1341-42.) Here, the FORA Board in 1997 merely adopted mandatory requirements for determining the consistency of local general plans with the Base Reuse Plan.

As shown by the court in *Families Unafraid*, the courts will enforce these mandatory requirements. And as noted by the California Supreme Court in *Yamaha*, “quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to ‘make law,’ [ ] if authorized by the enabling legislation, bind this and other courts as firmly as statutes

themselves.” *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

**b. “Whether the 1997 FORA Board could establish review standards binding on a reviewing Court.”**

This question is fully answered, in the affirmative, by the last two paragraph in the preceding section.

**c. “Whether the 1997 FORA Board could limit the police power discretion of subsequent FORA Boards.”**

All legislation and quasi-legislative regulations limit the discretion of subsequent legislative bodies. That is their purpose. That is why we have a “government of laws, not men.” The process for subsequent Boards to change the limits on their discretion is simple: amend the regulations.

**5. Conclusion.**

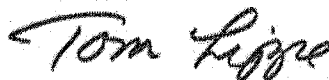
As described above, in drafting its new General Plan, the County altered or omitted many important, mandatory policies and programs of the Base Reuse Plan. These specific, targeted changes cannot be swept under the rug by pretending that the County General Plan incorporates the entire Base Reuse Plan “by reference.” The incorporation language of the County General Plan/Fort Ord Master Plan is very specific in this regard, and leaves no doubt that the County intended to, and did, alter or omit these Reuse Plan policies and programs.

These alterations and omissions fundamentally change the County’s legal obligations when it reviews future development entitlements, because the changes transform mandatory requirements of the Reuse Plan into discretionary decisions by the County.

As a result, there is substantial evidence that the County General Plan/Fort Ord Master Plan “is not in substantial conformance with applicable programs specified in the Reuse Plan” and must be disapproved under the mandatory procedural requirements of Master Resolution section 8.02.010.

Thank you for your attention to this matter.

Very truly yours,



Thomas N. Lippe

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**

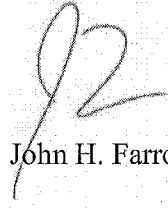
LandWatch joins the Sierra Club and Ms. Haines in opposing the proposed consistency determination. The County must modify its General Plan so that it faithfully reflects all applicable open space and conservation policies and programs.

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Thank you for the opportunity to provide these comments.

Yours sincerely,

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

A handwritten signature in black ink, appearing to read "JH Farrow", is positioned above the printed name. The signature is stylized and somewhat cursive.

John H. Farrow

JHF: am  
cc: Amy White



# **MEMORANDUM**

**OFFICE OF THE COUNTY COUNSEL  
COUNTY OF MONTEREY**

Memorandum of Law 2014-1

**DATE:** January 10, 2014  
**TO:** Honorable Chair and Members of the Board of Supervisors  
**FROM:** Leslie J. Girard, Chief Assistant County Counsel  
**SUBJECT:** Referral No. 2013.6 Re: General Plan and Fort Ord Reuse Plan Consistency

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## INTRODUCTION

By Referral No. 2013.6, dated November 5, 2013, Supervisor Parker requested our opinion with respect to a number of issues regarding the Fort Ord Reuse Authority's proposed consistency determination between the County's 2010 General Plan and the Fort Ord Reuse Plan. This memorandum responds to the Referral.

## QUESTIONS PRESENTED

1. Are any differences between the language of the policies set forth in the County's 2010 General Plan ("General Plan"), and specifically the Fort Ord Master Plan ("Master Plan"), and the language of the mitigation policies in Volume 4 of the adopted Fort Ord Reuse Plan ("Reuse Plan") significant such that the Master Plan policies must be revised in order for the Fort Ord Reuse Authority ("FORA") to certify the Master Plan as consistent with the Reuse Plan?
2. Does the County face liability to a developer for reliance on policies in the General Plan where the County has made a determination of consistency but FORA imposes additional requirements not set forth in the County's policies?
3. Do the oak woodland protection policies in the General Plan, state law, and County Code provide protection equivalent to those in Biological Resources Policy C-2 of the Reuse Plan?

## SHORT ANSWERS

1. No. While the printed language set forth in the Master Plan policies does not match word-for-word the language of the adopted Reuse Plan, the Master Plan incorporates the policies and programs of the Reuse Plan, and the language of

the Reuse Plan must therefore be considered in the interpretation and application of the Master Plan, and in the consistency determination process. The Fort Ord Reuse Authority Act ("Act"), and FORA's Master Resolution, allow FORA some flexibility in determining consistency based upon substantial compliance or substantial conformance supported by substantial evidence in the record. In our opinion substantial evidence currently in the record would support a consistency certification by FORA without revision of the Master Plan policies.

2. Generally, no. County liability in any given situation will depend on the specific facts of each case, and we will not speculate on liability in hypothetical scenarios. Generally, however, a developer will be on notice that the Reuse Plan applies to property within FORA's jurisdiction and, if a consistency determination is made by FORA, the County will have a number of defenses to any litigation concerning development requirements and should not face any liability.
3. Probably. The Act and Master Resolution only require "consistency" not "equivalency," and as more fully addressed in response to Question 1, above, we conclude that substantial evidence currently exists to support a determination that the Master Plan and Reuse Plan are consistent. The question of equivalency is different. The incorporation of the Reuse Plan into the Master Plan requires that, in the interpretation and application of the Master Plan the language of each be considered and harmonized to give effect. Accordingly the Master Plan, and other General Plan policies, should be applied to provide protection for oak woodlands consistent with that envisioned by the Reuse Plan, although County policies may provide greater protection.

#### BACKGROUND

On June 13, 1997, FORA certified a Final Environmental Impact Report (FEIR) for and adopted the Reuse Plan. The FEIR included some revisions to proposed policies and programs that serve as mitigation measures to reduce the impacts of the Reuse Plan.

On November 20, 2001, the County Board of Supervisors ("Board") amended the County's 1982 General Plan to include the "Monterey County Fort Ord General Plan Amendment" consisting of Reuse Plan policies applicable to Fort Ord territory within Monterey County. Pursuant to the requirement of state law, on January 18, 2002, FORA certified this amendment as consistent with the Reuse Plan and the Act, Government Code section 67650 - 67700.

