Attachment N
Letter from
Glen R. Mozingo, Appellant
Dated January 9, 3012

PLN110366/PLN110367
Mozingo (Powell)

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MEMBERS
CALIFORNIA STATE BAR
NEW YORK STATE BAR
UNITED STATES FEDERAL BAR
INTERNATIONAL BAR
UNITED STATES TAX COURT
U.S. COURT OF INTERNATIONAL TRADE
LAW SOCIETY OF ENGLAND & WALES*

January 9, 2013

Transmitted via Overnight Mail

Monterey County Board of Supervisors
168 West Alisal Street, 1st Floor
Salinas, California 93901

Attention: Gail Borkowski, Clerk

Re: ***Reply to Board Report Filed in Response to Appeal***

In the Matter of the Application of William Dan Powell (PLN 110366) Appeal to Resolution 12-027 Finding Project Categorically Exempt per Section 15304 and approving Amendment (PLN110366) to Coastal Administrative Permit (PLN 070074) and Application of William Dan Powell (PLN 110367) Appeal to Resolution 12-028 Finding Project Categorically Exempt per Section 15304 and approving a Coastal Administrative Permit (PLN 110367) to Allow the Conversion of an Approved Test Well Previously Approved under PLN 070074 (amended under PLN 110366) to a Domestic Production Well)

Real Property Location: 3072 Serra Avenue, Carmel, California 93923
APN: 009-081-027-000
Appellant: Glen R. Mozingo, Esq.

Dear Board of Supervisors:

*LICENSED TO PRACTICE LAW IN FORTY-NINE COMMON LAW COUNTRIES

1. **Appellant's Contention No. 1: The Owner of the Property on Which the Well is Located is a New Owner.**

The entity which is presently seeking the Amendment under PLN 110366, the Estate of William Dan Powell (hereinafter referred to as "New Owner") is not the same Applicant who obtained the original permit PLN 070074, William David Powell, deceased (hereinafter referred to as "Prior Owner"). Additionally, the new Owner who is presently seeking under PLN110367 the conversion of test well to a domestic production well is not the same Applicant who obtained the original permit PLN070074, William David Powell, the Prior Owner.

Staff Response No. 1

The Coastal Administrative Permit for the test well, PLN 070074, was approved by the Director of Planning on June 11, 2008 (Attachment E) and not appealed. The owner at that time was William Powell Trust with William David Powell as Trustee. That owner is now deceased. The next owner was the Estate of William Powell with Holly R. Bruce as the Successor Trustee. Holly R. Bruce transferred ownership of the property to William Dan Powell on April 21, 2011. William Dan Powell is now deceased, and the current owner is the Estate of William Dan Powell. Nonetheless, discretionary permits issued by the County of Monterey run with the property which they are issued – not with the particular owner. Therefore, the new owner of the property may apply for an amendment to the permit.

Reply to Staff Response No. 1

For matter of accuracy only, the owner of the property at the time the permit was filed was William David Powell, an individual. In reviewing the county and court records, it appears that after Mr. William David Powell died, his family filed a Heggstad Petition authorizing the transfer of the property into the trust so as to allow transfer to William Dan Powell while bypassing probate and on April 21, 2011 William Dan Powell took ownership of the Property.

Appellant has never argued that the Coastal Administrative Permit issued by the County of Monterey did not run with the property authorizing the drilling of the well. ***However, the Coastal Administrative Permit authorized by the County did not allow drilling of the well where it presently stands and Mr. William David Powell never applied for an Amendment to that Permit.***

2. Appellant's Contention No. 2: Knowledge of Prior Owner of Need to Obtain New Permit

At the time the Prior Owner began to drill the test well in its present location, the adjacent property owner (Appellant) expressed to the Prior Owner his concerns that the test well was being drilled in an unauthorized location. At that time, the adjacent property owner was directly advised by the Prior Owner that the Prior Owner was aware of the necessity to obtain a permit for this new location, but that he had an "inside guy" at the Planning Department, did not care about the requirement for a new permit, and would not be seeking the same since his "inside guy" at the Planning Department would take care of any issues that arose. Additionally, approximately three years ago, the Monterey County Board of Supervisors denied a request by the Prior Owner to authorize the relocation of the well based, in part, on the fact that no application to amend the authorized permit had ever been filed. The Monterey County Board of Supervisors prohibited the Prior Owner from proceeding with the development of the well. The Prior Owner was, therefore, placed on both constructive and actual notice that he could not proceed unless he complied with the conditions of the permit he obtained which required him to locate the well Fifty (50) feet from where Mr. Powell (deceased) chose to place the well.

