

FORT ORD REUSE AUTHORITY BOARD REPORT

BUSINESS ITEMS

Subject:	Authorize Board Chair to Execute Letter of Unconditional Commitment to the City of Marina, per Government Code §54960.2, to Cease, Desist from, and Not Repeat Challenged June 20, 2014 Board Action	
Meeting Date:	July 11, 2014	ACTION
Agenda Number:	8g	

RECOMMENDATION(S):

Authorize Board Chair to Execute Letter of Unconditional Commitment to the City of Marina, per Government Code §54960.2, to Cease, Desist from, and Not Repeat Challenged June 20, 2014 Board Action.

BACKGROUND/DISCUSSION:

During the May 30, 2014 special Board meeting closed session, the Board and Authority Counsel discussed the Preston Park lawsuit and proposed Preston Park Retention Resolution as a litigation strategy that could potentially lead to success in the lawsuit. The only reason Authority Counsel proposed, and the Board considered, the Resolution is as a potential solution to the currently pending *Marina v. FORA* litigation. A copy of the Retention Resolution is included as **Attachment A**.

Following closed session discussion at the May 30, 2014 special Board meeting, the Board considered and accepted public comment on the Retention Resolution in open session. This item was properly noticed and agendized in accordance with the Ralph M. Brown Act. Representatives from the City of Marina commented on and voiced opposition to the Resolution at this time. The Board voted to adopt the Resolution, 10 to 2. The FORA Act requires all non-unanimous Board actions return for a second vote, so a second vote was scheduled for the June 13, 2014 regular Board meeting.

On June 12, 2014, the FORA Board received a cease and desist letter from Karen Tiedemann on behalf of the City of Marina about the Preston Park Retention Resolution and anticipated future violations of the Brown Act (**Attachment B**). Due to numerous business items and time limitations, the Board did not consider the Preston Park Retention Resolution at the June 13, 2014 meeting. The item was continued to a June 20, 2014 special Board meeting.

FORA Counsel's June 19, 2014 response to the cease and desist demand refutes Marina's contention that the FORA Board violated the Brown Act by discussing litigation strategy via the proposed Preston Park Resolution during the May 30, 2014 FORA Board Meeting. Counsel's letter was previously provided to the Board and is included as **Attachment C**.

Government Code §54960.2, among amendments to the Ralph M. Brown Act enacted by the state legislature in 2011 and included herein as **Attachment D**, provides that in order to avoid unnecessary litigation, and without admitting any violation of the Brown Act, a legislative body may respond to a cease and desist letter by approving an unconditional commitment that it will cease, desist from, and not repeat the challenged past action. Government Code §Section 54960.2 prescribes that the response letter be in substantially the form included in the statute. Government Code §54960.2 prohibits the commencement

of an action to determine the applicability of the Brown Act to any past action of the legislative body for which it has provided an unconditional commitment. The provision of an unconditional commitment by a legislative body cannot be construed or admissible as evidence of a violation of the Brown Act. If the legislative body provides an unconditional commitment, a violation of the unconditional commitment constitutes an independent violation of the Brown Act, without regard to whether the challenged action would otherwise violate the Brown Act. A letter of unconditional commitment may only be rescinded as specified in Government Code §54960.2.

In order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, FORA staff has prepared a Letter of Unconditional Commitment stating that the FORA Board will cease, desist from, and not repeat discussion of the Preston Park Resolution, or any similar successor resolution, in closed session (**Attachment E**). The letter is written despite FORA's vigorous dispute with Marina's contention that FORA violated the Brown Act by receiving strategic litigation advice in closed session from counsel regarding the Preston Park Resolution. Nevertheless, by approving and issuing the unconditional commitment letter, the FORA Board wishes to prevent Marina from filing a Brown Act lawsuit that is in neither FORA's, Marina's, nor the tax-paying public's best interest.

FISCAL IMPACT:

Reviewed by FORA Controller 

Staff time for this item is included in the approved FORA budget.

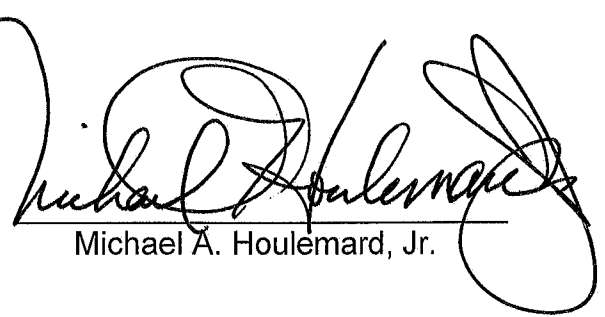
COORDINATION:

Authority Counsel

Prepared by


Jon Giffen

Approved by


Michael A. Houlemard, Jr.

