



December 2, 2019

Honorable William W. Monning
Member of the Senate
State Capitol, Room 4040
Sacramento, CA 95814

Dear Senator Monning:

This letter is in response to your inquiry dated November 5, 2019, regarding the Fort Ord Reuse Authority (FORA). It is my understanding you are requesting that the Department of Finance opine on FORA's authorization to receive former tax increment funding through certain Dissolution Law¹ provisions. While the issue of whether a payment is properly payable to FORA has not been presented to Finance in its capacity as the State's administrator of the Dissolution Law—and likely will never be—we appreciate the opportunity to assist you in Dissolution Law matters.

Passthrough Payments under Dissolution Law

Your primary question is whether Finance interprets Dissolution Law to require payment to FORA under Health and Safety Code section 34183(a)² and specifically, whether a pre-Dissolution Law requirement that redevelopment agencies within FORA's boundaries pay a statutory passthrough payment to FORA is a continuing obligation post-Dissolution Law. Although we do not anticipate this issue coming before Finance in any review process required by Dissolution Law, if the matter were to come to Finance for a formal determination, Finance's conclusion would likely be that the payment is not contemplated under Dissolution Law. This would be consistent with the wording and purpose of section 34183(a) and consistent with the Legislature's intent to direct the former tax increment funds to the affected taxing entities (ATEs) for core governmental services.

Under Dissolution Law, passthrough payments are determined by, and paid by, county auditor-controllers pursuant to section 34182 and section 34183. The only passthrough payments surviving post-Dissolution Law are those listed in section 34183(a). As your letter points out, FORA's statutory passthrough payment is provided for in section 33492.71 and is not listed in section 34183(a) and, as a result, it appears that the County Auditor-Controller may not be authorized to make a passthrough payment to FORA. Your letter suggests that the omission of FORA's statutory passthrough provision was an oversight and that one could read the law liberally to include it within section 34183(a). However, given the intent of Dissolution Law to direct as much former tax increment to the ATEs as soon as possible, we presume the omission was intentional.

¹ The dissolution of redevelopment agencies as contained in Part 1.8 and Part 1.85 of the California Health and Safety Code is known as the "Dissolution Law."


² All statutory references are to the California Health and Safety Code unless otherwise noted.

That only passthrough payments to ATEs survived the enactment of Dissolution Law is supported in both sections 34182 and 34183. Section 34182(c)(2) states that each county auditor-controller shall administer the former tax increment funds for the benefit of, "...the holders of former redevelopment agency enforceable obligations and the *taxing entities that receive passthrough payments* and distributions of property taxes pursuant to this part." (Emphasis added.) Further and consistent with section 34182(c)(2), the only statutory passthrough payments listed in section 34183(a) for payment are exclusively for ATEs and are given priority over all other payment obligations. The focus of these two sections on payments to ATEs indicates the Legislature's intent to fund ATEs. Since FORA is not an ATE, it follows that FORA's passthrough was intentionally omitted. Further, by ending FORA's passthrough, additional funds would be available for ATEs both for passthrough payments and as residual payments following the payment of other enforceable obligations.

Passthrough Payment as an Enforceable Obligation

Your letter also asks whether the payment required in section 33492.71 could be payable as an "enforceable obligation" of the relevant successor agencies. While Finance reserves the right to review this issue anew should it ever come to Finance for an official determination, even if section 33492.71 could fall under a definition of an "enforceable obligation" in section 34171(d), it would be an obligation for zero payment. Specifically, section 34189 renders inoperative all Community Redevelopment Law requirements which are dependent on tax increment. Since section 33492.71 is within the Community Redevelopment Law and completely dependent on tax increment, section 34189 has rendered the payment obligation of section 33492.71 inoperable and no funds could flow if payment is requested for it as an enforceable obligation.³

Thank you for contacting the Department of Finance on this matter. If you have any additional questions, please contact Jennifer Whitaker, Program Budget Manager, at (916) 445-3274.


KEELY MARTIN BOSLER
Director

³ Similar fact patterns involving the impact of section 34189 to invalidate what otherwise might be an enforceable obligation have been upheld by the Third District Court of Appeal. See *Cuenca v Cohen* (2017) 8 Cal.App.5th 200 and *Shayne v Bosler* (2019) WL 5701373.