Staff Response No. 2

The Appellant's assertion about Mr. Powell's statements and motivations are not corroborated by staff's research. The Appellant's assertions contradict Planning and Environmental Health staff's recollection of events. Mr. Powell is now deceased, and therefore, Appellant's recollection about their conversations cannot be confirmed.

Staff research indicates the following sequence of events. In 2008, after the approval of the Coastal Administrative Permit for the test well, William Powell (uncertainty with regard to which William Powell, but assuming William David Powell, owner at the time) came to the County Planning Department counter and spoke to the project planner about moving the well location. The project planner directed Mr. Powell to speak with Environment Health staff about the possibility of moving the well location, but did not give Mr. Powell permission to move the well site. Environmental Health staff made a site visit to the property in September 2008, made notes on a site plan, and approved the relocation of the well based upon the criteria of whether the well met the required setbacks from existing sanitary sewer lines. (See handwritten notes on map; see also applicant submission to EHB, attached as Attachment L.) The change in the location of the well did not require an amendment to the well permit issued by Environmental Health. Although the new well location was authorized by Environmental Health, the new well location was not authorized by the original Coastal Administrative permit which approved a different well location. Therefore, to cure the violation of the Coastal Administrative Permit and allow the test well to remain in the location where drilled, an amendment to the Coastal Administrative Permit for the test well was necessary. The Applicant applied for an amendment to the Coastal Administrative Permit on January 19, 2012.

Moving to Appellant's next contention, the Appellant contends that, approximately three years ago, the Monterey County Board of Supervisors denied a request by the Prior Owner to authorize the relocation of the well based, in part, on the fact that no application to amend the authorized permit had ever been filed. This contention has no merit, as the Board took no prior action on a request for relocation of the well. The Board of Supervisors took no action on either of these application or the previous application PLN 070074 three years ago. If the Appellant is referring to the Board of Supervisor's action on the adoption of the Interim Urgency Ordinance No. 5160 on May 25, 2010, as subsequently modified and extended by Interim Ordinance Nos. 5163 and 5176, legislative action is not the same as an action on a discretionary permit.

Additionally, the Appellant contends that the Monterey County Board of Supervisors prohibited the prior Owner from proceeding with the development of the well. Contrary to

the contention, the Board of Supervisors adopted Ordinance No. 5163 on June 29, 2010, an interim ordinance extending the Interim Ordinance No. 5160, which temporarily prohibited the acceptance and processing of water well applications within a portion of the California American Water Company - Monterey District Main System Service Area (Attachment G). Section 2 of Ordinance No. 5163 revised subsection C of Section 5 (Exemptions) of the Interim Ordinance No. 5160 as follows:

C. This ordinance does not apply to applicants who have constructed authorized test wells or received a discretionary development entitlement to construct a test well on a parcel in the unincorporated area of the County within the Coastal Zone prior to May 25, 2012, and the County is not prohibited from accepting and processing applications for a discretionary development entitlement to convert such test wells to production wells, provided that the test well was authorized prior to May 25, 2010 or constructed prior to May 25, 2010, in accordance with the terms of any permits issued by the County of Monterey. If a test well was constructed prior to May 25, 2010 not in accordance with the terms of any County discretionary development entitlements, the County is permitted to take such steps as may be necessary or appropriate to enforce the terms of such permits, including but not limited to the processing and issuance of such discretionary development entitlements and/or ministerial permits as may be needed. (emphasis added.)