**FORT ORD REUSE AUTHORITY
Resolution 14-12**

Resolution of the Fort Ord Reuse Authority Board to retain the Preston Park Property, pursuant to the authority granted to the Board by Government Code section 67678(b)(4)

THIS RESOLUTION is adopted with reference to the following facts and circumstances:

- A. In response to the US Government's closure of the Fort Ord military reservation, the Fort Ord Reuse Authority (FORA) was created by California statute in 1994 (Govt. Code 67650, et seq.) as the Local Reuse Authority for the whole of the former Fort Ord.
- B. FORA is governed by a 13 member Board that includes two representatives from the City of Marina (Marina)(Govt. Code §67660(a)).
- C. FORA is required by statute to plan, finance, and implement Fort Ord's transition from military to civilian use (Govt. Code §67651). FORA's mission is to effect the "transfer and reuse of. . .Fort Ord with all practical speed," and the Legislature declared that mission to be "the policy of the State of California" (Govt. Code §67651). FORA's mission of planning, financing, and managing the reuse of Fort Ord is "a matter of statewide importance" (Govt. Code §67657(c)). Under the Fort Ord Reuse Act, FORA's "board may sell, lease, or otherwise dispose of. . .property at full market value or at less than full market value...in order to facilitate the rapid and successful transition of the base to civilian use" (Govt. Code §67678(a)).
- D. Preston Park is a large townhouse complex located in Marina, originally built by the U.S. Army, and currently owned in fee-simple by FORA.
- E. FORA and Marina split Preston Park's rental proceeds.
- F. FORA's interest in Preston Park is principally governed by: (1) the Fort Ord Reuse Authority Act; (2) the Army/FORA Economic Development Conveyance Agreement (the EDC); and (3) the FORA/Marina Implementation Agreement (Implementation Agreement or IA).
- G. FORA manages Preston Park under a management agreement with Alliance Management, Inc., which rents individual housing units to private citizens.
- H. For years, both Marina and FORA shared the understanding that the IA required Marina to "buy-out" FORA's interest in Preston Park, if Marina wanted to hold title to the property. Based upon this mutual understanding, Marina and FORA have worked together since 2002 to use Preston Park and its revenue as collateral to finance vital FORA projects, many of which directly benefit Marina. This includes Revenue Bonds issued in 2002 to FORA for building removal and roadway construction in the City of Marina, a 2004 loan from Community Bank to pay FORA's Pollution Legal Liability Insurance Policy premium, and a 2006 line of credit from Rabobank to FORA to fund building removal in the City of Marina and other capital projects.

- I. In 2007, Marina bought out FORA's interest in the legally indistinguishable apartment complex known as Abrams B for \$7.7 million, which was one half of the appraised value of the Abrams B property. In the Spring of 2010, Marina and FORA entered into negotiations, similar to Marina's acquisition of Abrams B, for Marina to purchase FORA's interest in Preston Park.
- J. In 2010, FORA borrowed \$19 million from Rabobank, secured by a note and deed of trust on Preston Park.
- K. Marina's representatives on the FORA Board consented to and encouraged Rabobank's secured loan.
- L. For the reasons discussed above, FORA entered into a loan transaction with Rabobank based on its reasonably held belief that FORA would be able to liquidate its interest in Preston Park in a timely fashion.
- M. The remainder of that \$19 million Rabobank loan (approximately \$18 million) is due to be paid on or before June 15, 2014.
- N. In August 2010, Preston Park had an appraised value of \$57.3 million. In February 2012, the updated appraised value of Preston Park was \$60.9 million. As of September 2013, the updated appraised value of Preston Park was \$66.7 million.
- O. On July 10, 2012, Marina filed a lawsuit against FORA, entitled *City of Marina v. Fort Ord Reuse Authority, et al* (Monterey County Superior Court, Case No. M118566). In that currently pending lawsuit, Marina alleges that it is entitled to a "no cost conveyance" of the Preston Park property. FORA disputes that contention.
- P. FORA and Marina have engaged in unsuccessful mediation with retired Monterey County Superior Court Judge Richard Silver of JAMS.
- Q. FORA has a legal obligation under CEQA to mitigate the environmental impacts of base reuse. Those mitigation measures are described in the Environmental Impact Report for the Fort Ord Base Reuse Plan and the FORA Capital Improvement Plan.
- R. If FORA cannot liquidate its interest in Preston Park, FORA will fall approximately \$25 million short of being able to fulfill its CEQA and non-CEQA-mandated capital improvements, which include \$6.2 million in remaining building/blight removal (includes removal of lead-based paint and Asbestos Containing Materials), \$118.2 million in remaining transportation/transit, \$34 million in remaining habitat management, and \$24 million in remaining water augmentation.
- S. FORA has a limited amount of time to accomplish its statutory goals and mandates. The Fort Ord Reuse Authority Act "shall become inoperative when the [FORA] board determines that 80 percent of the territory of Fort Ord that is designated for development or reuse in the plan prepared pursuant to this title has been developed or reused in a manner consistent with the [Base Reuse Plan] . . . or June 30, 2020, whichever occurs

first, and on January 1, 2021, [the Fort Ord Reuse Authority Act] is repealed" (Govt. Code §67700).