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WILLIAM W. MONNING
SEVENTEENTH SENATE DISTRICT

CAPITOL OFFICE
STATE CAPITOL, ROOM 4040
SACRAMENTO, CA 95814
(916) 651-4017

MONTEREY DISTRICT OFFICE
99 PACIFIC STREET, SUITE 575-F
MONTEREY, CA 93940
(831) 657-6315

SAN LUIS OBISPO DISTRICT OFFICE
1026 PALM STREET, SUITE 201
SAN LUIS OBISPO, CA 93401
(805) 549-3784

SANTA CRUZ DISTRICT OFFICE
701 OCEAN STREET, SUITE 318-A
SANTA CRUZ, CA 95060
(831) 425-0401

SANTA CLARA COUNTY
TELEPHONE NUMBER
(408) 847-6101

November 5, 2019

Keely Martin Bosler, Director
California Department of Finance
State Capitol, First Floor
Sacramento, CA 95814

Dear Director Bosler:

This letter is to request your assistance in relation to the allocation of property tax revenues to the Fort Ord Reuse Authority (FORA). FORA was established, pursuant to the Fort Ord Reuse Authority Act, Title 7.85 of the Government Code, to oversee the economic recovery of the Monterey Bay area from the closure of and reuse planning of the former Fort Ord military base. FORA is governed by a board comprised of representatives within the boundaries of Fort Ord and includes the County of Monterey, local cities, and other taxing entities.

FORA has expressed interest in using bonding funds to remove the remaining blight within the former Fort Ord and there is confusion and conflict as to whether FORA is legally considered a statutory pass-through for the purposes of bonding. Because of this, I am asking that the California Department of Finance (DOF) clarify the following issues pertaining to FORA's bonding authority.

Pursuant to the FORA Act, FORA is currently scheduled to dissolve on June 30, 2020. Prior to its dissolution, FORA's members desire to issue bonds for the purpose of financing the removal of blighted buildings. These bonds are proposed to be secured by FORA's share of property tax increment revenues generated within the redevelopment project areas established within Fort Ord. Health and Safety Code Section (HSC) 33492.71(c) provides for the allocation of a portion of these property tax revenues to FORA, and various taxing entities, and further provides that such revenues will continue to be allocated to the extent needed to pay FORA's bond debt service following FORA's dissolution. FORA's member agencies, which include the cities of Seaside and Marina and the County of Monterey and whose redevelopment project areas generate FORA's property tax revenues, have consistently treated FORA's revenues as statutory pass-through payments both before and after the dissolution of redevelopment agencies.



There is, however, a statutory ambiguity resulting in uncertainty as to whether FORA's share of property tax revenues can be treated as a statutory pass-through following the dissolution of redevelopment in California. HSC Section 34183(a)(1), which authorizes county auditor controllers to pay statutory and negotiated pass-through payments that previously were paid by redevelopment agencies, does not include a reference to the statutory provision that provides for FORA's statutory pass-through payment as outlined in HSC Section 33492.71.

FORA and its member agencies believe that, if FORA's share of property tax revenues is not a statutory pass-through payment, it should instead be treated as an "enforceable obligation" of the redevelopment successor agencies receiving tax increment from within Fort Ord. For purposes of the Redevelopment Dissolution Act, HSC Section 34171(d)(1)(C) defines "enforceable obligations" of a redevelopment successor agency to include, among other things, "obligations imposed by state law, other than pass through payments that are made by the county auditor-controller pursuant to Section 34183." If the payments authorized by HSC Section 33492.71(c) are not statutory pass-through payments, then HSC Section 34181(d)(1)(C) appears to include these payments within the definition of enforceable obligation.

Pass-through payments and enforceable obligations are administered differently under the Redevelopment Dissolution Act. Pursuant to HSC Section 34183(a)(1), county auditor controllers are responsible for calculating and paying statutory pass-through payments, whereas under HSC Section 34177, subdivisions (a) and (o), redevelopment successor agencies are responsible for paying enforceable obligations, including listing all enforceable obligations on annual Recognized Obligation Payment Schedules (ROPS) and obtaining approval of each ROPS by the successor agency's oversight board and DOF.

In order to issue bonds secured by this revenue stream, FORA needs to know whether the payments to FORA are properly treated as statutory pass-through payments or enforceable obligations and either; (a) the determination of whether the payments to FORA are statutory pass-through payments is appropriately made by the Monterey County Auditor-Controller (CAC) and DOF does not and will not dispute the CAC's determination on this matter, or (b) DOF agrees with the successor agencies and the CAC that FORA's share of tax increment is properly treated as a statutory pass-through to be administered by the CAC pursuant to HSC Section 34183(a)(1).