The Powell test well permit (Permit 06-10966) was issued by the Environmental Health Bureau on August 12, 2008. The test well was completed on February 5, 2009. Per the ordinance language quoted above, if a test well, constructed prior to May 25, 2010, was not in accordance with the terms of any County discretionary development entitlements, the County was permitted to process and issue such discretionary development entitlements and/or ministerial permits as may be needed, notwithstanding any other restrictions on processing established by the interim ordinance. The amendment to the Coastal Administrative Permit comes within that exception. The amendment for the test well, if approved, cures any violation of the Coastal Administrative Permit by authorizing the location of the well where it was drilled. Therefore, per the section quoted above, Interim Ordinance No. 5163 did not prohibit the Applicant from applying for the amendment to the

Coastal Administrative Permit for the test well nor did it preclude the County from processing the application. In any event, the Interim Ordinance is not relevant to the current applications because Interim Urgency Ordinance No. 5160, as modified and extended by Interim Ordinance No. 5163 and Interim Ordinance No. 5176, expired on May 24, 2012.

Reply to Staff Response No. 2

Paragraph 2 of the Staff Response, addresses alleged communications between William David Powell and the project planner and Environmental Health Staff in 2008. Despite the fact that Appellant has requested proof of any such communications or proof of any approval of the relocation of the well, no such proof has been provided and the names of the individuals allegedly contacted by Mr. William David Powell have still not been provided. In fact, no documents confirming that Mr. Powell ever received approval for relocation of the well have ever been forthcoming from either Mr. Powell or anyone else and nothing on the site map produced as part of Attachment "L" reveals that any notes contained thereon were prepared by any county personnel nor has the document been appropriately authenticated by the author.

Additionally, based solely upon the applicant submission to EHB, Attachment "L" to Board Report 12-993, it appears that the Environmental Health Staff was misled by Mr. Powell as to where the original well site approved under the Coastal Administrative Permit PLN070074 was located at the time he approached the Environmental Health Staff for purposes of relocating the well. In 2008 applicant's submission to EHB, Attachment "L" to Board Report 12-993, denoted the original well site location to be midline between the front and back property lines of the Powell Lot nearly on the Property line between Appellant's lot and Mr. Powell's lot. The Topographical Survey prepared over a year later, in December of 2009, Attachment "K" to Board Report 12-993, clearly shows the original approved well location to be midline between the side property lines of Mr. Powell's lot and one-third (1/3) from the back property line of Mr. Powell's lot. In other words the approved well site located both the well and the setbacks completely within the Powell property lot with no encroachment into Appellant's property. (See Exhibits "A" and "B" attached hereto.)

Looking at the location of the well, as presented to the Environmental Health Staff in 2008, it is understandable why they would have assumed that the issue of easement on the adjacent property was not an issue to be considered by them. In fact, since Mr. Powell placed the approved original location of the well site almost on the property line between his property and that of the Appellant, there would have been a greater encroachment onto Appellant's property than the unauthorized well location site creates. Clearly, it would be an obvious assumption for the Environmental Health Staff to conclude that the Coastal Administrative Permit would not have been granted unless the adjacent property owner had approved the encroachment, and therefore, the question of easement was of no concern. Unfortunately, this was not the case. The original well site provided no encroachment onto the adjacent property owner's property and an easement has never been granted. *Accordingly, the unauthorized well location would grant a prescriptive easement or a private eminent domain, both of which are tantamount to an unconstitutional, unlawful taking of private property, which it is not believed was the County's intention.* However, this would certainly explain why the only concern surrounding the unauthorized location of the well was the sewer line setback and no import was given to the adjacent property setback.

It has never been argued by Appellant that the change in location of the well required amendment of the Environmental Health Permit. Appellant's argument has always been that an amendment to the Coastal Administrative Permit was required. However, no explanation has been provided as to why an amendment to the Environmental Health Permit was not necessary, especially in light of the fact that the new well location encroaches on both County and Private property belonging to another.

It was the amendment of the Coastal Administrative Permit that was discussed between Appellant and Mr. William David Powell which Mr. Powell clearly indicated he knew was required but that he did not feel was necessary. In fact, up until the time of his death, holding true to his word, Mr. William David Powell, never made any attempt to obtain such an amendment of the Coastal Administrative Permit as confirmed by Board Staff Report 12-993 which reveals no efforts to amend the Coastal

Administrative Permit until January 19, 2012, nearly four years after the original permit was obtained and three years after Mr. William David Powell passed away on February 15, 2009.