T. Government Code §67678(b)(4) provides that:

The [FORA] Board may retain real or personal property received...[if] both of the following occur:

- i. The board determines that retention of the property is necessary or convenient to carrying out the authority's responsibilities pursuant to law.
- ii. The board determines that its retention of the property will not cause significant financial hardship to the city or county with jurisdiction over the property.

NOW THEREFORE the Board hereby resolves that:

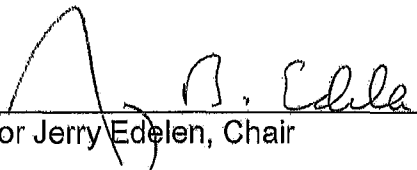
1. The Fort Ord Reuse Authority finds and determines that FORA's retention of the Preston Park property is necessary and convenient to carrying out FORA's responsibilities pursuant to law. This determination is based on the following:
 - a. If FORA cannot liquidate its interest in Preston Park, FORA will fall approximately \$25 million short of being able to fulfill its CEQA and non-CEQA mandated capital improvements.
 - b. The \$18 million remainder of Rabobank's loan must be repaid by June 15, 2014, or if extended, by December 15, 2014. If that loan is not repaid in a timely fashion, Rabobank will likely foreclose on Preston Park.
 - c. If FORA cannot liquidate its interest in Preston Park, then FORA will not be able to fulfill its CEQA and non-CEQA-mandated capital improvements, nor will FORA be able to pay back the \$18 million Rabobank loan.
2. The Fort Ord Reuse Authority finds and determines its retention of Preston Park will not cause significant financial hardship to the City of Marina for the following reasons:
 - a. To date, Marina has received approximately \$18 million in lease proceeds from Preston Park. FORA has also invested approximately \$4 million in the rehabilitation of Preston Park.
 - b. After FORA retains Preston Park pursuant to Government Code §67678(b)(4), FORA intends to share the proceeds of a Preston Park sale with Marina, which – based on appraised value – is estimated to result in a payment to Marina in excess of \$30 million.
 - c. Through the Preston Park sale, Marina will have the funds to pay FORA its development fee, legal fees related to the dispute, and other incidental expenses.
 - d. The City of Marina government will not be significantly impaired or forced to shut down if FORA sells Preston Park and shares the proceeds with Marina. To the

contrary, FORA's retention and sale of Preston Park will likely result in a large monetary payment to Marina.

- e. In the *Marina v. FORA* lawsuit, Marina has never claimed that it opposes the sale of Preston Park for the sake of its financial well-being. Instead, Marina alleges that it opposed the sale of Preston Park because it wishes to exert control over the Preston Park property.
3. In light of the determinations above, the FORA Board hereby resolves to retain the Preston Park property, pursuant to the authority granted to the Board by Government Code § 67678(b)(4).
4. This Resolution will take effect immediately upon adoption, or as soon thereafter as permitted by the Monterey County Superior Court.

Upon motion by Mayor Rubio, seconded by Supervisor Potter, the foregoing Resolution was passed on this 20 day of June, 2014, by the following vote:

AYES: BEACH, CHIULOS, EDELEN, GUNTER, LUCIUS, OGLESBY,
PENDERGRASS, POTTER, RUBIO
NOES: MORTON, O'CONNELL, PARKER
ABSTENTIONS: NONE
ABSENT: SELFRIDGE



Mayor Jerry Edelen, Chair

ATTEST:



Michael A. Houlemard, Jr., Clerk

goldfarb
lipman
attorneys

1300 Clay Street, Eleventh Floor
Oakland, California 94612
510 836-6336

Attachment B to Item 8g
7/11/14 FORA Board Meeting

M David Kroot
June 12, 2014

John T. Nagle

Lynn Hutchins

Karen M. Tiedemann

Thomas H. Webber

Dianne Jackson McLean

Michelle D. Brewer

Jennifer K. Bell

Robert C. Mills

Isabel L. Brown

James T. Diamond, Jr.