On October 26, 2010, the Board adopted the General Plan which includes the Master Plan. By its terms, the Master Plan consists not only of the Master Plan set forth in Chapter 9-E of the General Plan but also incorporates the Greater Monterey Peninsula Area Plan and other generally applicable policies of the General Plan. Of special significance is that the Master Plan "incorporates all applicable policies and programs contained in the adopted Reuse Plan as they pertain to the subject area." The Master Plan also incorporates six specific elements of the Reuse Plan: Land Use, Circulation, Recreation and Open Space, Conservation, Noise and Safety. See Master Plan at

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pages FO-1 and 2. Copies of those pages are enclosed as Attachment 1. The Master Plan was based on and supplanted the 2001 Monterey County Fort Ord General Plan Amendment but included updates to reflect relevant actions since 2001 such as the East Garrison Specific Plan and certain land swap agreements, but also minor text changes in consultation with FORA staff.

On September 17, 2013, by the adoption of Resolution No. 13-307, the Board certified that the General Plan (including the Master Plan) was consistent with the Reuse Plan and would be implemented in conformity with the Act, and directed staff to submit the General Plan to FORA for its certification. The County's request for certification was originally scheduled to be heard in November of 2013, but was continued to the FORA's January 10, 2014 meeting. FORA staff has recommended that the FORA Board of Directors concur in the County's determination that the General Plan is consistent with the Reuse Plan. See *generally*, January 10, 2014, FORA agenda packet, Item 8b ("Agenda Packet"). Relevant excerpts of the Agenda Packet, specifically the staff report and attachments A – E, are enclosed as Attachment 2. Several comments have been received by FORA contending that the General Plan is not consistent with the Reuse Plan.

The Referral, a copy of which is enclosed as Attachment 3, was assigned on November 5, 2013. The Referral Description, included in an attachment, states:

It has been determined that the County General Plan policies for Fort Ord do not match the mitigation policies set forth in Volume 4 of the [Reuse Plan] because staff relied upon a draft of the [Reuse Plan] instead of the final version which was never printed and distributed by FORA. RMA staff have issued an opinion that, for a variety of reasons, the lack of consistency in the language is not significant and therefore does not need to be fixed.

While the Referral does not specifically identify who has made the referenced determination, a review of the Agenda Packet reveals that it is generally accepted that the printed language of the Master Plan does not match word-for-word the language of the Reuse Plan.<sup>1</sup>

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<sup>1</sup> We are informed by RMA staff that these differences date to the County's 2001 General Plan amendment, and FORA certification of that amendment in 2002, notwithstanding the differences. The Master Plan carried forward the previously certified language. We have not investigated nor have any comment on the question of whether the Reuse Plan was properly printed or distributed by FORA, as described in the Referral. That issue is not relevant to the analysis herein.

## ANALYSIS

### I. Applicable Legal Principles

#### A. Statutory Construction

This matter largely involves the interpretation and application of statutes and other legislative actions (state law, the General and Master Plans, and FORA's "Master Resolution"). With respect to the interpretation of statutes, the analysis "starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. . . . In determining intent [a court should] look first to the words themselves. . . . When the language is clear and unambiguous, there is no need for construction. . . . When the language is susceptible of more than one reasonable interpretation, however, [the court will] look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." "The provisions must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." *Golden State Homebuilding Associates v. City of Modesto*, 26 Cal. App. 4th 601, 608 (1994) (quoting *People v. Woodhead*, 43 Cal. 3d 1002, 1007-1008 (1987) and *DeYoung v. City of San Diego*, 147 Cal. App. 3d 11, 18 (1983)). "Significance, if possible, should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose, as 'the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory frameworks as a whole.' [Citation]." *Id.*

We are not to insert what has been omitted nor omit what has been inserted. Code of Civil Procedure § 1858. A specific intent controls a general intent if the two conflict. Code of Civil Procedure § 1859; Civil Code § 3534. Statutes should be construed so as to harmonize rather than raise conflicts. *Woodward v. Southern California Permanente Medical Group*, 171 Cal. App. 3d 656, 664 (1985). "Interpretation which gives effect is preferred to one which makes void." Civil Code § 3541.

Finally, "[a]n agency's interpretation of its governing statutes is entitled to great weight." *Ross v. California Coastal Commission*, 199 Cal. App. 4th 900, 922-923 (2011).

#### B. Consistency Determination

A determination that the General Plan is consistent with the Reuse Plan is a requirement of the Act, which established FORA and sets forth its powers and duties. Section 67675.2 of the Act requires a local agency with territory within Fort Ord to submit its general plan to FORA. The submittal is to be carried out by the adoption of a resolution certifying that the general plan "is intended to be carried out in a manner fully in conformity with [the Act]." As mentioned above, the County took such action by the

adoption of Resolution No. 13-307.<sup>2</sup>

Section 67675.3 of the Act addresses FORA's process for review of the General Plan; within 90 days after submittal of a request for certification FORA is to hold a noticed public meeting and either "certify" or refuse to certify that portion of the General Plan applicable to the Fort Ord territory (in this case the Master Plan). The FORA board "shall approve and certify" the Master Plan if it finds that it "meets the requirements of [the Act] and is consistent with the [Reuse Plan]." There is no elaboration on the phrase "consistent with" the Reuse Plan.

In 1997 FORA adopted, and has amended from time-to-time a "Master Resolution" generally setting forth its organization and the manner in which its duties are to be discharged. In relevant part, Chapter 8 addresses the process and standards for consistency determinations. A copy of Chapter 8 is enclosed as Attachment 4. Section 8.01.020 (f) of the Master Resolution (at page 43 of Attachment 4) makes clear that land use decisions based on the Master Plan may not be implemented if FORA has not or refused to certify that the Master Plan is consistent with the Reuse Plan.

Special counsel to FORA has provided several opinions regarding the interpretation of the consistency determination provisions of the Act and the Master Resolution; first briefly in a memorandum to the FORA board in July of 2013, and more substantively in memoranda dated September 3, 2013 and December 26, 2013. The September 2013 memorandum is enclosed as Attachment 5, and the December 2013 memorandum is included in the Agenda Packet (Attachment 2) at pages 51 – 53 of 190.

FORA's interpretation of its governing statutes is entitled to great weight (*Ross v. California Coastal Commission, supra*, 199 Cal. App. 4th at 922-923). In addition, we have independently reviewed the memoranda and concur in their conclusions. In relevant part, the memoranda conclude that the plain language of the Act, and the standards set forth in Chapter 8 of the Master Resolution, provide FORA with flexibility in determining consistency, and that the standard FORA may apply is one of "substantial compliance" or "substantial conformance" with respect to six enumerated factors. The FORA board is to make this determination on the basis of substantial evidence in the record.

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<sup>2</sup> As part of the action, the County determined that the General Plan was consistent with the Reuse Plan. That determination was not required by the Act, only the commitment that the General Plan would be carried out in full conformity with the Act. Due to the passage of time, it is too late for a legal challenge to the County's action in adopting Resolution 13-307, and the Referral does not directly ask for our opinion regarding its validity. Rather, the Referral essentially inquires of the ability of FORA to make a consistency determination in light of the differences in the language of the Master Plan and the Reuse Plan. We therefore do not specifically address or analyze the County's action, although for the same reasons set forth herein we believe the action to be valid.