As to the remaining paragraphs of this subsection of the Staff Response pertaining to Urgency Ordinance 5160 as extended by Interim Ordinance 5163 and Interim Ordinance 5176, there seems to be a confusion that has occurred as a result of additional language included in Interim Ordinance 5163 and it appears that the Staff's interpretation of this language is misplaced. Urgency Ordinance 5160 specifically prohibits anyone who has drilled an authorized well before May 25, 2010 from applying to amend a well permit or applying for a new permit to allow for the illegal well. It also specifically provides:

> ***"Section 10. No Taking of Property Intended.***
>
> ***Nothing in this ordinance shall be interpreted to effect an unconstitutional taking of property of any person. If the Board of Supervisors determines, based on specific evidence, in the administrative record, that the application of one or more of the provisions of this ordinance to a proposed project would effect an unconstitutional taking of private property, the Board shall disregard such provision or provisions to the extent necessary to avoid such unconstitutional taking"***

Interim Ordinance 5163 added language to provide the County authority to *enforce the terms* of the original well permit issued to an individual who drilled an unauthorized well.

In the case of Mr. Powell, he was provided a permit to drill a test well at a location in the back 1/3 of his property, midline between the Powell and adjacent property owner's property line and Santa Fe Street (hereinafter referred as to "original well location"). Mr. Powell, in complete disregard of the permit issued, chose to drill the test well in the front left corner of the property with setbacks encroaching

on both county property (Serra Avenue) and the adjacent property owner's property, without easement being granted from either the county or the adjacent property owner ("unauthorized well location").

Based upon the language added to the Urgency Ordinance in Interim Ordinance No. 5163, it appears that the only authority granted to the County was to *enforce the terms* of the original permit, which, clearly stated, means the Ordinance provided the County authority to require Mr. Powell to move the well to the authorized location, the original well location, and to take whatever steps were necessary to provide appropriate permits to allow the well to be placed in the original well location (i.e. provide permits to allow removal of trees as this was the basis for why the well was not drilled at the original location pursuant to Staff Response at Page 10, paragraph 1, which states as follows: *"However, during a site visit in the summer of 2008, the well driller requested the relocation of the well site because access to the original well site would have required the removal of trees that had not been permitted for removal."*

Nothing in Interim Ordinance 5163 provided the County authority to create a prescriptive easement or a private eminent domain, both of which are tantamount to an unconstitutional unlawful taking of private property.

Even if one were to accept the Staff interpretation of Interim Ordinance 5163, pursuant to Section 10 outlined above, the *Board shall disregard this interpretation to the extent necessary to avoid such unconstitutional taking of property.*

Additionally, at the time Urgency Ordinance was initiated, there were only three test wells in existence. Two of those wells were authorized wells and only one was not, Mr. Powell's well. After reviewing the proposed Urgency Ordinance, Appellant contacted the Board of Directors concerning the fact that Mr. Powell had drilled an unauthorized well and requested that language be included into the Urgency Ordinance that would preclude individuals who failed to drill authorized wells not in accordance with any permit issued by the County. The Board of Directors concurred and specifically included this language precluding Mr. Powell from seeking application

to obtain authority for the relocation of the unauthorized well to the location at which he drilled without authority. Therefore, since the only individual who had drilled an unauthorized well at the time the Urgency Ordinance became effective was Mr. Powell, it is a true assertion that the Board of Supervisors denied Mr. Powell authority to relocate the well.

