From:	Karen Irias
To:	"COB@co.monterey.ca.us"
Cc:	"McKeeCJ@co.monterey.ca.us"; FORA Board; "jgiffen@kahlaw.net"; Supervisor Alejo; Supervisor Phillips; Supervisor Salinas; "district4@co.monterey.ca.us"; Supervisor Adams; "bdelgado62@gmail.com"; "frank.oconnell93933@gmail.com"; Councilmember Morton; Councilmember Amadeo; David Brown; "Attys@WellingtonLaw.com"; Wilson Wendt; Art Coon; Giselle Roohparvar; Sean Marciniak
Subject:	11.5.18 Marciniak Letter to Board re Public Comment on Item 27 on Agenda for November 2, 2018 [IWOV-iManage.FID961270]
Date:	Monday, November 05, 2018 2:41:50 PM
Attachments:	2018-11-05 Marciniak Letter to Monterey County Board of Supervisors.pdf

This email is sent on behalf of Sean R. Marciniak.
Replies may be directed to Mr. Marciniak at Sean.Marciniak@msrlegal.com. Thank you.

Karen Irias | Miller Starr Regalia
Assistant to Sean R. Marciniak
1331 North California Boulevard, Fifth Floor, Walnut Creek, CA 94596
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November 5, 2018

VIA E-MAIL

Monterey County Board of Supervisors
c/o Gail T. Borkowski, Clerk of the Board
168 West Alisal St., 1st Floor
Salinas, CA 93901
Email: COB@co.monterey.ca.us

Re: Public Comment on Item 27 on Agenda for November 2, 2018
Board of Supervisors Hearing

Dear Members of the Board of Supervisors:

On behalf of Marina Community Partners, we submit this public comment regarding Item 27 on the Board's November 6, 2018 Agenda, which proposes to extend the County's Safe Parking Program through March 31, 2019, and its proposal to exempt the extension of the program from environmental review.

So as not to flood you with paperwork, we have condensed our comments as follows:

- In commenting on the foregoing items, we hereby incorporate by reference all of the objections to the Safe Parking Program and the County's Declaration of Shelter Crisis that we detailed in our letters to the Board on November 13, November 17, December 8, 2017, and December 13, 2017 as well as all correspondence we have directed to other agencies, such as the City of Marina and the Fort Ord Reuse Authority, and for which we provided courtesy copies to the County (including, without limitation, our November 22, 2017 letters to the City of Marina and FORA).

- Marina Community Partners applauds the County for its creative solutions in tackling the County's homeless problem, but does not agree that 2616 First Avenue in the City of Marina is the proper site. The County has indicated that alternative sites, presumably in the County's own jurisdiction, have been evaluated, but this process has been opaque, and it is not clear what other sites have been reviewed. We respectfully request that the County be more transparent about its efforts to identify and review alternative sites.

- The City of Marina's zoning rules govern use of the program site, and the proposed program is inconsistent with that zoning, as detailed extensively in past letters.[1] In the past, the County has asserted that its land use regulations govern 2616 First Avenue, and that it enjoys sovereign immunity from the City's rules. In the County's application for an extension of the Safe Parking Program, however, it now acknowledges the applicability of City rules.[2] As such, the County must apply to the Marina City Council for approval of the Safe Parking Program, and secure, at the very least, an amendment to the University Villages Specific Plan and the City's General Plan before continuing the program's operation. (*See, e.g.,* Miller Starr Regalia's December 8, 2017 Letter, p. 8.)

- The extension of the program cannot be exempted from review under the California Environmental Quality Act, as proposed. The specific exemption the County has identified, under CEQA Guidelines section 15301(c),[3] does not apply as a matter of law, and unusual circumstances exist to support an exception to the proposed CEQA exemption, for the following reasons:

    - As originally conceived, the Safe Parking Program was supposed to be temporary, and was supposed to cease on November 29, 2018. The program, by design, was designed to expire, and thus relying on an exemption for the continuation of existing activities does not work at a fundamental, conceptual level. Further, extending the program without any commitment to a clear sunset date brings into question its impermanency, and therefore all long-term effects of the project must be accounted for, including long-term impacts related to land use, safety, traffic, and other environmental topics that may occur once reasonably foreseeable development is built out in the vicinity. The County's CEQA report contains no substantive analysis of these issues. For instance, the County's noise analysis merely concluded there are no sensitive receptors in the immediate vicinity of the

[1] The County's environmental report for the program extension, prepared by Rincon Consultants, makes a threadbare zoning consistency analysis on pages 12 to 13, which is not compelling in light of the extensive evaluations we have submitted in past correspondence.