Margaret F. Jung

Heather J. Gould

Juliet E. Cox

William F. DiCamillo

Amy DeVaudrevil

Barbara E. Kautz

Erica Williams Orcharton

Luis A. Rodriguez

Xochitl Carrion

Rafael Yaquian

Vincent L. Brown

Caroline M. Nasolla

Elizabeth Klueck

Mayor Edelen (Chair)
Mayor Pro-Tem Beach
Supervisor Calcagno
Mayor Gunter
Councilmember Lucius
Councilmember Morton
Mayor Pro-Tem O'Connell
Mayor Pro-Tem Oglesby
Mayor Pendergrass
Supervisor Potter
Mayor Rubio
Councilmember Selfridge
Executive Officer Houlemard
Fort Ord Reuse Authority
920 2nd Avenue, Suite A
Marina, CA 93933

via messenger

Re: Brown Act Violations by FORA
Cease and Desist Letter and Request for Relief

Dear Directors and Executive Officer Houlemard:

On behalf of the City of Marina we are writing you regarding the Fort Ord Reuse Authority's ("FORA") (1) past violations of the Ralph M. Brown Act ("Brown Act," Gov. Code § 54950, *et seq.*) related to Resolution 14-xx on Retention of Preston Park ("Preston Park Resolution"), and (2) anticipated future violations of the Brown Act during the June 13, 2014 Regular Meeting.

1. FORA violated the Brown Act on or before May 30, 2014 when considering the Preston Park Resolution.

As described below, the Board engaged in secret deliberations of, and potentially took action regarding, the Preston Park Resolution outside of the public meeting on May 30, 2014. We provide a description of the violations and proposed remedies pursuant to Government Code Section 54960.2, and request that the FORA Board of Directors ("the Board") cure the violations described below before attempting further action on the Preston Park Resolution.¹

Facsimile

510 836-1035

San Francisco

415 788-6336

Los Angeles

213 627-6336

San Diego

619 239-6336

Goldfarb & Lipman LLP

¹ All section references are to the Government Code unless otherwise indicated.

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No public deliberations on the Preston Park Resolution by the Board occurred. After receiving public comment from representatives of the City as well as four members of the public, Director Rubio (Mayor of the City of Seaside) discounted the validity of public concerns in less than two minutes. Director Rubio recited an interpretation of state law, as well as an interpretation of the alleged contractual obligations of the City and FORA, to argue that the Preston Park Resolution will not set a "precedent," in which FORA will unilaterally retain the lands of other localities in the future. Furthermore, Director Rubio explicitly referenced the existing litigation between the City and FORA, cited the legal purpose of FORA, and claimed the legal thresholds to implement the Preston Park Resolution had been met.² No other Board member offered comment or public deliberation.

In light of the legal conclusions relied on by Director Rubio immediately after the closed session regarding the Preston Park litigation, as well as the lack of public deliberation by other Board members, it appears the Board engaged in secret deliberations regarding the Preston Park Resolution. Likewise, the alleged polling of the Board regarding the Special Meeting, as noted in public comment, further implicates violation of the Brown Act.

Civil Liability

FORA is subject to the Brown Act. Gov. Code § 67663. The Brown Act requires that government actions "be taken openly and that [government] deliberations be conducted openly." Gov. Code § 54950. Courts broadly construe the Brown Act mandate to apply to both deliberations and actions in various settings: Deliberations include, "not only collective discussion but also the collective acquisition and exchange of facts preliminary to the ultimate decision." *Stockton Newspapers v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 102 (internal quotations omitted). Actions include both preliminary and final votes, as well as a collective decision, commitment, or promise of the majority regarding a motion, proposal, resolution, order, or ordinance. Gov. Code §§ 54953(c) & 54952.6. And, the term 'meeting' includes any discussions, deliberations, or actions in which a majority of the legislative body participates, whether simultaneously or in a series of communications. Gov. Code § 54952.2.

Although Section 54956.9 authorizes closed sessions "to confer with, or receive advice from, [] legal counsel regarding pending litigation," this exception is "strictly construed." *Stockton Newspapers, supra*, 171 Cal.App.3d at 104. That is, the purpose of the communication between the attorney and the legislative body cannot be "a legislative commitment, [thereby evading] the central thrust of the public meeting law." *Id.* at 105. "Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure

² See FORA Board of Directors Video of Special Meeting on May 30, 2014, minutes 3:10-5:00. Available at: <http://fora.org/board.html>

the public interest." *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 58. Courts have looked to the California Attorney General for guidance, who in turn emphasized, "the purpose of Section 54956.9 is to permit the body to receive legal advice and make **litigation decisions only**; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 186 (quoting Cal. Dept. of Justice, Off. of Atty. Gen., *The Brown Act* (2003), p. 40) (emphasis added).

It appears that on or before the public vote regarding the Preston Park Resolution on May 30, 2014, Board members received legal advice and deliberated about the resolution behind closed doors. There was no Board deliberation of the resolution in open sessions, either prior to or after public comment. Only after the public deliberated the impacts of the Preston Park Resolution during the public comment period, did a Board member offer a legal opinion interpreting state law and public contracts, as well as the legal adequacy of findings. Moreover, the Board member's statements were offered with explicit reference to litigation between the City and FORA, immediately after a closed session discussing the same litigation with counsel.