Lastly, as to the contention that the Interim Ordinance is not relevant to the current application because the Urgency Ordinance and Interim Ordinances expired on May 24, 2012, as indicated in Board Report 12-993, Mr. Powell's application to amend a prior permit, which has now been admitted to be an application for new permit, was filed on January 19, 2012, during the pendency of the Ordinances. ***In other words, Mr. Powell's application was strictly prohibited by the Ordinances which were in effect at the time Mr. Powell filed his application.*** **Another showing of a disregard for the rules and regulations of the County of Monterey by Mr. Powell. Therefore, contrary to the assertions made, the Urgency and Interim Ordinance are absolutely relevant.**

3. <u>Appellant's Contention No. 3: The Action Being Requested is Not an Amendment to a Preexisting Permit but a Request for a New Permit by a New Property Owner</u>

At the hearing before the Zoning Administrator, this Application was characterized by the New Owner as "an amendment to a preexisting permit," when, in fact, it is an application by the New Owner for a new permit. The original approved permit did not authorize the location of the well in its present location. The Prior Owner was aware of this fact and aware that a new permit was required for the present location, which is approximately fifty (50) feet away from the authorized location. The County Staff has affirmed that no previous Application for Amendment was prepared or received for this property or for PLN 070074 under Item 2(d) of Exhibit C of the "Draft Resolution," despite the fact that a New Application was admittedly required. The Monterey County Board of Supervisors ruled approximately three years ago that the prior application may not be amended and that a new permit application is necessary based upon the fact that no

application to amend had ever been submitted and the Prior Owner was prohibited from proceeding with the well development due to his failure to comply with the conditions of the authorized County permit to drill a test well.

Staff Response No. 3

The County acknowledges that the Coastal Administrative Permit for the test well did not authorize the location of the well where it was drilled. The amendment to the Coastal Administrative Permit for the test well, PLN 110366, is necessary to authorize the location where the well was drilled. ***It is in essence a new permit***. Whether it is called a new permit or an amendment to the permit does not make a material difference. Amendments to Coastal Administrative Permits are discretionary actions.

The Director of Planning is the Appropriate Authority to consider Coastal Administrative Permits, unless the matter is referred to public hearing. The original permit, PLN070074, was approved by the Director of Planning. Monterey County Code section 20.76.115.A states that if, in the opinion of the Appropriate Authority, the amendment is of a minor or trivial nature, with no impacts not already assessed in the original permit action, and generally in keeping with the action of the Appropriate Authority, the amendment may be approved by the Appropriate Authority. Because the Appellant requested a public hearing, the Amendment was referred to the Zoning Administrator. The Zoning Administrator conducted a noticed public hearing and approved the Amendment (PLN ll0366) on August 9, 2012. In regard to Appellant's contention regarding the Board of Supervisor allegedly took three years ago, see Staff's Response to Contention No. 2 above.

Reply to Staff Response No. 3

We agree that amendments to Coastal Administrative Permits are discretionary actions, and respectfully submit, that no such discretion should be afforded in the present instance. The amendment being requested by Mr. Powell is neither minor or trivial in nature. It is a request that the County allow *a prescriptive easement or a*

private eminent domain, both of which are tantamount to an unconstitutional unlawful taking of private property and are impacts not already assessed in the original permit action.

It appears that the New Owner, in an attempt to circumvent the desires of the Board of Supervisors, chose to ignore the intentions of the Environmental Health Bureau's "May 21, 2012 Interim Guidelines for Well Permits and Processing of Well Permits." The New Owner has attempted to convince the Zoning Administrator to ratify conduct that is in violation of the Coastal Administrative Permit received by the Prior Owner, so as to gain a permit to convert an illegal test well into a production well. This action is in contravention of the desires of the Board of Supervisors, should not be countenanced and the Ruling of the Zoning Administrator should be overturned.

Additionally, as to the comment that "whether it is called a new permit or an amendment to the permit does not make a material difference." Were that true than the method for providing appropriate notice would be the same. However, it is not true, because a new permit and an amendment to an existing event are completely separate events requiring different notice.

4. **Appellant's Contention No. 4A: The Actions by the Monterey Zoning Administrator are Contrary to Law and Should be Overturned. The Decision of the Monterey County Zoning Administrator is Contrary to and in Violation of the Fifth Amendment of the Constitution of the United States and Fourteenth Amendment of the California Constitution, California State Law, and the Environmental Health Bureau's "May 21, 2012 Interim Guidelines for Well Permits and Processing of Well Permits."**

   Appellant's Contention No. 4B: The Actions by the Monterey Zoning Administrator are Contrary to Law and Should be Overturned. The Decision of the Monterey County Zoning Administrator Permits a Wrongful Taking of Property by an Adjacent Property Owner and Creates a Claim of Prescriptive

Easement Upon the Property of the Adjacent Property Owner Based on Adverse Possession.