[2] In the land use impacts analysis in the environmental report prepared by Rincon Consultants, the County acknowledges that the City of Marina's University Villages Specific Plan is an "applicable" land use plan, consistency with which is required. (*See* Rincon Consultants CEQA Report, pp. 12-13.)

[3] Subsection (c) of CEQA Guidelines section 15301 specifically covers the operation and maintenance of "existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety)." The program, which entails the provision of social services in a parking lot, is unlike any one of the listed facilities.

program site, without acknowledging the extent of development that may happen in the reasonably foreseeable future.

- The County's CEQA report improperly assumes the appropriate environmental baseline, against which all environmental impacts should be measured, is the level of activity associated with the current operation of the Safe Parking Program. However, the County's original strategy for exempting the temporary program — i.e., an emergency exemption[4] — contained no substantive review of the program's impacts. Moreover, this original strategy was timely challenged by our clients.[5] Given these facts, the County's use of an "elevated" baseline to support its adoption of the program's extension is a violation of CEQA. The proper baseline is use of the parking lot as it was operated prior to establishment of the Safe Parking Program.

- The project description for the program is not sufficiently definite. The program is intended to service "15 vehicles at the project site, or more as space permits." (Rincon Consultants Categorical Exemption Report, p. 6.) Just as the duration of the program is unclear, so is its intensity of use. The parking lot at issue contains space for nearly one hundred vehicles, and thus it is conceivable that the expansion of the program "as space permits" means the County is in fact contemplating a scope of operations six times larger than currently acknowledged. This ambiguity is a violation of CEQA, as it prevents the public from understanding the potential impacts of the project.

For the foregoing reasons, the Safe Parking Program must undergo more robust environmental review in a negative declaration or environmental impact report. Moreover, the County's acknowledgment that the City's land use plans regulations apply means that it is the City of Marina, and not the County, that is the proper lead agency, and it is the City that must commence preparation of these documents.

* * *

Accordingly, we request that the County: (1) desist in its effort to locate the Safe Parking Program at 2616 First Avenue and find an alternative site located in the County's jurisdiction; (2) comply with the demands set forth in our previous letters; (3) apply to the City of Marina for approvals to conduct its proposed activities;

[4] The County's election to abandon its usage of the emergency exemption appears to be an acknowledgement that this strategy was improper.

[5] As the County knows, such claims are currently tolled by agreement, signed in December 2017 and last amended in January 2018.

(4) work with the City to study any implementation of the Safe Parking Program in compliance with the California Environmental Quality Act; and (5) provide MCP with written, advance notice by mail of all actions the County plans to take with respect to the Safe Parking Program and any declarations of emergency concerning the County's homeless problem pursuant to, *inter alia*, Public Resources Code sections 21083.9, 21092(b)(3), and 21092.2, and Government Code section 54954.1, which the County here to date has failed to do.

Sincerely,

MILLER STARR REGALIA

Sean Marciniak

cc: Clients
Wilson Wendt, Esq., Miller Starr Regalia
Arthur F. Coon, Esq., Miller Starr Regalia
Giselle S. Roohparvar, Esq., Miller Starr Regalia
Charles J. McKee, Monterey County Counsel (McKeeCJ@co.monterey.ca.us)
Fort Ord Reuse Authority Board of Directors (board@fora.org)
Jonathon Giffen, Counsel for FORA (jgiffen@kahlaw.net)
Members of the Monterey County Board of Supervisors
(district1@co.monterey.ca.us; district2@co.monterey.ca.us;
district3@co.monterey.ca.us; district4@co.monterey.ca.us;
district5@co.monterey.ca.us)
City of Marina City Council (bdelgado62@gmail.com;
frank.oconnell93933@gmail.com; gmorton@montereyfamilylaw.com;
nancyamadeo@gmail.com; davidwaynebrown@aol.com)
Bob Rathie, City of Marina City Attorney (Attys@WellingtonLaw.com)