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II. Any Differences In The Language Of The Master Plan And Reuse Plan Policies Are Not Significant Such That The Master Plan Policies Need To Be Revised In Order For FORA To Make A Consistency Determination

As described above, the printed language of the Master Plan does not track, word-for-word, the language of the Reuse Plan; however, the Master Plan specifically incorporates the programs and policies of the Reuse Plan. We note that in the hierarchy of legislative authority, it is clear that the Reuse Plan controls the application of the Master Plan, thus the requirement for a consistency determination and the prohibition on implementing Master Plan policies if found inconsistent with the Reuse Plan.

We concur with FORA special counsel that differences in language are not necessarily a basis to find inconsistency. If the legislature had intended to require identical language it could have directed that FORA determine that the Master Plan was "identical to" the Reuse Plan; however, the legislature chose to use the phrase "consistent with" which does not imply or require identicalness.

Discrepancies in the wording of a few policies, especially when viewed in the context of the rest of the Master Plan and its stated intent to be consistent with the Reuse Plan, are unlikely to cause a court to invalidate a consistency certification. In evaluating a project's consistency with a general plan, courts interpret consistency to mean that a project is "in agreement or harmony with the terms of the applicable plan, not in rigid conformity with every detail thereof." *San Francisco Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656, 678 (2002). "A project is consistent with the general plan "if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. A given project need not be in perfect conformity with each and every general plan policy." *Clover Valley Foundation v. City of Rocklin*, 197 Cal. App. 4th 200, 238 (2011). See also *Sequoyah Hills Homeowners' Association v. City of Oakland*, 23 Cal. App. 4th 704 (1993). The critical factors in evaluating consistency are "the nature of the policy and the nature of the inconsistency," with the outer limit being that general consistency cannot overcome specific, mandatory and fundamental inconsistencies with plan policies." *Clover Valley*, 197 Cal. App. 4th at 239. The differences in wording between the Master Plan and Reuse Plan are unlikely to be viewed as so fundamentally inconsistent as to justify a finding of inconsistency, especially because the Master Plan itself states that it incorporates the policies of the Reuse Plan.

We also note that a court is likely to defer to FORA's findings. An agency's determination of consistency "carries a strong presumption of regularity" and can be overturned by a court only if the agency abused its discretion. *Clover Valley*, 197 Cal App. 4th at 238. In evaluating abuse of discretion, the court must give a finding of consistency "great deference." *San Francisco Upholding the Downtown Plan*, 102 Cal. App. 4th at 679. A court can reverse a finding of consistency "only if, based on the evidence before the local governing body, . . . a reasonable person could not have reached the same conclusion." *Clover Valley*, 197 Cal. App. 4th at 238.

Harmonizing all the legislative enactments, with a view to effectuating the legislative intent, and giving significance to the incorporation into the Master Plan of the policies and programs of the Reuse Plan, it is our opinion that the language of the Master Plan need not be revised in order for FORA to make a consistency determination. Because the standard to be applied by FORA in making the determination is one of substantial compliance or conformance, based upon substantial evidence in the record, the differences in the language may be determined to be immaterial (or rather "not significant" as described in the Referral). That is clearly the opinion of County and FORA staff (as reflected in the FORA staff report included in Attachment 2), and in our view there is substantial evidence currently in the record, as well as the interpretation provided by special counsel to FORA, to support a consistency finding.<sup>3</sup>

We note that FORA has not yet acted on the request to certify, and the record is therefore not yet complete. Additional evidence may be submitted into the record which may bear on the question of substantial evidence. We do not presume to prejudge FORA's actions, but merely observe that, in our opinion, substantial evidence currently exists upon which a consistency determination may be made.<sup>4</sup>

### III. The County Has Very Little Risk Of Liability Exposure Due To Language Differences If FORA Makes The Consistency Certification

As set forth in the summary above, County liability in any given situation will depend upon specific facts, and we will generally not speculate on hypothetical situations. We note, however, that the Master Resolution requires that a notice be recorded on every property within Fort Ord putting an owner on notice that the Reuse Plan applies and any development will be subject to its terms, and by other restrictions imposed by the Master Resolution or other enactments by FORA. Section 8.01.010 (j), at page 42 of Attachment 4. Significantly, this notice will refer solely to the application of the Reuse Plan and other FORA enactments, and not a local agency's general plan or other land use policies.

In addition, if FORA makes the consistency certification, the County will have a variety of defenses to any action concerning the imposition of additional development requirements by FORA based on the Reuse Plan. In light of these considerations we believe the County has little or no exposure to liability should FORA make a consistency certification in light of any language differences.

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<sup>3</sup> The substantial evidence is more fully described in the FORA staff report and its attachments (Attachment 2).

<sup>4</sup> We also render no opinion on whether substantial evidence exists to support a denial of certification.

IV. The Oak Woodland Policies Of The Master Plan Should Provide Equivalent Protection As The Policies Of The Reuse Plan

The Referral requests "specific assessment of whether oak woodland policies in the County's General Plan, state law, and County Code provide equivalent protection as Biological Resources Policy C-2 of the Reuse Plan, as represented by RMA staff."

The Reuse Plan Biological Resources Policy C-2 has five subsidiary policies, but by way of example, the introduction to the policy provides: "The County shall preserve and enhance the woodland elements in the natural and built environments." Biological Resources Policy C-2 of the Master Plan provides: "The County shall encourage the preservation and enhancement of native oak woodland elements in the natural and built environments."

The Board referral correctly observes that the Master Plan policy wording is identical to the draft Reuse Plan policy language, whereas the final adopted Reuse Plan policy incorporates revisions from the Reuse Plan Final EIR. The five subsidiary policies under Master Plan Biological Resources Policy C-2 also reflect the draft Reuse Plan wording rather than the wording of the Reuse Plan Final EIR.

Similar to the analysis in Part II, above, we conclude that the Master Plan policy language must be interpreted and applied consistent with the Reuse Plan policy, and substantial evidence currently exists in the record that would support a consistency certification by FORA. The question of equivalency is different; however, and does not bear upon the ability of FORA to make a consistency certification.

In an October 23, 2013 letter from the County to FORA, County staff responded to public comments concerning the differences in the Biological Resources policy by noting that the policies would be implemented in a manner consistent with the Reuse Plan and that oak woodlands are also protected under other General Plan policies (e.g., LU Policies 1.6 and 1.7, OS Policies 5.3, 5.4, 5.10, 5.11, and 5.23), state law, and the County Code. A copy of that letter is included in the FORA Agenda Packet and enclosed as Attachment 6.