Appellant alleges that the request by the New Owner asks the County to violate County ordinances for setbacks, allow the unlawful taking of another's property contrary to the United States and California Constitutions and statutory laws of this state, and violate the requirements of the permit process for issuance of a new permit which require notice to all interested parties and an opportunity to object. Due to the overlap in the contentions in 4A and 4B, responses below are organized by the various issues raised by appellant.

Staff 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 the 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 1 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 onto 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 a 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 a 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 and safety purpose. Maintaining a setback provides distance between the well, a conduit to the ground water 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. 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 74-090, 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.

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 the Powell's property, not the Appellant's. Thus, the decision results in no physical invasion. The Appellant already has a house on his property with which the well setback does not physically interfere. Therefore, the well setback does not deprive Appellant of all economically viable use of his property. 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. The 25-foot radius from the well where drilled extends approximately 10.5 feet onto the Appellant's property. The 15-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 outside the well casing – adding an additional 5.275 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 10.12.060 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 the 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 onto 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). 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). 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 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 garages 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).

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 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 his property. 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.

2. Notice

The Appellant appears to assert that the application process did not provide for notice to all interested parties and an opportunity to object. The Appellant and all interested parties were given opportunity to object to the amendment to the Coastal Administrative Permit for the test well as well as the Coastal Administrative Permit for the production well. Notices for the amendment to the Coastal Administrative Permit for the test well were mailed to all interested parties and property owners within 300 feet of the Powell property on May 30, 2012, posted in the project vicinity on May 31, 2012 for an Administrative approval

schedule for June 13, 2012. Because the amendment was originally considered to be of a minor and trivial nature, the publication of a notice in the newspaper was not required per Monterey County Code section 20.76.115.A which only requires mailing and posting of notices. On June 4, 2012, staff received a copy of a letter from the Appellant requesting a public hearing on the application. Staff granted the request and scheduled the project for a public hearing before the Zoning Administrator on August 9, 2012.

Notices for the Coastal Administrative Permit for the production well were mailed to all interested parties and property owners within 300 feet of the Powell property on June 8, 2012, posted in the project vicinity on June 8, 2012, and published in *The Herald* on June 10, 2012 for an Administrative approval scheduled for June 27, 2012. On June 12, 2012, staff received a copy of a letter from the Appellant requesting a public hearing on the application. Staff therefore referred the project for public hearing before the Zoning Administrator, and the public hearing at the Zoning Administrator was held on August 9, 2012. Notices for the Zoning Administrator hearing for both permits were mailed on July 27, 2012, posted in the project vicinity on July 30, 2012, and published in the *Salinas California* on July 28, 2012.

The hearing before the Board of Supervisors on this appeal had been duly noticed. Notices for the October 23, 2012 public hearing were mailed on October 12, 2012, posted in the project vicinity on October 12, 2012, and published in *The Herald* on October 12, 2012. This hearing is de novo, and the Appellant and all members of the public have the opportunity to testify and be heard.

(3) Interim Guidelines

The Appellant contends that the Zoning Administrator's decision violates the Environmental Health Bureau's "May 21, 2012 Interim Guidelines for Well Permits and Processing Well Permits." The Guidelines state that wells must comply with existing Monterey County Code, all required well setbacks, as well as federal, state and local regulations, in addition to the guidelines. The guidelines state that well sites shall be a minimum of 25 feet from property line and that the well set back shall not cross property

lines unless the well setback stays within a portion of the adjacent lot that has developmental restraints such as steep slopes, easements, or front, back, and side yard setbacks. If the setback cannot stay within these areas, the guidelines suggest an easement or other written recorded approval of the owner of the adjacent lot ***must*** be obtained.