EXHIBIT 1

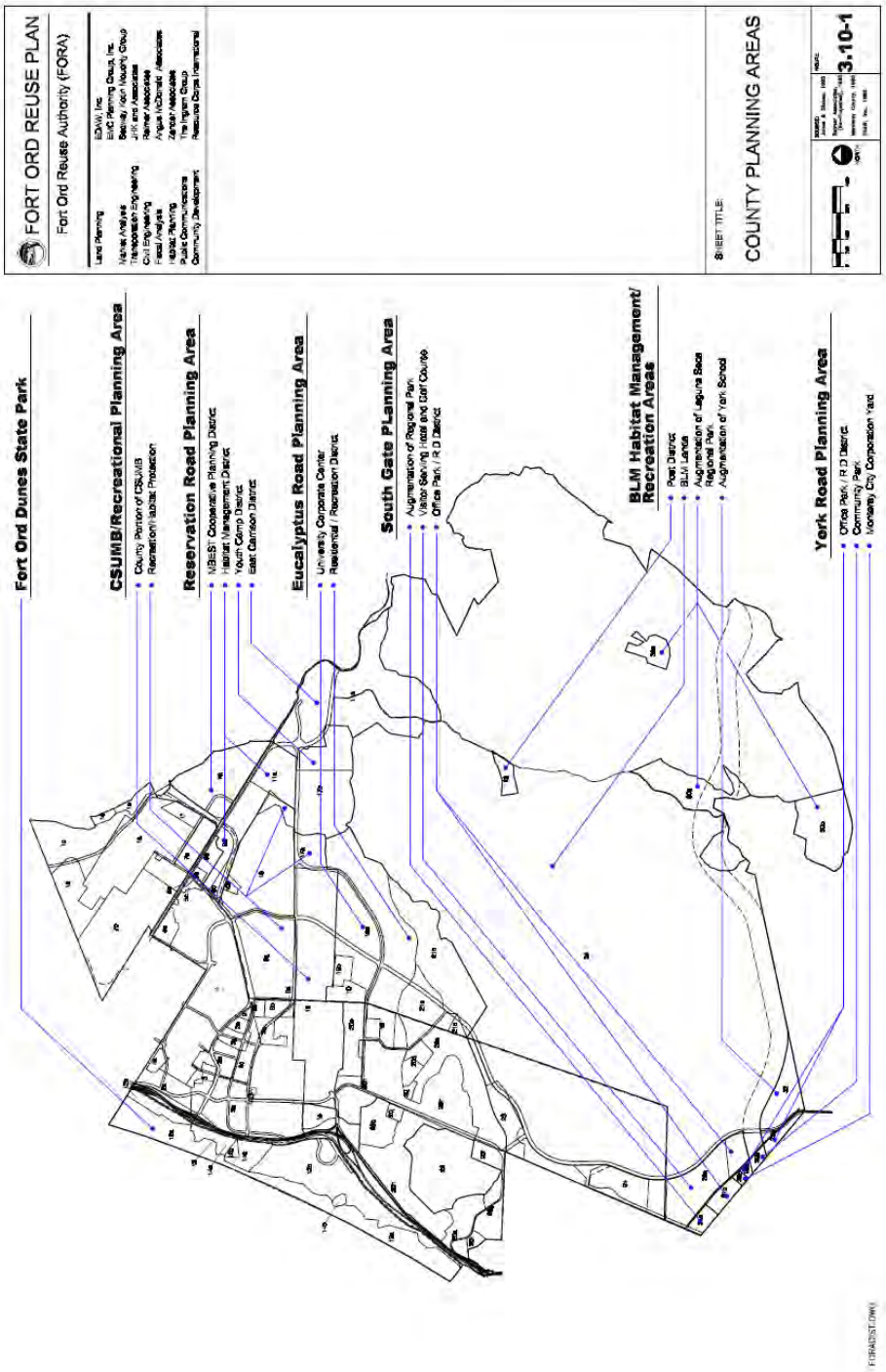
FORT ORD REUSE PLAN
Fort Ord Reuse Authority (FORA)
SHEET TITLE
COUNTY PLANNING AREAS
3.10-1
Fort Ord Dunes State Park
CSUMB/Recreational Planning Area
County Portion of CSUMB
Recreation/Habitat Protection
Reservation Road Planning Area
MBEST Cooperative Planning District
Habitat Management District
Youth Camp District
East Garrison District
Eucalyptus Road Planning Area
University Corporate Center
Residential / Recreation District
South Gate PLanning Area
Augmentation of Regional Park
Visitor Serving Hotel and Golf Course
Office Park / R D District
BLM Habitat Management/ Recreation Areas
Post District
BLM Lands
Augmentation of Laguna Seca Regional Park
Augmentation of York School
York Road Planning Area
Office Park / R D District
Community Park
Monterey City Corporation Yard