While FORA may obtain legal advice in closed session regarding litigation, discussion of legislative activity, including the Preston Park Resolution, may not be discussed in closed session. See *Trancas Property Owners Assn., supra*, 138 Cal.App.4th at 186; *Stockton Newspapers, supra*, 171 Cal.App.3d at 105; *Sacramento Newspaper Guild, supra*, 263 Cal.App.2d at 58. Any acquisition or exchange of facts, any discussion, or any preliminary vote by the Board regarding the Preston Park Resolution outside of a public meeting violates Section 54953 of the Brown Act.³

Request for Relief

The Brown Act empowers any interested person to pursue relief from Brown Act violations, including the judicial declaration of a violation and subsequent declaration that actions in violation of the Brown Act are null and void. Gov. Code §§ 54960-54960.1. Furthermore, courts may enjoin the legislative body from future violations, including mandatory audio recording of future closed session to be reviewed *in camera*. Gov. Code § 54960. Finally, agencies that violate the Brown Act may be liable to plaintiffs for attorney's fees.

³ Any Board members who participated in an inappropriate closed session discussion regarding the Preston Park Resolution, or otherwise outside of a public meeting, may be criminally culpable of a misdemeanor, punishable by up to six months in county jail and/or a fine of up to \$1,000.00. Pen. Code § 19.

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For the reasons discussed above, we request that FORA immediately cease and desist all further Brown Act violations, including but not limited to the discussion, deliberation, or dissemination of facts, as well as preliminary votes or Board member commitments related to the Preston Park Resolution or any other legislative action. We further request that FORA cure and correct past Brown Act violations by:

- Disclosing any meeting notes and minutes from the May 30, 2014 closed session regarding topics beyond the scope for which the closed session was authorized, including but not limited to the Preston Park Resolution;
- Providing a letter pursuant to Section 54960.2 committing FORA to future compliance with the Brown Act, including a description of steps FORA will take to ensure future compliance;
- Voluntarily initiating audio recordings of all future closed sessions, whether related to the litigation between the City and FORA, or any other statutorily permissible purpose, and;
- Discontinuing any further Board action related to Preston Park Resolution and any successor resolution regarding the retention of Preston Park Property.

At this time the City has not yet filed an action in court or requested review of the Brown Act violation by the district attorney. Rather, this letter is sent in hope that the Board will cure and correct any Brown Act violations as requested above without formal judicial intervention.

2. FORA should hear public comment before or during its consideration of the Preston Park Resolution on June 13, 2014.

Should FORA deny our request to discontinue further Board action regarding the Preston Park Resolution, FORA should publicly deliberate and accept public comment before or during consideration of the resolution at the June 13, 2014 Regular Meeting.

We understand FORA has accepted public comment before some second votes, but disallowed public comment before other second votes. Notably, the Board disallowed public comment before the second vote regarding the Preston Park Management Agreement Extension during its regular meeting on January 10, 2014 (Agenda Item 8(a)). However, during its Regular Meeting on March 14, 2014, public comment was heard and Board members deliberated the second vote regarding a consistency determination between the 2010 Monterey County General Plan and the 1997 Fort Ord Reuse Plan (Agenda Item 8(a)). Likewise on March 14, public comment was allowed before a second vote approving an Executive Officer Contract Extension (Agenda Item 8(b)). Here, public comment must be allowed before a second vote on the Preston Park Resolution.

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First, the plain text of the Brown Act, Section 54954.3(a) requires, "an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item[.]" Section 54954.3(a) provides for an exception to the public comment before or during the legislative body's consideration, but only when that item "has already been considered by a committee[.]" No committee has previously received public comment regarding the Preston Park Resolution. Thus, public comment must be received before a second vote on the Preston Park Resolution.

Second, as stated by Board Chair Edelen on May 30th, and reflected in the proposed Special Meeting Minutes under Agenda Item 8(a), public comment was improperly limited to two necessary findings within the Preston Park Resolution; the public was not allowed to comment on the merits of the resolution. To cure this violation of the Brown Act, the Board must accept public comment regarding the Preston Park Resolution, including underlying findings **and** the resolution to retain the Preston Park Property.

Finally, disallowing public comment and Board deliberation of the Preston Park Resolution violates the spirit of Government Code Section 67668 and FORA Master Resolution Section 2.02.040(b). Both sections require a second Board vote for resolutions or ordinances that did not receive unanimous approval when heard within 72 hours of introduction. The intent of each provision, like the Brown Act, promotes public discussion and debate among Board members in order to facilitate informed votes, and ensures the integrity of public agency action by allowing the Board and members of the public adequate time to analyze resolutions. Because the previous vote on the Preston Park Resolution was not unanimous, FORA should hear public comment and publicly deliberate the Preston Park Resolution prior to a second vote.