In previous discussions with FORA's legal counsel regarding the proper treatment of FORA's property tax revenue stream, DOF raised the possibility that FORA's property tax revenue stream may not be available to FORA at all following the dissolution of the redevelopment agencies in Marina, Seaside and the County of Monterey. HSC Section 34189 was referenced, which provides that, as of February 1, 2012, the date on which all redevelopment agencies in California were dissolved, "all provisions of the Community Redevelopment Law that depend on the allocation of tax increment to redevelopment agencies, including, but not limited to, HSC

Sections 33445, 33640, 33641, and 33645, and subdivision (b) of Section 33670, shall be inoperative.”

It is my understanding that FORA believes this interpretation of the Redevelopment Dissolution Statutes is incorrect for several reasons:

- First, the FORA Act and HSC Section 33492.78, which provides for the allocation of tax increment generated within Fort Ord to school and community college districts, have both been amended since the dissolution of redevelopment agencies in February, 2012. This indicates that the legislature knew that FORA existed and continued to receive its pass-through payments pursuant to HSC Section 33492.71 following the dissolution of redevelopment agencies.
- Second, HSC Sections 33492.71 and 33492.78, which allocated property tax increment to FORA and school entities, respectively, both provide that redevelopment agencies will make the payments provided for in those sections instead of the otherwise-applicable statutory pass-through payments provided for under HSC Sections 33607.5 and 33676. This indicates that the allocations of property tax revenues generated within Fort Ord project areas provided for under HSC Sections 33492.71 and 33492.78 serve the same purpose and apply in lieu of the typical statutory pass-through provisions set forth in the Community Redevelopment Law and that these provisions should have been listed in HSC Section 34183(a)(1) as statutory pass-through payments to be calculated and paid by the CAC. FORA believes the omission of HSC Sections 33492.71 and 33492.78 from HSC Section 34183(a)(1) was an oversight on the part of the legislature when the Redevelopment Dissolution Act was drafted.
- Third, while HSC Sections 33492.71 and 33492.78 were omitted from the list of statutory pass-through provisions set forth in HSC Section 34183(a)(1), Section 33492.72 is referenced in Section 34183(b) among the statutory provisions authorizing subordination of statutory pass-through payments. This supports the conclusion that the legislature intended to treat the payments provided for in HSC Sections 33492.71 and 33492.78 as statutory pass-through payments.
- Finally, to date, all parties, including the County of Monterey and the cities of Seaside and Marina, have treated FORA's share of tax increment as a statutory pass-through payment and the CAC has distributed these payments to FORA as a statutory pass-through every year since redevelopment agencies were dissolved in 2012. The CAC has indicated to FORA that DOF has been aware of the payments to FORA and has never objected to these payments.

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It should be noted that, if FORA's property tax revenue allocation is a pass-through, FORA and its members believe the revenue stream will continue as long as the successor agencies in Marina, Seaside and the County of Monterey, respectively, have enforceable obligations outstanding. In contrast, enforceable obligations are paid in accordance with their terms regardless of former redevelopment plan limitations. FORA and its members are comfortable with, and have no objection to, the limited time frame during which FORA will receive its share of property tax revenues to assure bond holder payments, if this allocation is treated as a statutory pass-through payment.

In order for FORA to issue bonds secured by its share of property taxes generated from the redevelopment project areas within the Fort Ord boundaries, FORA needs to know with certainty that these property tax revenues will continue to be allocated to payment of FORA's bonds pursuant to HSC Section 33492.71(d)(1)(A) (prior to FORA's dissolution) and (d)(1)(D) (following FORA's dissolution).

I am requesting that DOF confirm FORA's allocation of property taxes pursuant to these statutory provisions is properly considered a statutory pass-through payment, which the CAC is required to pay to FORA pursuant to HSC Section 34183(a)(1), in a written response by November 25, 2019.

Thank you for your attention to this matter. If you have any questions, please feel free to contact Bethany Westfall or Tobias Uptain-Villa, with my staff, at 916-651-4017.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Monning', with a stylized flourish at the end.

WILLIAM W. MONNING
Senator, 17th District

WWM:tuv/bw