EXHIBIT 2

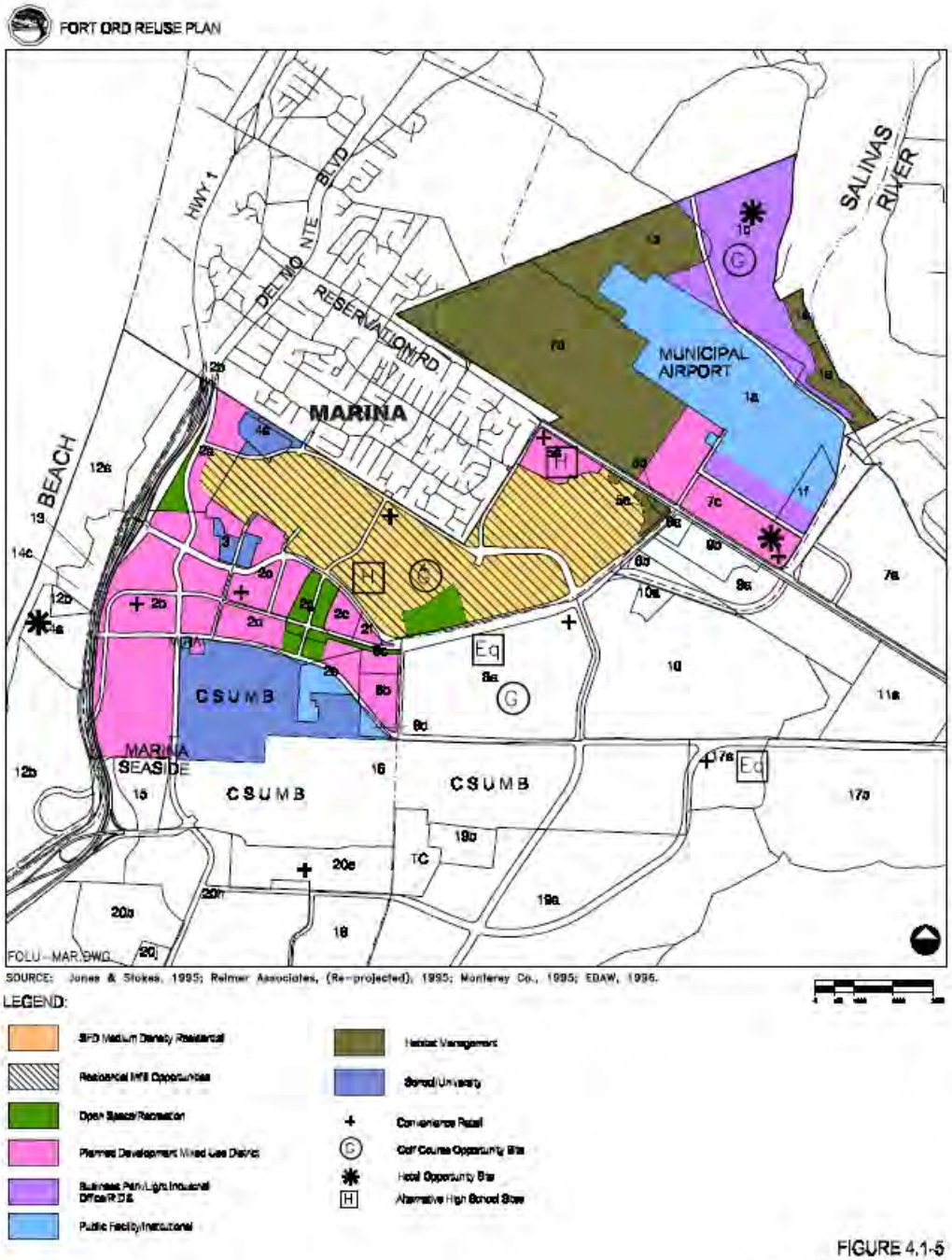

FIGURE 4.1-5
CITY OF MARINA
LAND USE CONCEPT

EXHIBIT 3

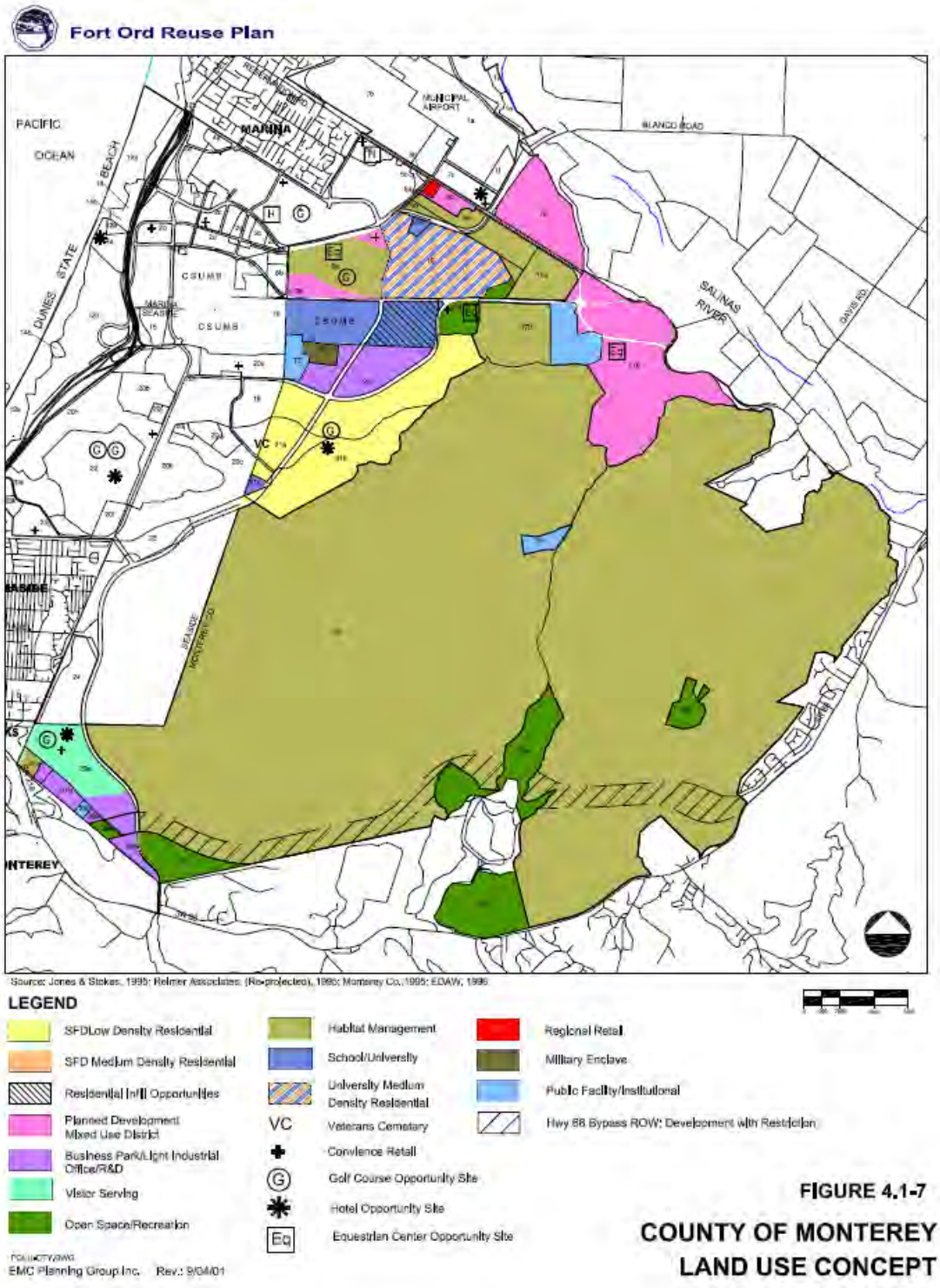

FIGURE 4.1-7

COUNTY OF MONTEREY
LAND USE CONCEPT

From:	John Farrow
To:	Michael Houlemard; Dominique Davis; FORA Board; Michael DeLapa
Subject:	CEQA compliance for Transition Plan
Date:	Wednesday, November 07, 2018 8:55:36 PM
Attachments:	LandWatch to FORA responding to Waltner re CEQA.pdf