The Environmental Health Bureau's "May 21, 2012 Interim Guidelines for Well Permits and Processing Well Permits," marked Exhibit 1 in the Appeal (Attachment D), are not binding. They were issued as interim guidelines for Environmental Health Bureau staff. On June 6, 2012, John Ramirez, Director of Environmental Health issued a memo and guidelines to the Drinking Water Protection Services Section of the Environmental Health Bureau (Attachment M) to clarify the protocol for processing applications for wells until the ordinance revising Monterey County Code Chapter 15.08 is adopted by the Board of Supervisors and, in the coastal zone, certified by the California Coastal Commission. These are guidelines for staff; they have not been adopted by the Board of Supervisor, are not codified, and are not binding. Moreover, the interim guidelines reflect a draft well ordinance that has not been adopted. Since the drafting of the guidelines, and in response to public comments received on the draft, staff is revising the draft ordinance, and the interim guidelines no longer reflect staff's current guidance. Therefore, the Board of Supervisors is not required to comply with the guidelines. Chapter 15.08 of the Monterey County Code, which governs wells, is binding. It requires compliance with state standards (25-foot setback), but does not prohibit the siting of wells where the well setback required by state standards would cross property boundaries. Therefore, approval of the amendment to Coastal Administrative Permit to amend the test well location and the Coastal Administrative Permit to convert the test well to a production well do not violate County regulations.

(4) Easement requirement from Monterey Peninsula Waste Management District.

The Appellant contends that the encroachment requires him to record an easement as proposed by the "Monterey Peninsula Waste Management District" thereby reducing his property value. Staff is not exactly certain to what entity the Appellant is referring to.

Monterey Regional Waste Management District is the district that manages the Monterey Peninsula's solid waste stream. This district would not require an easement for water wells.

Monterey Peninsula Water Management District (MPWMD) is the district that is responsible for managing, augmenting and protecting the water supplies on the Monterey Peninsula. According to Henrietta Stern, MPWMD Project Manager, the district does not record easements on property. They do require the property owner for the well to record a "Notice of Limitation of Use" on their property. This notice includes a copy of the Water Distribution permit for the well, conditions of approval, a site map, and an indemnification agreement. This notice does not get recorded on adjacent properties unless the well is serving water to the adjacent properties. The Powell well will only serve water to the Powell Property. The MPWMD will not require the recordation of an easement on the Appellant's property.

The Carmel Area Wastewater District (CAWD) treats wastewater from Carmel and the surrounding area. CAWD's sewer lines in the area are located in the street on Santa Fe Avenue and along the southern property lines of the Applicant's and Appellant's properties in an easement (Attachment H) near the rear setbacks. The Powell well is located toward the front of both properties, fronting on Serra Avenue. In February 2010, Ray von Dohren, former General Manager of CAWD, submitted a letter to the Environmental Health Bureau regarding the issue of well setbacks from sanitary sewer facilities. In cases where the setback extends to adjacent properties, CAWD recommended that the County record an encroachment with the County Recorder's Office in those cases or require that the entire setback be located on the well applicant's property (Attachment I). It is not necessary in this case to follow these advisory recommendations. The sewer mains in the area of the project are located in the street on Santa Fe Avenue west of the Applicant's property, approximately 87 feet from the well (Attachment K) and along the southern property lines of the Applicant's and Appellant's properties in an easement (Attachment H) near the rear setbacks. Because of the location of the existing sewer mains, it is highly improbable that the new sewer mains will be installed in an area anywhere close to the Powell well setback. Even if the home on Appellant's property were to be remodeled, the location of and connection of the single family dwelling to the CAWD sewer main would not change.

(5) Allegations of potential contamination from the Appellant's property on the well.

The Appellant alleges the existing, unauthorized, location of the well violates the 25-foot setback to prevent contamination. He notes that the previously approved well site was to be located within the proposed driveway of the Powell residence. According to the California Well Standards Bulletin 74-90, the use of well pits, vaults, or equivalent features to house the top of well casing below ground surface shall be avoided, if possible, because of their susceptibility to the entrance of poor-quality water, contaminants and pollutants. Well pits or vaults can only be used if approval is obtained from the enforcing agency. The original well location and configuration was approved by the Environmental Health Bureau. However, during a site visit in the summer of 2008, the well driller requested the relocation of the well site because access to the original well site would have required the removal of trees that had not been permitted for removal.

