MONTEREY COUNTY

RESOURCE MANAGEMENT AGENCY – PLANNING DEPARTMENT

MEMORANDUM

Date: February 26, 2013

To: Board of Supervisors

From: Laura Lawrence, R.E.H.S., Planning Services Manager

Subject: Item #13 – Appeal by Glen R. Mozingo of the Powell Well Application

Since the printing of the staff report, additional information is being provided to the Board of Supervisors to address the horizontal separation between domestic wells and sources of pollution and modifications allowed to the California Plumbing Code.

Those changes are reflected in Finding 2 (Consistency), Evidence (h) and in Finding 6 (Appeal) under "County's Response Nos. 4A and 4B" in the Resolution for PLN110366 (**Attachment B** of the February 26, 2013 staff report) and in Finding 2 (Consistency), Evidence (f) and in Finding 8 (Appeal) under "County's Response Nos. 4A and 4B" in the Resolution for PLN110367 (**Attachment C** of the February 26, 2013 staff report). The new information is shown in underlined text below:

FINDING: **CONSISTENCY** – The Project, as conditioned, is consistent with the applicable plans and policies which designate this area as appropriate for development.

The new well site is 14.5 feet away from the neighbor's (Mozingo) property line adjacent to Serra Avenue. The new location created a radius that would extend 10.5 feet into the adjacent property over a portion of the driveway of the Mozingo property. Upon reviewing setback requirements established under the zoning, the County has determined that the radius would only affect approximately 55 square feet of developable area, less than 1% of the Mozingo property. The impact is not a significant impact and does not substantially burden the neighbor's use of his property. Additionally, Monterey County Code section 18.02.040.F gives the local Building Official discretion to grant modifications to the California Plumbing Code for individual cases if certain findings can be made. In the case of the Appellant's property, if the Appellant needed to place a sewer line on his property within 25 feet of the Powell well, he could apply to the Building Official for a modification of the 25-foot requirement. Provided that certain findings could be made, the Building Official could approve the modification, in which case the Powell well would have no effect at all on Appellant's use of his property. See response to Appellant's Contentions 4A and 4B.

FINDING: **APPEAL** – The appellant contends that findings or decision or conditions are not supported by the evidence and that the decision by

the Zoning Administrator to approve the Coastal Administrative Permit on August 9, 2012 was contrary to law. The Board finds that the Appellant's contentions are without merit for the reasons set out below.
County's Response Nos. 4A and 4B:

1. Takings

Appellant contends that approval of the amendment to the CAP and approval of the CAP permits an unlawful taking of property, in violation of the Fifth Amendment of United States Constitution and the 14th Amendment of the California State Constitution. The appeal alleges that the Zoning Administrator's decision allowing the well to remain in its present location violates the "Article 5" of the United States Constitution, as recognized by the 14th amendment. (Appeal, page 11 of August 31 letter attachment.) Article 5 of the United States Constitution governs amendments to the United States Constitution and has no relation to the appeal before the Board of Supervisors. We presume the Appellant was referring to the Fifth Amendment to the United States Constitution, referenced elsewhere in the appeal.

The Fifth Amendment, made applicable to the states through the 14th Amendment, provides that private property "shall not be taken for public use, without just compensation." Section 19 or Article I of the California Constitution also prohibits the taking or damage of private property without just compensation. While the appeal does not specifically articulate the basis of Appellant's takings assertion, his contention appears to rest on the argument that the 25-foot well setback requirement encroaches on to the Appellant's property. Our conclusion, having evaluated the law and facts, is that allowing the well to remain in the present location, where drilled, does not result in an unconstitutional taking of the Appellant's property.

The well setback is mandated by the California Plumbing Code for reasons of public health and safety. The required setback radius between water wells and building sewers is typically 50 feet. However, Table 7-7 in the 2010 California Plumbing Code sets the minimum horizontal distance for water supply wells from building sewers to be not less than 25 feet when the drainage piping is constructed of materials approved for use within a building. Regulations set forth in California Well Bulletins 74-81 and 74-90 and Monterey County Code (MCC) Chapter 15.08 (Well Ordinance) establish setback distances from potential contaminating sources such as sewer and wastewater pipes. The well setback requirement serves an important public health and safety purpose. Maintaining a setback provides distance between the well, a conduit to the groundwater supply, and the potential source of contamination in the event of a leak or pipe break. There are no sewer laterals or wastewater lines within 25 feet of the Powell well.

Modification of the minimum distance between a well and sewer line is allowed under the California Well Standards Bulletin 74-90. When, at the approval of the enforcing agency, a water well is to be located closer to a source of pollution or contamination than allowed by the California Well Standards Bulletin 74-90, the annular space shall be sealed from ground surface to the first impervious stratum, if possible. The annular seal for all such wells shall extend to a minimum depth of 50 feet. The Powell well is sealed to a depth of 105 feet. Therefore, the relocated Powell well meets these setback requirements (**Attachment R** of the February 26, 2013 staff report).

The local Building Official also has authority to reduce 25-foot well setback required by the California Plumbing Code on a case by case basis if certain findings can be made. Pursuant to California Plumbing Code sections 1.8.7.1 and 1.8.7.2, the local building department may, on a case-by-case basis, approve alternate materials, designs, tests, or methods of construction for single family dwellings except for structures located in mobilehome parks, structures located in special occupancy parks and factory-built housing. This authority to modify certain standards is also reflected in and provided by Monterey County Code section 18.02.040.F, which states that "[w]herever there are practical difficulties involved in carrying out the provisions of this Chapter [the Chapter includes and incorporates by reference the California Plumbing Code], the Building Official shall have the authority to grant modifications for individual cases, upon application of the owner or owner's representative, provided the Building Official shall first find that (1) special individual reasons makes the strict application of this Chapter impractical; (2) the modification is in compliance with the intent and purpose of this Chapter; and (3) that such modifications do not lessen health, accessibility, life and fire safety, or structural requirements."