Dear Members of the FORA Board of Directors,

Attached please find comments from LandWatch Monterey County responding to the November 5, 2018 letter from Alan Waltner regarding the proposed adoption of the Transition Plan.

By copy to Michael Houlemard and Dominique Davis, I ask that they confirm receipt of this letter and ensure its distribution to Board members as soon as possible and prior to the meeting scheduled for November 9, 2018.

John Farrow

John H. Farrow | **M. R. Wolfe & Associates, P.C.** | Attorneys-At-Law
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m | r | wolfe
& associates, p.c.
attorneys-at-law

November 7, 2018

By E-mail

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

Re: CEQA compliance for adoption of Transition Plan

Dear Members of the Board:

On behalf of LandWatch Monterey County, I write to respond to the November 5, 2018 letter from Alan Waltner to Jon Giffen, which opines that FORA's adoption of the transition plan is not a project subject to CEQA.

Waltner's letter acknowledges that the adoption of the Transition Plan is similar to the adoption of a general plan or zoning ordinance, both of which are projects clearly subject to CEQA. Waltner's analysis is flawed because it simply accepts the draft resolution's unsupported and unsupportable claim that the transition plan will not result in (a) changes to contemplated or approved land uses, (b) amendment or abandonment of previously adopted mitigation, or (c) changes to the Reuse Plan itself.

There is no basis for the claim that there will be no changes to contemplated or approved land uses as a result of the Transition Plan. Member agencies will no longer be constrained by the Reuse Plan and there is simply no authority for the proposition that member agencies must indefinitely abide by the land use designations, the development restrictions, or the policies regulating development in the Reuse Plan. For example, land use jurisdictions may chose to ignore the cap on the total allowable level of development or to ignore policies that regulate noise, water supply, transportation, etc.

There is no basis for the claim that the transition plan will not amend, abandon, or render uncertain previously adopted mitigation. As LandWatch has pointed out in its prior letters, the Transition Plan does not ensure continued enforcement of Reuse Plan policies that were identified as mitigation, does not provide for ongoing monitoring and reporting of mitigation requirements as required by CEQA, and does not identify any *enforceable* obligation that successor agencies complete infrastructure projects, including

any such projects that may be required as mitigation. As the Transition Plan staff report admits, and as FORA has been advised by the City of Marina and LAFCO, there is no agreement that the Transition Plan assignments of obligations, including what FORA calls "obligations" to construct CIP improvements, are legally authorized or that the assignments will in fact occur. In light of the failure of FORA to secure actual agreements to continue existing mitigation commitments, CEQA requires that FORA make findings as to the effect of the Transition Plan on existing mitigation plans and propose alternative mitigation as necessary. Waltner's analysis simply ignores the fact that the Transition Plan without enforceable agreements to continue previously adopted mitigation will effectively render that mitigation uncertain and/or unenforceable.

As LandWatch has repeatedly objected, the Transition Plan fails even to *identify* the Reuse Plan mitigation requirements that FORA expects other agencies to implement in the future. Waltner's claims that "further delineation of those program elements that pose a potential for environmental change is unnecessary" is based on the premise that "the transition plan avoids all such potential changes in the FORA Program." Since that premise is unsupported and unsupportable, the conclusion does not follow. Accordingly, FORA must at minimum identify the specific policies, development restrictions, and infrastructure projects that it believes are required mitigation measures and indicate how those mitigation measures will be enforced in the future. If the mitigation is changed or has become uncertain or will be abandoned as a result of the Transition Plan, CEQA requires that FORA make specific findings. The obligation to make such findings is distinct from the obligation to prepare a subsequent EIR pursuant to Public Resources Code § 21166. Waltner's letter does not address this distinct obligation other than to claim that all (unspecified) previously adopted mitigation will (somehow) be implemented.