Again, we believe it improper to continue action regarding the Preston Park Resolution in light of the Brown Act violations that took place on or before May 30, 2014. Should FORA proceed with a second vote on the resolution, it must fully comply with the Brown Act, Government Code Section 67668 and FORA Master Resolution Section 2.02.040(b) by accepting public comment and allowing public deliberation regarding both the findings and resolution to retain Preston Park Property.

Sincerely,



KAREN M. TIEDEMANN

KMT:jdb

June 19, 2014

Suite 200
Monterey, California 93940

Tel (831) 373-7500
Fax (831) 373-7555

Sender=s e-mail:
jgiffen@kaglaw.net

VIA EMAIL AND U.S. MAIL

Karen M. Tiedemann
Goldfarb & Lipman LLP
1300 Clay Street, Eleventh Floor
Oakland, CA 94612

Re: Preston Park Resolution

Dear Ms. Tiedemann:

FORA received your June 12, 2014 letter alleging Brown Act violations. Your letter alleges that on or before May 30, 2014, the FORA Board engaged in secret deliberations concerning Resolution 14-xx ("the Preston Park Resolution") in violation of the Brown Act.

1. Factual Background

On or about July 10, 2012, Marina filed a complaint in Monterey County Superior Court against FORA. Marina's complaint concerns Preston Park, a 354-unit townhouse complex owned in fee simple by FORA. In the *Marina v. FORA* lawsuit, Marina alleges that it is entitled to a no-cost conveyance of Preston Park. FORA disputes that contention for a number of reasons.

One of the many reasons that FORA disputes Marina's contention that Marina is entitled to a no-cost conveyance is because Government Code section 67678(b)(4) allows FORA to retain Preston Park if the FORA Board determines that FORA's retention of the property: "(i) . . . is necessary or convenient to carrying out [FORA's] responsibilities pursuant to law, [and] (ii) . . . will not cause significant financial hardship to the city or county with jurisdiction over the property."

In light of Government Code section 67678(b)(4), FORA's attorneys have from time to time considered a FORA Board resolution under Section 67678(b)(4) as a litigation strategy that could potentially be employed in the *FORA v. Marina* lawsuit. Prior to the public meeting on May 30, 2014, FORA's attorneys proposed and discussed the Preston Park Resolution with the FORA Board in closed session, again, as a litigation strategy that could potentially lead to FORA's success in the *Marina v. FORA* lawsuit. The one and only reason FORA's attorneys proposed and the FORA Board considered the Preston Park Resolution is because it offers a potential solution to the currently pending *Marina v. FORA* lawsuit.

On May 30, 2014, at a noticed FORA Board meeting, the FORA Board considered and accepted public comment on the properly agendized Preston Park Resolution in open session. Marina commented on, and voiced its opposition to, the Preston Park Resolution at that meeting.

The Board voted in favor of the Preston Park Resolution, 10 to 2. Because FORA's rules require that all non-unanimous Board actions are subject to a second vote, a second vote on the Preston Park Resolution was set for June 13, 2014. But, in light of the FORA Board's busy agenda on June 13, the second vote was re-scheduled for June 20, 2014.

2. FORA Did Not Violate the Brown Act By Conferring with and Receiving Advice From its Legal Counsel Regarding the Preston Park Resolution in Closed Session.

Marina alleges that the FORA Board violated the Brown Act by engaging in "secret deliberations" and potentially taking "action regarding the Preston Park Resolution outside of the public meeting on May 30, 2014." For the reasons set out below, the FORA Board did not violate the Brown Act by considering the Preston Park Resolution, within the context of the *Marina v. FORA* lawsuit, in closed session.

Government Code section 54956.9 provides that

Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.

In light of the clear and unambiguous language of Section 54956.9 above, the FORA Board absolutely had a right to confer with its attorney regarding the Preston Park Resolution, in closed session, without City of Marina representatives in the currently pending litigation listening to the conversation concerning the pending litigation.

The court in *Sacramento Newspaper Guild v. Sacramento County* (1968) 263 Cal.App.2d 41 addressed this issue:

There is a public entitlement to effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned. . . . [T]he attorney's professional task is to provide his client a frank appraisal of strength, weakness, gains and risks, hopes and fears. If the public's "right to know" compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a *sense of treachery* in disclosing this kind of appraisal. To him its conduct in public would be shocking, unprofessional, unthinkable.

Id. at 56 (internal citations omitted; italics in original).