The referral questions whether the policies cited by staff provide equivalent protection as the Reuse Plan Biological Resources Policy C-2. We note that, on the one hand, it is obvious from the plain language that "shall preserve" is a stronger mandate than "shall encourage the preservation." On the other hand, one could argue that the explicit reference to "oak woodlands" in the County's plan is stronger protection for oak woodlands than the more vague reference to "woodland" in the final Reuse Plan language. We also have noted that the Master Plan incorporates all applicable policies and programs contained in the Reuse Plan. This language provides a basis for the County to interpret and apply the Master Plan policy as having the same meaning as the Reuse Plan's "shall preserve" language.

The Master Plan also explicitly incorporates General Plan policies and directs that the more restrictive policy will apply in case of a conflict or difference between a policy of

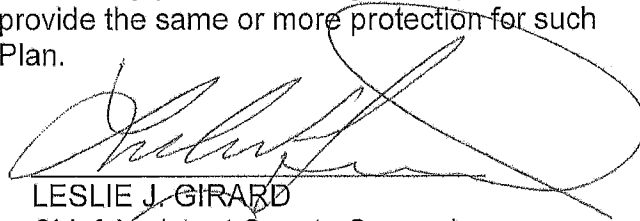


the Master Plan and General Plan. See Attachment 1 at page FO-1. For example, General Plan Policy OS 5.3 provides that “[d]evelopment shall be carefully planned to provide for the conservation and maintenance of critical habitat,” which could be construed as being as restrictive as Reuse Plan Biological Resources Policy C-2. State law (Public Resources Code section 21083.4) and General Plan policy OS-5.23 require feasible mitigation for loss of oak woodlands; arguably, mitigating loss of oak woodlands might be considered less protective than preserving them in the first place, but to the extent mitigation might consist of conservation easements and direct replacement at more than 1:1 ratio, the mitigation requirements may be quite protective.

Finally, the overall thrust of general plan goals, objectives, and policies is often more determinative of consistency than the exact words in a particular policy. Even if the County plan were to use the exact language of the Reuse Plan (e.g., “shall preserve”), the County would legally have some flexibility in interpretation and application of the policy within the context of the overall objectives and policies of the Master Plan and General Plan. As discussed earlier, case law holds that “a project is consistent with the general plan if considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. A given project need not be in perfect conformity with each and every general plan policy.” *Clover Valley Foundation v. City of Rocklin*, 197 Cal. App. 4th at 238. For example, in *Clover Valley*, the city of Rocklin’s general plan required all land within 50 feet from the banks of streams to be in an open space designation. The city approved a road which made two limited encroachments into the 50-foot buffer. The general plan policy was clear and specific, yet the city found that the road’s intrusion into the buffer was consistent with the policy based on the city’s historical practice and its determination that moving the road outside the buffer would result in additional hillside grading and loss of oak trees. Notwithstanding the specific mandate of the city’s general plan, the court upheld the city’s finding of general plan consistency, reasoning that allowing the encroachment into the open space buffer furthered the general plan’s policies, whereas “strictly enforcing the buffer” would “defeat[ ] its purposes and likely conflict[ ] with other general plan policies.” *Id.* at 239. As this case illustrates, the application of general plan policy to a particular project depends on the facts and circumstances of the project, interpretation of policy by the decision-maker, and application of the policy within the overall context of the goals, objectives, and policies of the applicable plan.

CONCLUSION

The differences in language between the Master Plan and Reuse Plan do not preclude FORA from certifying the Master Plan as consistent with the Reuse Plan, and substantial evidence currently exists in the record to support a certification. The County faces minimal or no liability if FORA certifies consistency. Finally, although equivalency is not required, the Master Plan and other County policies relating to the preservation of oak woodlands, and state law, should provide the same or more protection for such woodlands as described in the Reuse Plan.



LESLIE J. GIRARD  
Chief Assistant County Counsel

LJG:WSS:ljb

Attachments:

1. Fort Ord Master Plan pages FO-1, FO-2
2. FORA Agenda Pack excerpts, January 10, 2013
3. Referral 2013.16
4. FORA Master Resolution Chapter 8
5. FORA Special Counsel opinion, September 9, 2013
6. Benny Young letter to FORA, October 23, 2013

cc: Lew Bauman, CAO

Benny Young, RMA Director  
Carl Holm, RMA Deputy Director  
Mike Novo, Planning Director

# **Link to large attachments - Item 8a Attachment F.8**

***Link to attachments 1-6 to Chief Assistant  
County Counsel Leslie Girard's January 10,  
2014 memorandum addressed to the  
Monterey County Board of Supervisors***

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<http://fora.org/Board/2014/Packet/Additional/031414Item8a-Attach1-6.pdf>

# JANE HAINES

February 10, 2014

Michael Houlemard, Director  
Fort Ord Reuse Authority  
920 Second Avenue  
Marina, CA 93933

via email to michael@fora.org

Re: Board packet for February 13, 2014

Dear Michael:

This is my third communication to FORA pertaining to the confusing manner in which FORA is presenting the public's letters on the topic of consistency between the Monterey County 2010 General Plan and the 1997 Base Reuse Plan. I respect FORA's integrity, so I don't think FORA is deliberately attempting to confuse the issues. However, FORA has presented the letters in a disordered way at least five times in the past month, so I suggest that FORA place a higher priority on fairly presenting the public's comments:

- On Tuesday, Feb. 4, I left a voice message for a FORA staff member explaining that the packet for the Feb. 5 Administrative and Executive Committees misplaced the attachment to my Dec. 30 letter. Rather than having my attachment follow my letter, my attachment was made the attachment for another, unrelated letter. I requested correction of the error.
- On Thursday, Feb. 6, I called FORA again and asked whether my request had been taken care of. I was told that my request had been forwarded to the staff person in charge of placing letters into the packet.
- I am sending this Feb. 10 letter because when I reviewed the packet that FORA posted on Feb. 7, I found more errors. Specifically, the attachment to my Dec. 30 letter is now separated from my Dec.30 letter by an attachment that should follow Sierra Club's Oct. 10 letter. Additionally, a second attachment to Sierra Club's Oct. 10 letter is wholly missing from the packet.
- After seeing the confusing presentation of my and Sierra Club's letters in both the Feb. 5 Administrative Committee packet and the Feb. 7 Board packet, I reviewed the Jan. 2 Administrative Committee packet and discovered that it wholly omits two attachments to the Sierra Club's Oct. 10 letter. Thereafter, I reviewed the Jan. 10 Board packet and discovered

that my Dec. 30 letter has an erroneous attachment and Sierra Club's Oct. 10 letter lacks the same attachment that incorrectly follows my Dec. 30 letter.

