

MEMORANDUM

Kennedy, Archer & Giffen

A Professional Corporation

DATE: January 10, 2018

TO: FORA Board of Directors

FROM: Authority Counsel Jon Giffen

RE: Assignability of Implementation Agreements (Part 1)

Question: Are the Implementation Agreements between FORA and the constituents of FORA assignable?

Answer: Yes. As noted in the discussion below, the Implementation Agreements are assignable by their terms.

ANALYSIS

We have reviewed the Implementation Agreements entered into between FORA and the Cities of Del Rey Oaks, Marina, Monterey, Seaside, and the County of Monterey in 2001. The following bullet points provide our initial analysis of the assignability of those agreements.

- In California, the general rule is that agreements are freely assignable (i.e., do not require the consent of the promisee in order to be assigned) unless either (i) the contract contains an express prohibition or restriction on assignment or (ii) the promisor is required to provide some personal skill, credit, or other quality of the promisor in performing the contract.
- The Implementation Agreements do not contain any specific prohibitions or restrictions on assignment. To the contrary, Section 10(b) expressly allows the jurisdictions to assign rights and delegate duties under the agreements to redevelopment agencies. Although redevelopment agencies are no longer in use today, Section 10(b) demonstrates that the contracting parties thought about the issue of assignability at the time the contracts were signed. Thus, absence from the agreements of any restrictions or prohibitions on assignment was not accidental.
- Neither are there any apparent requirements for personal skill contained in the Implementation Agreements. It might be argued that the Cities and County relied on FORA's credit in entering into the agreements, but a mere assignment made without accompanying releases of liability would not relieve FORA from secondary monetary responsibility for performance under the assigned

agreements. Thus FORA's credit would remain in play for so long as FORA exists (and would not be available after FORA's sunset, irrespective of whether any assignment occurred).

- Section 6(f) of the Implementation Agreements demonstrates that the contracting parties contemplated that FORA might be unable to pay all of the Base-wide Costs or undertake all of the Base-wide Mitigation Measures described in the agreements (and so the parties could not reasonably have expected that FORA's credit would assure full completion of the work). Section 7 of the Implementation Agreements goes on to reflect the expectation and intent that such expenses would be covered through the formation of a land-based financing district. This was ultimately implemented by the formation of a district under the Mello-Roos Community Facilities Act.
- Bear in mind that the general rule favoring "assignability" deals primarily with the concept of one contracting party being able to bind the other contracting party to accept performance by a third party to whom the obligation may be assigned. However, a classic contractual "assignment" cannot occur without a willing assignee. With regard to the Implementation Agreements, a somewhat different context is involved. FORA is not looking to contract with a third party to step into FORA's shoes as an assignee of FORA's rights and obligations under the agreements but rather is contemplating FORA's eventual dissolution pursuant to the FORA Act and Cortese-Knox-Hertzberg Local Government Reorganization Act (the "Reorganization Act").
- Based on our initial review of the LAFCO statute and the Implementation Agreement language favoring assignability, it appears that LAFCO will have the ability to pass along to the appropriate successor entity (ies) authority to continue the levying and collection of special taxes, fees, and assessments on property once within FORA's jurisdiction after FORA ceases to exist. In the meantime and until then, each of the Cities and the County will continue to be required to contribute their "fair and equitable share" of the project costs in the manner, at the time, and to the extent contemplated in the Implementation Agreements.

We are continuing to analyze the Implementation Agreements in the context of the eventual dissolution of FORA, and will supplement this memorandum with our further analysis of the expected role of LAFCO in handling the dissolution process, particularly as it involves the terms of the Implementation Agreements.