The Appellant does not contend or demonstrate that approval of the well at its current site results in a physical invasion of appellant's property or deprives the Appellant of all economically viable use of his property. The well is on Powell's property, not the Appellant's. Thus, the decision results in no physical invasion. Accordingly, the appropriate standard to evaluate the takings claim is the standard for regulatory takings set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Penn Central* requires "ad hoc, factual inquiries" into several factors, including "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations," and the character of the governmental action. (*Id.* at 124; see also *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 538-39 (2005); *Herzberg v. County of Plumas*, 133 Cal App. 4th 1 (2005).)

An examination of the particular facts and evidence in this case shows

that the well setback does not effect a takings. The well setback does not significantly impact or substantially burden Appellant's use of his property and does not deprive the Appellant of economically viable use of his property. The Appellant already has a house on his property with which the well setback does not physically interfere. The 25-foot radius from the well where drilled extends approximately 10.5 feet onto the Appellant's property. The 25 foot radius has been measured from the center of the well casing (10.75 inches in diameter). In consultation with Environmental Health staff, the 25-foot radius should be measured from the outside of the well casing—adding an additional 5.375 inches to the measurement. (The Environmental Health Bureau would not take a measurement from the vault walls if the well were placed in a vault.) Measuring from the outside of the well casing, the well setback extends approximately 10.5 feet onto the Appellant's property. The total area affecting the Appellant's property is an estimated 250 square feet with the majority of that area within the front and side setbacks. The setbacks are required by site development standards in the Monterey County Coastal Zoning Ordinance (Title 20). Section 20.12.060 requires main structures to maintain a setback of 20 feet from the front property line, 5 feet from the side property line, and 10 feet from the rear property line. Further, non-habitable accessory structures, such as garages, are required to maintain a front setback of 50 feet or behind the main structure, whichever is less, 6 feet on front one-half of property and 1 foot on rear one-half of property from the side property line, and 1 foot from the rear property line. The amount of the well setback that extends on to a usable area of Appellant's property, beyond the front, side and rear setbacks, is an estimated 55 square feet, a small area (less than 1%) relative to his whole property (**Attachment K** of the February 26, 2013 staff report). In other words, the amount of the well setback that is within the portion of the Appellant's property that could be developed is 55 square feet; at most, the well setback affects less than 1% of the Appellant's property. The Appellant's property is already developed with a single family residence and a garage on the rear of the property, on the other side of the property from the well setback (**Attachment J** of the February 26, 2013 staff report). The single family dwelling is located approximately 40 feet from the front property line and the garage is more than 80 feet from the front property line. The well setback does not have any effect on the single family home or the garage. The 55 square foot area is currently the Appellant's driveway. The setback does not require any change in the use of this area as a driveway. The location of the well setback also does not substantially restrict the future development of Appellant's property, as there is ample room for expansion of the single family residence not in the 55 square foot area. Even if a structure were to be built in that area, the only restriction would be that indoor plumbing fixtures could not be placed within that 55 square foot area. If the Appellant were to move the garage area forward, sewer laterals would not necessarily be an issue because garage typically lack bathrooms. However, if wastewater lines

were to be installed in the garage, the sewer laterals would run toward the rear of the property, opposite the well site, toward the location of the sewer main in the easement at the rear of the property (**Attachment H** of the February 26, 2013 staff report).

The Appellant has provided no evidence that the well setback actually impacts the use of his property or diminishes the value of his property. A diminution in property value due to the well setback would not necessarily result in a taking, and in this case, the Appellant has supplied no evidence of a loss of use or value resulting from Powell's well. The facts show that the well setback serves an important public health purpose of preventing groundwater contamination, imposes limited restrictions on less than 1% of the Appellant's property, and does not deprive the Appellant of economically viable use of his property. The Appellant has also made no application to develop within the 55 foot area. His concern that the well setback might burden a future use, for which he has not applied, is not proof of a substantial burden on or deprivation of use of his property. Without an application by Appellant (or subsequent owner of that property) to develop within the setback area, it is premature to conclude that any deprivation would occur. In fact, the Powell well may result in no impact on Appellant's property. If Appellant desired to place a sewer lateral within the 25 foot setback area, the Appellant could apply to the County Building Official for a modification of the Plumbing Code's 25-foot requirement. As explained above, the County Building Official has the discretion to grant modifications to the California Plumbing Code well setback requirement in individual cases provided that "(1) special individual reasons makes the strict application of this Chapter impractical; (2) the modification is in compliance with the intent and purpose of this Chapter; and (3) that such modifications do not lessen health, accessibility, life and fire safety, or structural requirements." (Monterey County Code section 18.02.040.F.) The application for modification would be judged on its facts at the time of the application, but it is possible that a modification could be approved in light of the location of the well, the annular seal depth, and soil characteristics. According to the well log on file with the Health Department, the unconsolidated sediment (soil) on the Powell property extends to a depth of 65 feet. These sediments contain clays which are less permeable, allowing for more filtration of contaminants before reaching consolidated material (hard rock) which has fractures and can be more permeable. Therefore, based on this factual analysis, we conclude that the amendment to the Coastal Administrative Permit to authorize the new location of the test well and the Coastal Administrative Permit to convert the test well to a production well do not result in a taking of Appellant's property.