FORA's skewed presentation of our letters distorts our letters' arguments. As FORA has presented them, our letters refer to attachments that are not attached and have attachments that are irrelevant to our arguments.

I request that FORA correct the errors and promptly notify Board members, the public and any staff members who might have already concluded that my letters and letters from the Sierra Club don't make sense. Please explain that the manner in which FORA presented our letters over the past month is not the way we submitted those letters. I request the following corrections:

1. Move pages 48 and 49 in the Feb. 7 packet to follow page 39.
2. Insert into the packet the important Sept. 16 letter from the Sierra Club to Monterey County which is referenced in Sierra Club's letter on page 37 of the Feb. 7 packet. That letter is wholly missing from the Feb. 7 packet.
3. Move pages 48 and 49 so that they do not follow my Dec. 30 letter which ends on page 47; that letter's only attachment begins on page 50. Pages 48 and 49 have nothing to do with my Dec. 30 letter. The attachment that begins at page 50 should follow my letter which ends on page 47 in order for the reader to understand my Dec. 30 letter.
4. The Jan. 10 memorandum from Asst. County Counsel Leslie Girard to the Bd. of Supervisors was distributed by FORA at the Jan. 10 FORA meeting. It is therefore part of the administrative record and should be included in the revised packet.
5. I request that this (my) Feb. 10 letter also be included in the revised packet.

I am emailing this request to you prior to 8 a.m. on Monday, Feb. 10. I request that the above 5 steps be completed as early as possible today to give FORA Board members and the public sufficient time to read correct versions of my and Sierra Club's letters prior to the Feb. 13 Board meeting. I further request that an explanation accompany the corrected version, explaining to anyone who would otherwise rely on the Feb. 7 or earlier versions of our letters, that those letters and their attachments were mis-assembled by FORA, not by me and not by Sierra Club. I am making this request on behalf of myself, not on behalf of Sierra Club. I make it on my own behalf as a member of the public who values accurately informed public decision-making.

Sincerely,

Jane Haines

copy: [swaltz@csumb.org](mailto:swaltz@csumb.org), [awhite@mclw.org](mailto:awhite@mclw.org), [lippelaw@sonic.net](mailto:lippelaw@sonic.net), [jfarrow@mrwolfeassociates.com](mailto:jfarrow@mrwolfeassociates.com)

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February 12, 2014

Board of Directors  
Fort Ord Reuse Authority  
920 2nd Avenue  
Marina, CA 93933

**Re: February 13, 2104 Meeting, Agenda Item # 8a: Certification of the 2010 Monterey County General Plan**

Dear Chairperson Edelen and Members of the Board:

This office represents the Ventana Chapter of the Sierra Club with respect to the Fort Ord Reuse Authority's ("FORA") pending certification of the 2010 Monterey County General Plan pursuant to Government Code § 67675.3 and FORA Master Resolution sections 8.01.020 and 8.02.010. Board staff have prepared two alternative certification resolutions (Board Packet, Attachments A and E).

**1. The Sierra Club objects to adoption of the draft resolution at Attachment A.**

Attachment A would certify the General Plan as it stands today, without requiring any changes. The Sierra Club continues to object to this course of action for all the reasons set forth in its previous comments letters, including my January 8, 2014, letter.

In drafting its new General Plan, the County altered or omitted many important, mandatory policies and programs of the Base Reuse Plan. These specific, targeted changes cannot be swept under the rug by pretending that the County General Plan incorporates the entire Base Reuse Plan "by reference." The incorporation language of the County General Plan/Fort Ord Master Plan is very specific in this regard, and leaves no doubt that the County intended to, and did, alter or omit these Reuse Plan policies and programs. These alterations and omissions fundamentally change the County's legal obligations when it reviews future development entitlements, because the changes transform mandatory requirements of the Reuse Plan into discretionary decisions by the County. As a result, there is substantial evidence that the County General Plan/Fort Ord Master Plan "is not in substantial conformance with applicable programs specified in the Reuse Plan" and must be disapproved under the mandatory procedural requirements of Master Resolution section 8.02.010.

**2. The Sierra Club objects to Recital K of the draft resolution at Attachment E.**

The Sierra Club appreciates that Board staff prepared an alternative certification resolution (Board Packet, Attachment E) that conditions final certification of the County General Plan on the County's adoption of certain amendments to its General Plan. The Club also appreciates that Board staff have amended this alternative certification resolution in certain respects in response to my

January 8, 2014, letter. As a result, if the Board limits its options to the adoption of either Attachment A or Attachment E, the Sierra Club requests that the Board adopt Attachment E.

However, the Sierra Club also objects to the adoption of Attachment E because it misstates the applicable standard for the Board's certification of local general plans. Recital K of Attachment E states:

The term "consistency" is defined in the General Plan Guidelines adopted by the State Office of Planning and Research as follows: "An action, program or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." This includes compliance with required procedures such as section 8.020.010 of the FORA Master Resolution.

The first sentence of this recital states a test developed and adopted by the State Office of Planning and Research ("OPR") for determining the consistency of actions, programs or projects with local general plans. This test is inapplicable to FORA's determination of the consistency of the local general plans with the Fort Order Reuse Plan for many reasons discussed in my January 8, 2014, letter. It is also inapplicable for the following additional reasons.

First, OPR's General Plan Guidelines do not purport to establish a test for determining the consistency of local general plans with military base reuse plans, either in general (i.e., under the Military Base Reuse Authority Act at Government Code section 67840.2(c))<sup>1</sup> or specifically with respect to the Fort Ord Reuse Plan (i.e., under the Fort Ord Reuse Authority Act at Government Code section 67675.3 (c)).<sup>2</sup>

Second, the State Office of Planning and Research ("OPR") simply has no authority to adopt guidelines for determining the consistency of local general plans with military base reuse plans. OPR's authority to issue the General Plan Guidelines stems from Government Code section 65040.2. This section directs OPR to develop and adopt guidelines for several "advisory" purposes. (Section 65040.2, subdivision (c).) The primary directive of section 65040.2 is to "develop and adopt

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<sup>1</sup> "The board shall approve and certify the portions of a general plan or amended general plan applicable to the territory of the base, or any amendments thereto, if the board finds that the portions of the general plan or amended general plan applicable to the territory of the base meet the requirements of this title, and are consistent with the reuse plan." (Government Code § 67840.2(c).)

<sup>2</sup> "The board shall approve and certify the portions of a general plan or amended general plan applicable to the territory of Fort Ord, or any amendments thereto, if the board finds that the portions of the general plan or amended general plan applicable to the territory of Fort Ord meets the requirements of this title, and is consistent with the Fort Ord Reuse Plan." (Government Code § 67675.3 (c).)

