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MEMORANDUM

DATE: August 2, 2018
TO: Fort Ord Committee of the Board of Supervisors
FROM: Wendy S. Strimling, Senior Deputy County Counsel
SUBJECT: FORA Transition: Habitat Conservation

The Fort Ord Reuse Authority (FORA) is currently preparing a transition plan to submit to the Local Agency Formation Commission (LAFCO) on or before December 30, 2018, pursuant to Government Code section 67700. To evaluate County's options and make policy recommendations regarding the FORA transition, the Fort Ord Committee of the Board of Supervisors has requested legal analysis of a number of subjects involved in the transition planning. This memo addresses the subject of habitat conservation specifically.

In considering the "habitat liabilities/obligations" identified in the FORA Draft Transition Plan, the Fort Ord Committee raised several questions regarding the County's obligations and options, including the following questions:

1. What are County's obligations under the Habitat Management Plan? Does County need a regional approach/creation of a Joint Powers Authority (JPA) to manage the County's obligations under the Habitat Management Plan?
2. What is the alternative to adoption of a basewide Habitat Conservation Plan?
3. Can a JPA be formed without adoption of an HCP?

These questions involve environmental, financial, and practical considerations as well as legal considerations. The purpose of this memo is to provide the legal framework for considering these issues.

Habitat Management Plan

The United States Army developed the *Installation-Wide Multispecies Management Plan for Former Fort Ord, California*, dated April 1997 ("Habitat Management Plan" or "HMP") for the Army's closure and disposition of the former Fort

Ord to comply with the federal Endangered Species Act (ESA).¹ The HMP was required as a result of the Biological Opinion issued by the United States Fish and Wildlife Service (USFWS) for the closure of Fort Ord in order to reduce the incidental take of species listed under the ESA and loss of those species' habitat associated with the decommissioning of the former Army base. The federal Environmental Impact Statement and Final Supplemental Environmental Impact Statement prepared for the base closure also recommended preparation of the HMP as mitigation for potential loss of species and habitat.

The HMP is an "installation-wide" plan. It applies basewide but categorizes the land within the former Fort Ord on a parcel by parcel basis into the following HMP management categories: Habitat Reserve, Habitat Corridor, Development with Reserve Areas or Development with Restrictions, Borderland Development Along NRMA (Natural Resource Management Area) Interface, Development, and Future Road Corridors. The categories have different levels of restrictions on development and requirements for habitat management. The goal is "to promote preservation, enhancement, and restoration of habitat and populations of HMP species while allowing development on selected property that promotes economic recovery after closure of Fort Ord." (HMP, Chapter 4, pa. 4-1.) So, for example, lands categorized as "Habitat Reserve" are to be managed to conserve and enhance threatened and endangered species, while the HMP places no management restrictions on "Development" lands.

The County of Monterey has agreed to fulfill the requirements of the HMP with respect to former Fort Ord lands that have habitat management requirements and that have been transferred to or will transfer to the County. The County of Monterey signed the HMP as a "concurring agency," whereby County concurred with the management requirements stated in the Habitat Management Plan for the Fort Ord lands that the County was to receive. (Board of Supervisors' Order, dated July 29, 2003, authorizing concurrence with the management requirements of the HMP.) The HMP requires entities with management responsibilities for lands categorized as Habitat Reserve, Habitat Corridor, or Development with Reserve Areas or Development with Restrictions to monitor conservation areas and corridors; the County is one of the entities with such responsibilities. (HMP, at p. 4-20.) Responsibilities include requiring avoidance of impacts to HMP target species and conserving and managing the areas in accord with the goals and objectives of the HMP and parcel-specific requirements in the HMP. (*Id.*) The HMP requires the land transfer deeds to contain covenants to implement the HMP. Thus, the deeds transferring land from FORA to the County have contained the specific use restrictions of the HMP and the conservation, management, monitoring and reporting requirements of the HMP if and as applicable to the particular parcels being transferred. (We refer you to staff for the specific requirements applicable to specific parcels.) Additionally, the Fort Ord Base Reuse Plan and the County's Fort Ord Master Plan require implementation of HMP policies. (See Biological Resources Policies.)

Habitat Conservation Plan

The proposed Habitat Conservation Plan (HCP) serves a different function than the HMP. The HMP enabled Army closure of the former Army base in compliance with the federal Endangered Species Act (ESA), and it established a comprehensive

¹ The 1997 HMP is a revision of an earlier HMP published in February 1994.

basewide framework for species and habitat conservation; however, the HMP did not provide future landowners with “take” authorization under the federal ESA or its state counterpart, the California Endangered Species Act (CESA). The proposed Habitat Conservation Plan is intended to provide the basis for incidental take authorization under state and federal law. Thus, while the proposed HCP would incorporate the HMP and supersede the HMP as the primary habitat conservation plan for non-federal recipients of Fort Ord lands, it also serves a different function—providing the basis for issuance of “incidental take” permits under state and federal law for several identified species. Without a habitat conservation plan approved by the federal and state wildlife resource agencies, the County would remain obligated to fulfill the management requirements under the HMP but would not have take authorization.