The closed session conversations concerning the Preston Park Resolution were the exact types of conversations referenced in the excerpt above. FORA's attorneys gave the FORA Board a frank appraisal of the strengths, weaknesses, gains, and risks of the Preston Park Resolution, within the context of the *Marina v. FORA* lawsuit. If Marina's representatives were present for and listened to those frank conversations, FORA's interests would be significantly prejudiced. See League of California Cities, *Open and Public IV: A Guide to the Ralph M. Brown Act*, (2nd Edition, 2010) p. 36 ("The essential thing to know is that a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in litigation in which the agency is a party.")

No closed-session FORA Board actions were taken on the Preston Park Resolution. FORA's attorneys advised and conferred with the FORA Board regarding the Preston Park Resolution, in closed session, and then the matter was considered and ultimately voted on in open session. A somewhat similar issue was addressed in *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172, 187.

In *Trancas*, the City of Malibu, in closed session, actually approved and adopted a settlement agreement, which touched on some matters that ordinarily require a public hearing. Later, the city attorney announced the settlement agreement and its terms in a public hearing. *Id.* at 183-187. The Court concluded that the City of Malibu violated the Brown Act by adopting, in closed session, the settlement agreement which legally required a public hearing. But, the court also gave some guidance to other governmental entities, facing similar situations, going forward. The court held

under section 54956.9, governing bodies may discuss with their counsel, in closed session, any settlement proposals or terms they deem worthy of consideration. And they generally may agree to such terms and settlements in closed session. What they may not do is decide upon or adopt in closed session a settlement that accomplishes or provides for action for which a public hearing is required by law, without such a hearing.

Id. at 187.

A court would likely handle litigation strategies, like the Preston Park Resolution, in a similar way as settlement agreements. Thus, even assuming *arguendo* that the Preston Park Resolution requires a public hearing, under *Trancas*, the FORA Board was entitled to confer with counsel and receive advice regarding this litigation strategy in closed session.

It is absurd to suggest that FORA is using the *Marina v. FORA* lawsuit as a "pretext for secret consultations" or "subterfuge to reach nonlitigation oriented policy decisions." As is clear from the text of the resolution itself, the Preston Park Resolution was considered, and may

Karen M. Tiedemann
June 19, 2014
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ultimately be passed, as a litigation strategy in response the *Marina v. FORA* case. The matter would never have been considered outside of the context of this currently pending litigation.

Under Section 54956.9 and all of the relevant case law, the FORA Board was entitled to confer with counsel regarding the Preston Park Resolution in closed session.

3. FORA's Response to Marina's Request for Relief

FORA vigorously disputes Marina's contention that FORA violated the Brown Act by receiving advice from counsel regarding the Preston Park Resolution in closed session. With that said, another lawsuit between Marina and FORA is in neither FORA's, Marina's, nor the tax-paying public's best interest.

Therefore, in order to avoid unnecessary litigation and without admitting any violation of the Brown Act, one option the FORA Board will likely consider in open session at its July 11, 2014 Regular Meeting is whether FORA will respond to Marina's cease and desist letter with a "letter of unconditional commitment" pursuant to Government Code section 54960.2(b) and (c).

In the meantime, because FORA's rules require a second vote on all non-unanimous FORA Board actions, the FORA Board will proceed to a second vote at the Special Meeting scheduled for June 20, 2014. FORA does intend to publicly deliberate and accept public comment on the Preston Park Resolution at the June 20, 2014 Special Meeting.

Thank you for your attention to this letter. Should you have questions or comments, please contact me.

Sincerely,

KENNEDY, ARCHER & GIFFEN

Jon R. Giffen

JRG/dcj

cc: James Diamond (via email)
Robert Wellington (via email)
FORA Board Members (via email)

RALPH M. BROWN ACT EXCERPT - Government Code §54960.2

54960.2.

- (a) The district attorney or any interested person may file an action to determine the applicability of this chapter to past actions of the legislative body pursuant to subdivision (a) of Section 54960 only if all of the following conditions are met:
- (1) The district attorney or interested person alleging a violation of this chapter first submits a cease and desist letter by postal mail or facsimile transmission to the clerk or secretary of the legislative body being accused of the violation, as designated in the statement pertaining to that public agency on file pursuant to Section 53051, or if the agency does not have a statement on file designating a clerk or a secretary, to the chief executive officer of that agency, clearly describing the past action of the legislative body and nature of the alleged violation.
 - (2) The cease and desist letter required under paragraph (1) is submitted to the legislative body within nine months of the alleged violation.
 - (3) The time during which the legislative body may respond to the cease and desist letter pursuant to subdivision (b) has expired and the legislative body has not provided an unconditional commitment pursuant to subdivision (c).
 - (4) Within 60 days of receipt of the legislative body's response to the cease and desist letter, other than an unconditional commitment pursuant to subdivision (c), or within 60 days of the expiration of the time during which the legislative body may respond to the cease and desist letter pursuant to subdivision (b), whichever is earlier, the party submitting the cease and desist letter shall commence the action pursuant to subdivision (a) of Section 54960 or thereafter be barred from commencing the action.
- (b) The legislative body may respond to a cease and desist letter submitted pursuant to subdivision (a) within 30 days of receiving the letter. This subdivision shall not be construed to prevent the legislative body from providing an unconditional commitment pursuant to subdivision (c) at any time after the 30-day period has expired, except that in that event the court shall award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to this section, in accordance with Section 54960.5.
- (c) (1) If the legislative body elects to respond to the cease and desist letter with an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate this chapter, that response shall be in substantially the following form:

To _____:

The [name of legislative body] has received your cease and desist letter dated [date] alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:

[Describe alleged past action, as set forth in the cease and desist letter submitted pursuant to subdivision (a)]

In order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the [name of legislative body] hereby unconditionally commits that it will cease, desist from, and not repeat the challenged past action as described above.

The [name of legislative body] may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of Brown Act Commitment." You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Section 54960 of the Government Code. That notice will be delivered to you by the same means as this commitment, or may be mailed to an address that you have designated in writing.

Very truly yours,

[Chairperson or acting chairperson of the legislative body]

- (2) An unconditional commitment pursuant to this subdivision shall be approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda.
 - (3) An action shall not be commenced to determine the applicability of this chapter to any past action of the legislative body for which the legislative body has provided an unconditional commitment pursuant to this subdivision. During any action seeking a judicial determination regarding the applicability of this chapter to any past action of the legislative body pursuant to subdivision (a), if the court determines that the legislative body has provided an unconditional commitment pursuant to this subdivision, the action shall be dismissed with prejudice. Nothing in this subdivision shall be construed to modify or limit the existing ability of the district attorney or any interested person to commence an action to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body.
 - (4) Except as provided in subdivision (d), the fact that a legislative body provides an unconditional commitment shall not be construed or admissible as evidence of a violation of this chapter.
- (d) If the legislative body provides an unconditional commitment as set forth in subdivision (c), the legislative body shall not thereafter take or engage in the challenged action described in the cease and desist letter, except as provided in subdivision (e). Violation of this subdivision shall constitute an independent violation of this chapter, without regard to whether the challenged action would otherwise violate this chapter. An action alleging past violation or threatened future violation of this subdivision may be brought pursuant to subdivision (a) of Section 54960, without regard to the procedural requirements of this section.
- (e) The legislative body may resolve to rescind an unconditional commitment made pursuant to subdivision (c) by a majority vote of its membership taken in open session at a regular meeting as a separate item of business not on its consent agenda, and noticed on its posted agenda as "Rescission of Brown Act Commitment," provided that not less than 30 days prior to such regular meeting, the legislative body provides written notice of its intent to consider the rescission to each person to whom the unconditional commitment was made, and to the district attorney. Upon rescission, the district attorney or any interested person may commence an action pursuant to subdivision (a) of Section 54960. An action under this subdivision may be brought pursuant to subdivision (a) of Section 54960, without regard to the procedural requirements of this section.



FORT ORD REUSE AUTHORITY

920 2nd Avenue, Suite A, Marina, CA 93755

Phone: (831) 883-3672 | Fax: (831) 883-3675 | www.fora.org

Attachment E to Item 8g
FORA Board Meeting, 7/11/2014

July 11, 2014

The City of Marina
c/o Karen M. Tiedemann
Goldfarb & Lipman LLP
1300 Clay Street, Eleventh Floor
Oakland, CA 94612

Dear Ms. Tiedemann,

The FORA Board has received your cease and desist letter dated June 12, 2014, alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:

"It appears that on or before the public vote regarding the Preston Park Resolution on May 30, 2014, Board members received legal advice and deliberated about the resolution behind closed doors. There was no Board deliberation of the resolution in open sessions, either prior to or after public comment. Only after the public deliberated the impacts of the Preston Park Resolution during the public comment period, did a Board member offer a legal opinion interpreting state law and public contracts, as well as the adequacy of findings. Moreover, the Board member's statements were offered with explicit reference to litigation between the City and FORA, immediately after a closed session discussing the same litigation with counsel."

In order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the FORA Board hereby unconditionally commits that it will cease, desist from, and not repeat discussion of the Preston Park Resolution, or any similar successor resolution, in closed session.

The FORA Board may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of Brown Act Commitment." You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Government Code Section 54960. That notice will be delivered to you by the same means as this commitment, or may be mailed to an address that you have designated in writing.

Very truly yours,

Jerry Edelen
Board Chair