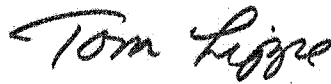
guidelines for the preparation of and the content of the mandatory elements required in city and county general plans.” (Section 65040.2, subdivision (a). ) Section 65040.2 also directs that OPR’s guidelines “shall contain advice including recommendations for best practices to allow for collaborative land use planning of adjacent civilian and military lands and facilities,” *but these directives pertain only to active, not decommissioned, military lands and bases.* (Section 65040.2, subdivisions (e) and (f).)

Nothing in Government Code section 65040.2 authorizes OPR to develop and adopt guidelines defining the term “consistency” for determining the consistency of local general plans with military base reuse plans, either in general under the Military Base Reuse Authority Act or with respect to Fort Ord under the Fort Ord Reuse Authority Act.<sup>3</sup> Instead, the Legislature has delegated the task of developing reuse plans to govern land use planning for decommissioned military bases exclusively to the local reuse authorities established pursuant to the Military Base Reuse Authority Act (see Government Code section 67840), or in the case of Fort Ord, pursuant to the Fort Ord Reuse Authority Act (see Government Code section 67675).

Therefore, the Sierra Club requests that the Board adopt the resolution at Attachment E after revising it to delete Recital K.

Thank you for your attention to this matter.

Very truly yours,



Thomas N. Lippe

C002 021214 to FORA.wpd

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<sup>3</sup> In fact, nothing in Government Code section 65040.2 authorizes OPR to develop and adopt guidelines defining the term “consistency” even for purposes of determining the consistency of actions, programs or projects with local general plans.



Michael W. Stamp  
Molly Erickson  
Olga Mikheeva  
Jennifer McNary

**STAMP | ERICKSON**  
Attorneys at Law

Attachment F.11 to Item 8a  
FORA Board Meeting, 3/14/14  
479 F  
Monterey, California 93940  
T: (831) 373-1214  
F: (831) 373-0242

February 13, 2014

Jerry Edelen, Chair  
and Members of the Board of Directors  
Fort Ord Reuse Authority  
920 2<sup>nd</sup> Ave., Suite A  
Marina, CA 93933

Subject: February 13, 2014 FORA Board Agenda Item 8a – Consider Certification of 2010 Monterey County General Plan as Consistent with the 1997 Fort Ord Reuse Plan

Dear Chair Edelen and Members of the Board of Directors:

This Office represents Keep Fort Ord Wild and The Open Monterey Project, who object to a finding by FORA of consistency between the Monterey County General Plan and the Fort Ord Master Plan and the Fort Ord Reuse Plan. We presume that the County has provided you with our comment letter submitted last year. However, we have not seen the issues raised in that letter addressed in the FORA board packet to date. We again raise all the same objections to FORA that Keep Fort Ord Wild raised to the County. This letter incorporates the attached letter and all of its objections in its entirety as if fully set forth herein.

The FORA staff position – that the County plans substantially conform with the Reuse Plan – is not accurate. The omission of required Reuse Plan plans, policies and programs from the County plans means that the County plans do not substantially conform with the Reuse Plan.

County General Plan Policies Regarding Water Are Inconsistent With the Fort Ord Reuse Plan

Keep Fort Ord Wild is particularly concerned about the inconsistency between the County plans and the Reuse Plan with regard to water. Potable water supply in Fort Ord is very limited. FORA does not know how much longer the supply will last.

"The general plan is atop the hierarchy of local government law regulating land use. It has been aptly analogized to 'a constitution for all future developments.'" "*Concerned Citizens of Calaveras County v. Board of Supervisors of Calaveras County* (1985) 166 Cal.App.3d 90, 97, quoting *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183.)

The General Plan is inconsistent with the Reuse Plan with regard to water supply. Specifically, the Fort Ord Reuse Plan requires the County to do as follows:

Adoption of appropriate land use regulations that will ensure that development entitlements will not be approved until there is verification of an assured long-term water supply for such development entitlements.

In response, the County's claim of consistency as to its General Plan is this:

See Public Services Element Policies PS-3.1 and PS-3.2 (pgs. PS-8 and PS-9), the Fort Ord Master Plan Hydrology and Water Quality Program B-1.6 (p. FO-39), and the Agreement between FORA and the Monterey County Water Resources Agency providing rights to a limited amount of groundwater, the use of which is allocated by resolution of the FORA Board and, in turn, the County.

(Reso. No. 13-307, p. 10; Reso. No 13-290, Ex. 1, p. 10.)

The County claims do not support a finding of consistency by the FORA Board. The County policies that the County claims fulfill and are consistent with the Reuse Plan are as follows:

General Plan Policy PS-3.1 says this:

Except as specifically set forth below, new development for which a discretionary permit is required, and that will use or require the use of water, shall be prohibited without proof, based on specific findings and supported by evidence, that there is a long-term, sustainable water supply, both in quality and quantity to serve the development.

This requirement shall not apply to:

- a. the first single family dwelling and non-habitable accessory uses on an existing lot of record; or
- b. specified development (a list to be developed by ordinance) designed to provide: a) public infrastructure orb) private infrastructure that provides critical or necessary services to the public, and that will have a minor or insubstantial net use of water (e.g. water facilities, wastewater treatment facilities, road construction projects, recycling or solid waste transfer facilities); or
- c. development related to agricultural land uses within Zone 2C of the Salinas Valley groundwater basin, provided the

County prepare a report to the Board of Supervisors every five (5) years for Zone 2C examining the degree to which:

- 1) total Water demand for all uses predicted in the General Plan EIR for the year 2030 will be reached;
- 2) groundwater elevations and the seawater intrusion boundary have changed since the prior reporting period; and
- 3) other sources of water supply are available.

If, following the periodic report, the Board finds, based upon substantial evidence in the record, that:

- the total water demand for all uses in Zone 2C in 2030 as predicted in the General Plan EIR is likely to be exceeded; or
  - it is reasonably foreseeable that the total water demand for all uses in Zone 2C in 2030 would result in one or more of the following in Zone 2C in 2030: declining groundwater elevations, further seawater intrusion, increased substantial adverse impacts on aquatic species, or interference with existing wells, then the County shall initiate a General Plan amendment process to consider removing this agricultural exception in Zone 2C. Development under this agricultural exception shall be subject to all other policies of the General Plan and applicable Area Plan; or
- d. development in Zone 2C for which the decision maker makes a finding, supported by substantial evidence in the record, that the:
- 1) development is in a Community Area or Rural Center and is otherwise consistent with the policies applicable thereto;
  - 2) relevant groundwater basin has sufficient fresh water in storage to meet all projected demand in the basin for a period of 75 years; and,
  - 3) benefits of the proposed development clearly outweigh any adverse impact to the groundwater basin.