While a discussion of the federal ESA or CESA is beyond the scope of the memo, in sum these laws protect listed endangered and threatened species (and in the case of federal law, their critical habitat). The ESA prohibits the taking of listed endangered and threatened species. (16 USC sec. 1538(a)(1).) “Take” is broadly defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (16 USC sec. 1532 (19).) By regulation, “harm” includes significant habitat modification or degradation. Private or local government development projects that have no federal involvement and that could result in a take of listed species would violate the ESA unless the applicant obtains an “incidental take permit.” To grant an incidental take permit, the USFWS must find that the take “is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” (16 U.S.C. sec. 1539(a)(1) (B).) The incidental take permit cannot be issued unless the applicant submits a “conservation plan” that specifies the impact that will result from such taking, the steps applicant will take to minimize and mitigate the impacts, reasons why alternative actions to such taking are not being used, and such other measures as may be required by USFWS. (16 U.S.C. sec. 1539(a)(2).) The USFWS must find that the taking will be incidental, that the applicant will minimize and mitigate the impacts to the maximum extent feasible, that the applicant will ensure that adequate funding for the plan will be provided, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. (16 USC sec. 1539(a)(2)(B).) Under the CESA, the California Department of Fish and Wildlife (CDFW) similarly must issue a permit under Fish and Game Code section 2081 to authorize incidental take, provided, among other things, that the take is minimized and fully mitigated and that the applicant commits to adequate funding and monitoring of the mitigation.

The HMP does not provide take authorization. The HMP explicitly states that it does not provide take authorization under federal ESA, although it was intended to “simplify” future regulatory compliance and form the basis for a habitat conservation plan that would support the issuance of an incidental take permit to the future land recipients under section 10 of the ESA. (HMP, p. 4-9.) The HMP also notes that future landowners must still comply with applicable measures for state-listed threatened and endangered species required under the California ESA, CEQA, and other regulations.

Accordingly, using the framework of the HMP, FORA has taken the approach of preparing a basewide Habitat Conservation Plan (HCP) to accompany applications to USFWS and CDFW for incidental take of listed species under the ESA and CESA. The HCP has been under preparation since approximately 1997. FORA can explain the various hurdles it has encountered in developing the plan.

If the County needs to undertake any development that would result in a take of a federally listed species, it would need a habitat conservation plan that satisfies the federal requirements. Federal and state law do not necessarily require a basewide approach, but the HMP was “installation-wide” and was intended to simplify the process of obtaining incidental take permits. Further investigation would be advisable to determine if there are agreements that commit FORA or any of the land recipient entities to a basewise conservation approach. If there are no such contractual constraints, then the law does not prohibit a more individualized approach to seeking take authorization, such as each jurisdiction or development applicant pursuing individualized take authorization, but these other approaches raise many practical and financial issues to consider, including management and funding of any basewide HMP management responsibilities and allocation of the CFP dollars already collected by FORA for habitat conservation.

Joint Powers Agency

In conjunction with preparation of a basewide HCP, FORA has been preparing a draft joint powers agreement to create a Joint Powers Authority (JPA) to administer the HCP. The Joint Exercise of Powers Act (California Government Code section 6500 et seq.) authorizes two or more public agencies to enter into agreement to jointly exercise powers common to the contracting parties (Gov’t Code sec. 6502), so legally, the various public agencies have the legal authority to create a JPA, regardless of whether an HCP is adopted. However, if the JPA were to be approved prior to adoption of an HCP, the agreement must not be predecisional; it cannot legally assume adoption of the HCP ahead of that adoption. The joint powers agreement could address habitat management in any number of ways. For example, a JPA could be formed to implement existing HMP requirements, to assume responsibility from FORA for pursuing the incidental take permits and HCP, and to provide a process for consideration of amendments to the JPA in the event of adoption of a basewide HCP. Alternatively, a JPA could be formed solely for implementation of the HMP, or it could authorize the JPA to determine whether to pursue a basewide approach or other approach to pursuit of incidental take authorization. We would be happy to advise further about specific concepts for the JPA as they develop.

Conclusion

Given the complex history, the legal and factual issues associated with the FORA transition, and the evolving transition plan, we provide this advice with the caveat that it is based on our legal analysis to date and our current understanding of the facts. We would be happy to provide additional analysis of these issues as the FORA transition planning proceeds.

cc: Melanie Beretti, RMA
Nick Chiulos, Assistant CAO