Waltner acknowledges that addressing LandWatch's claim that a subsequent EIR is required is "beyond the scope" of his letter. Nonetheless, Waltner dismisses the claim based solely on his argument that the Transition Plan is not a "project" under CEQA because it "makes no changes in any applicable project-level or programmatic actions." For the reasons mentioned above and set out in LandWatch's previous letters, this is incorrect.

Waltner admits that when the transition occurs, FORA will not enforce consistency with the Reuse Plan, will no longer enforce the Implementation Agreements, and will not construct improvements. Waltner then argues that these changes do not flow from the adoption of the Transition Plan but from the Legislature's mandate that FORA be sunsetted. Waltner ignores the fact that the Legislature also gave FORA both the obligation to adopt a transition plan and the discretion to determine its contents. Because the Transition Plan is discretionary plan that will in fact result in physical changes to the environment, it is subject to CEQA – just like a legislatively mandated general plan is subject to CEQA. The Legislature knows how to devise a statutory exemption from CEQA. It did not do so here.

Waltner claims without any analysis that the Base Reuse Plan and its EIR "will continue to constrain local land use actions." Waltner cites no authority for the proposition that the 1997 Base Reuse Plan and its EIR will constrain future general plans, zoning ordinances, and development projects. Waltner relies instead on the mere recitals to that effect in the draft Transition Plan resolution. For example, Waltner does not address LandWatch's objection that FORA is improperly relying on the existing Implementation Agreements as the basis for its claim that mitigation obligations can be assigned to other agencies. It is preposterous to suggest that the Base Reuse Plan and its mandated mitigation, will continue in force indefinitely, without any agency responsible to monitor, enforce, or update its provisions, and with the acknowledged uncertainty and open disputes as to the assignability and enforceability of its provisions.

Waltner claims that "many of these constraints were recorded as deed restrictions and may continue as covenants running with the land." Waltner fails to provide any authority for this claim, or to acknowledge that the only published decision enforcing the Fort Ord covenants does *not* address FORA's termination. *See Monterey/Santa Cruz County Bldg. and Constr. Trade Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500.

Waltner does not explain what agency would be entitled, much less required, to enforce existing covenants, particularly in view of the disputes and uncertainty as to the continuing mandates of the Reuse Plan, its EIR, and its implementing agreements.

Waltner does not explain how existing covenants on indiviudal properties could possibly enforce such protections as total cumulative caps on development and other cumulative development restrictions set out in in the Base Reuse Plan, HMP, and CEQA mitigation. When the next project seeking land use approval exceeds the residential unit cap in the DRMP, or fails to implement the jobs/housing balance, who will be entitled or required to bar its approval?

Enforcement of existing provisions of the Reuse Plan and its EIR will be particularly problematic after the 1997 Base Reuse Plan ceases to be a living document enforced by FORA and subject to FORA's amendments to address changing circumstances. For example, the covenant mandated by the Implementation Agreements purports to bar any development that is not consistent with a local general plan that FORA has found to be consistent with the Reuse Plan. But FORA will no longer be making consistency findings and the local general plans FORA previously found consistent with the Reuse Plan cannot and will not be frozen in time. Ultimately, any such perpetual alienation of property rights based on a dead document would be disfavored and set aside. This may happen as soon as the first project seeks a general plan amendment.

Furthermore, Waltner provides no authority that deed restrictions can be required for *post-FORA* land transfers, and, if so, what agency would be required to impose and enforce such future covenant.

Finally, Waltner claims that CEQA compliance can be postponed until future discretionary actions by local agencies. But as LandWatch has explained, CEQA will not be triggered by the local agencies *failure* to act to implement mitigation. Public Resources Code, §21080(b)(5); Guidelines, §15270(b). FORA cannot delegate to other agencies FORA's own, current obligation to undertake CEQA review for the Transition Plan. It is *FORA's approval of the Transition Plan* that would abandon, change, or render uncertain previously adopted mitigation. If future action or inaction by local agencies is "speculative" as Waltner claims, it is only because FORA has not done the hard work required to identify required mitigation; to negotiate binding agreements for that mitigation, or to determine that such agreements cannot be reached; and to propose alternative mitigation where necessary.

Yours sincerely,

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

John Farrow

JHF:hs