General Plan Policy PS.3.2 says this:

Specific criteria for proof of a Long Term Sustainable Water Supply and an Adequate Water Supply System for new development requiring a discretionary permit, including but not limited to residential or commercial subdivisions, shall be developed by ordinance with the advice of the General Manager of the Water Resources Agency and the Director of

the Environmental Health Bureau. A determination of a Long Term Sustainable Water Supply shall be made upon the advice of the General Manager of the Water Resources Agency. The following factors shall be used in developing the criteria for proof of a long term sustainable water supply and an adequate water supply system:

- a. Water quality;
- b. Authorized production capacity of a facility operating pursuant to a permit from a regulatory agency, production capability, and any adverse effect on the economic extraction of water or other effect on wells in the immediate vicinity, including recovery rates;
- c. Technical, managerial, and financial capability of the water purveyor or water system operator;
- d. The source of the water supply and the nature of the right(s) to water from the source;
- e. Cumulative impacts of existing and projected future demand for water from the source, and the ability to reverse trends contributing to an overdraft condition or otherwise affecting supply; and
- f. Effects of additional extraction or diversion of water on the environment including on in-stream flows necessary to support riparian vegetation, wetlands, fish or other aquatic life, and the migration potential for steelhead, for the purpose of minimizing impacts on the environment and to those resources and species.
- g. Completion and operation of new projects, or implementation of best practices, to renew or sustain aquifer or basin functions.

The hauling of water shall not be a factor nor a criterion for the proof of a long term sustainable water supply.

Fort Ord Master Plan Hydrology and Water Quality Program B-1.6 says this:

The County shall review and monitor development entitlements to ensure that a long-term water supply is available for the proposed development.

None of these policies are consistent with the Fort Ord Reuse Plan requirement as stated at the top of page 2 of this letter.

General Plan Policy PS-3.1 provides a rebuttable presumption of long term sustainable water supplies in Zone 2C, which includes all of developable Fort Ord.

Jerry Edelen, Chair  
and Members of the Board of Directors  
Fort Ord Reuse Authority  
February 13, 2013  
Page 5

Nothing in the General Plan states how the presumption can be rebutted and on what standard or basis. To date, the County has never found this presumption to be rebutted, or stated how it could be rebutted. This means that new development such as Monterey Downs can be expected to argue that Monterey Downs does not need to prove water supply, and does not need to limit itself to water demand, because Monterey Downs is subject to the PS-3.1 presumption of long-term sustainable water supply.

The County's purported reliance on the Agreement between FORA and MCWRA is not appropriate and is not material to the consistency determination, because the Agreement is at a much lower level than the General Plan and the Fort Ord Master Plan. As a general rule, agreements are subject to a general plan and area plan, not the other way around. As stated above, "The general plan is atop the hierarchy of local government law regulating land use. It has been aptly analogized to 'a constitution for all future developments.'" ( *Concerned Citizens of Calaveras County v. Board of Supervisors of Calaveras County* (1985) 166 Cal.App.3d 90, 97, quoting *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183.)

Based on this inconsistency alone, the FORA Board should find the County plan to be inconsistent with the FORA Reuse Plan. FORA defines "Reuse Plan" to include the FORA Master Resolution. (Master Resolution, § 1.01.050(a).)

Request: Because the language in the Fort Ord Master Plan Hydrology and Water Quality Program B-1.6 is so general, developers like Monterey Downs can be expected to argue that the General Plan Policy PS-3.1 presumption satisfies the Program B-1.6 language. As a result, if the argument is successful, it is possible that developments will be approved that exceed the truly available wet water, as opposed to a theoretical paper allocation. FORA should prevent that, and should ensure that the two plans are truly consistent. FORA should direct the County to modify the General Plan to state that General Plan policy PS-3.1 does not apply to Fort Ord, and the Fort Ord Master Plan should also make it clear that due to Fort Ord water restrictions that policy PS-3.1 does not apply within Fort Ord.

The Reuse Plan States that Water Is a "Central Resource Constraint" at Fort Ord.  
The County Plan Is Inconsistent with the Reuse Plan.

The Reuse Plan's lengthy section on "Management of Water Supply" states:

Water supply is a central resource constraint for  
development of Fort Ord. Insuring that development does

not exceed the available water supply and safe yield is a major component of the DRMP.<sup>1</sup>

Fort Ord's water supply is severely compromised due to seawater intrusion, as well as groundwater contamination from the former military use.

The Reuse Plan calls water a "scarce resource." The Reuse Plan presents measures that "ensure that development is managed within this resource constraint." The Reuse Plan requires:

- "allocation of the existing potable water supply," with mandatory implementation procedures and an annual report,
- a five-year review, and
- water allocation monitoring.<sup>2</sup>

Pursuant to the Reuse Plan, FORA is required to "monitor" the availability of water to "insure" that water consumption "will not exceed" the water supply within the former Fort Ord.<sup>3</sup> Hydrology and Water Quality Policy B-2 requires the County to "condition approval of development plans on verification of an assured long-term water supply for the projects." The County policy PS-3.1 violates Reuse Policy B-2.

The jurisdiction's general plan is required to be in harmony with the Reuse Plan. That is a fundamental purpose of the consistency determination. The County General Plan and the Reuse Plan are not in harmony, and are facially inconsistent. If there is a conflict between the County General Plan and the Reuse Plan, as exists here, there is no requirement that the more restrictive plan prevails.

The County General Plan presumption of long term sustainable water supply would apply to Monterey Downs. As proposed, the Monterey Downs project will require some 825 acre feet per year or more, according to public records. 825 acre feet would far exceed the County's "allocation" at Fort Ord. Under the County General Plan, the County simply will presume that the water exists to serve Monterey Downs. That is not consistent with the Reuse Plan or the very real water supply constraints at Fort Ord.

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<sup>1</sup> Fort Ord Reuse Plan: 3.11.5.4, "Management of Water Supply"; Hydrology and Water Quality Policy B-2.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

Fort Ord is supplied by water from a "small" aquifer.<sup>4</sup> FORA is aware that the aquifer is limited in size, and is not being actively recharged. FORA does not know when the aquifer is going to run out of water. FORA has never established the safe yield of the aquifer. FORA has done nothing to address the steadily dwindling small water supply. FORA has never found that Fort Ord has a "long term sustainable water supply" nor has FORA even considered the issue.

The County General Plan Policy PS 3.1 "presumption" of a long term sustainable water supply for all County development on the former Fort Ord places at risk the water supply for the other jurisdictions, including existing developments like California State University Monterey Bay, and the commercial developments along Imjin Road. At particular risk is the entire City of Marina, whose residents and businesses rely on water from the same water source: a "small" and unsustainable aquifer pumped by Marina Coast Water District.

As stated above, in September 2013, Keep Fort Ord Wild submitted detailed comments and exhibits on this point to the County. The County should have provided those comments to you as part of its submission packet. Out of an abundance of caution, KFOW attached that letter and enclosures here, and urges FORA to review the comments and issues carefully. In this letter to FORA, KFOW reiterates and incorporates each and every one of its concerns and comments that were raised in the September 2013 KFOW letter to the County. We ask FORA to review the letter and its enclosures prior to taking any position on the consistency determination for the County plans.

#### FORA Executive Officer Cannot Act as a Legislative Authority

Resolution 14-xx (Attachment E, item 5) provides that the General Plan is denied by the FORA Board, and that the General Plan will be certified if the Board's suggested modifications are adopted and transmitted to the FORA Board by the County, and the Executive Officer "confirms such modifications have been made." In other words, FORA's Executive Officer would be empowered to be part of the legislative decision-making process in determining whether or not the General Plan shall be deemed certified. The resolution's proposal to give such legislative authority to the Executive Officer is an impermissible delegation of legislative authority in violation of the Article III, section 3 of the California Constitution, which provides that "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." An action by FORA to determine whether or not the General Plan shall

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<sup>4</sup> WRIME, Marina Coast Water District Deep Aquifer Study, 2003; United States Geological Services, 2002.

be deemed consistent should be an entirely legislative process of the FORA board, so that FORA's constituents (the public) can evaluate, monitor, and respond to FORA's action. Allowing the Executive Officer to play a decision-making role in that process improperly circumvents the public process and shortchanges the public.

An additional reason of why Resolution 14-XX (Attachment A) is improper is because it is contrary to the CEQA principle proscribing delegation of certain functions such as assessment of environmental impact. (CEQA Guidelines, § 15025(b).) Delegation is inconsistent with the purpose of the review and consideration function because it insulates the members of the FORA Board from public awareness and possible reaction to the individual members' environmental and economic values. The Executive Officer should not be given the responsibility to participate in determining whether modifications have been made (and consequently participate in determining whether the General Plan should be certified) but he does not have the authority to approve or disapprove the certification. The Executive Officer is not the decision maker.

#### The Language Is Different Between the County Plans and the Reuse Plan

The County has admitted that "the language is different" between the County plans and the Fort Ord Reuse Plan. (October 23, 2013 County letter, p. 1.) The County argues that "there is significant history in the Fort Ord Reuse Plan, and in the FEIR that shape and guide how the policies of the FOMP are interpreted and applied." The County's argument is nonsensical. The County does not explain what the County means by "significant history in the Fort Ord Reuse Plan" or how the "history" modifies the adopted written plans, if at all, or its basis for the claims.

#### Other Concerns

The Veterans cemetery is in the County plans, but is not in the Reuse Plan. The addition of a Veterans cemetery is not consistent with the Reuse Plan plans, policies and maps. The change of land use to a Veterans cemetery has not been subjected to environmental review by any person.

For determination of consistency, FORA should use only the original Reuse Plan, not the "republished" 2001 version. The 2001 version was never adopted and has not have environmental review. The County's public records show that the County relied on the unadopted "republished" 2001 Reuse plan materials when the County prepared its Fort Ord Master Plan.

The General Plan and Fort Ord Master Plan is inconsistent with the Fort Ord Reuse Authority's Development and Resource Management Plan (DRMP). In



Jerry Edelen, Chair  
and Members of the Board of Directors  
Fort Ord Reuse Authority  
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particular, we draw your attention to the policies of the DRMP. We attach the DRMP in its entirety, exactly as provided on the FORA website (pp. 127-136).

#### Proposed Findings

The proposed findings presented to the FORA Board are simply inaccurate and do not correctly present or apply the applicable law and regulations.

#### Procedural Objections


At its October 11, 2013 and November 8, 2013 meetings, the consistency agenda item was not heard. Instead, at the October meeting Chair Edelen announced the item and immediately stated that the matter would be continued in order for FORA staff to work on the letters received. He called for a motion to continue, and after very brief procedural discussion by the Board, the Board unanimously passed the motion to continue the item. In November 2013, the Board hearing was continued due to lack of proper public notice pursuant to the FORA Master Resolution. In January 2014, the item was agendaized under "old business" on the FORA agenda. We question why this item was agendaized under "old business," because at the October 11 and November 8 meetings this item was not opened for public comment or presentation.

We have observed that for items called "old business", the FORA Board does not consistently open the item for a public hearing. For example, at the October 11 2013 FORA Board meeting, Board Chair Edelen called the "old business" item for Mr. Bowden's contract for legal services, then Chair Edelen immediately called for a Board vote. The Board vote took place immediately without any discussion, and without opening the item to public comment. No mention was made of a public hearing, and no earlier public hearing was referenced. The public simply was shut out of the process. The second meeting should also be open for public comment.

A consistency determination is a project subject to CEQA. The consistency determination is a discretionary act by the FORA Board. That act has not been evaluated pursuant to CEQA.

Keep Fort Ord Wild and The Open Monterey Project join in all other comments and concerns submitted to FORA by other groups, agencies, and individuals. We urge you to consider these comments carefully. Thank you.

Very truly yours,



Molly Erickson

Attachments (on CD):

- A. FORA Master Resolution, sections 8.02.010, 8.02.020(j)(7)
- B. Fort Ord Reuse Plan, 3.11.5.4, "Management of Water Supply" and Hydrology and Water Quality Policy B-2
- C. Monterey County General Plan policy PS-3.1
- D. KFOR letter to County Board of Supervisors, September 17, 2013 with attachments, re County consistency determination (presented to the County on CD)
- E. Monterey Downs Administrative Draft Environmental Impact Report
- F. Eastside Parkway 90% Improvement Plans
- G. October 7, 2013 letter from FORA
- H. EA/IS for The General Jim Moore Boulevard and Eucalyptus Road Improvement Project
- I. Development and Resource Management Plan excerpts
- J. History of FORA's illegal changes to Chapter 8 of the Master Resolution, specifically over 100 changes of the word "shall" to the word "may"
- K. FORA Annual Report FY 2012-213, pages 1-16
- L. August 26, 2013 LandWatch letter to County Board of Supervisors
- M. Zone 2C Map
- N. January 7, 2014 KSBW Report

# **Link to large attachments - Item 8a Attachment F.11**

***Link to attachments A to N and powerpoint  
attached to Molly Erickson's February 13,  
2014 letter addressed to the FORA Board of  
Directors***

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<http://fora.org/brd031414.html>