The Appellant alleges that the location of the well creates a potential contamination claim for such items as oil, gasoline, radiator coolant, grease, gardening contaminants such as fertilizer, insecticides, weed abatement and the run off from washing of cars. The well is located on the Applicant's property in an unpaived area. The paved driveway on Appellant's property extends to the common property line. It is highly improbable that contaminants from the Appellant's property, as cited above, would exist in such great quantities as to run off the property, percolate more than 100 feet vertically and 15 feet laterally as to contaminate the well and the ground water. The purpose of the well seal is to prevent such contamination. See Staff's response to Nos. 4A and 4B above.

(6) Prescriptive Easement Reply

Appellant contends the Zoning Administrator's decision creates a potential claim for prescriptive easement after a statute five (5) year period. The approval of the well does not create a prescriptive easement. A prescriptive easement can only be established by judicial decree. To find a prescriptive easement, the court must find that the use was adverse to the person in possession of the land in question, open or notorious, and continued for five years

without interruption. (*California Easements and Boundaries*, sec. 1.32 (CEB, 2012.) It is within Appellant's power to prevent any prescriptive easement. If Appellant records a notice giving consent to the use or posts a notice on the land indicating that the use is by permission, the use is not hostile and would not give rise to a prescriptive easement. Appellant could also negotiate an easement with the owner. Correspondence on file dated June 18, 2010 from Appellant indicates that the owner in 2010 offered to pay for an easement and Appellant refused the offer.

Reply to Staff Response 4A and 4B

(1) Taking Reply

The cases cited to in the Staff Response are easily distinguishable from the instant action. In all three cases cited in the Staff Response, the government took possession of an interest in property or authorized a physical invasion of property by a third party for a *public purpose.* To allow Mr. Powell, a private citizen, an unconstitutional, unlawful taking of Appellant's property, another private citizen, for Mr. Powell's private purposes, i.e., to allow water to his private property as admitted in the Staff Response at page 9, Paragraph 3 *"The Powell well will only serve water to the Powell Property,"* serves no public purpose.

Additionally, the 14th Amendment to the California Constitution is broader than the Fifth Amendment to the United States Constitution in providing that no person may be denied equal protection of the laws nor may a citizen or class of citizens be granted privileges or immunities not granted on the same terms to all citizens.

The Staff Response goes on to specifically admit and outline the extent of the unconstitutional, unlawful taking that exists. Then, for reasons completely unknown by Appellant, attempts to quantify this unconstitutional, unlawful taking by the limited amount of property being taken and the minimal concession Appellant would have to make should such an unconstitutional, unlawful taking be allowed. In other words, allow Mr. Powell complete use of his property in a manner he chooses, but deny

Appellant the same right as admitted to in the Staff Response where it states at Page 7, Paragraph 2, the well setback *"imposes limited restrictions on less than 1% of the Appellant's property..."* In doing so, the Staff Response grants privileges to one citizen over another and denies Appellant equal protection in contravention to the 14th Amendment of the California Constitution.

An unconstitutional, unlawful taking is an unconstitutional, unlawful taking and Appellant has proven his claim for a potential unconstitutional, unlawful taking as shown by the Staff Response admitting the 25-foot setback encroaches onto Appellant's property affecting 250 square feet of Appellant's property, though the Staff Response claims only 55 square feet of this property is usable. There is no legal precedence under which the Appellant must show a physical invasion onto, or substantial burden to, Appellant's property to avoid an unconstitutional, unlawful taking of his property by a private citizen for a private purpose.

The Staff Response properly states the purpose of the well setback is to serve an important public health purpose of preventing groundwater contamination. However, the well setback encroaching into Appellant's property has the opposite effect. Allowing the well to remain where it is and allowing the prescriptive easement or unconstitutional, unlawful taking of Appellant's property presents the real exposure to Appellant of contamination to the water source since, as admitted by the Staff Response, the setback runs under Appellant's gravel or dirt driveway over which vehicles are driven and washed resulting in a potential exposure to oils, lubricants, chemicals and contaminants.

(2) Notices Reply

Appellant's only response to this subsection is that the Staff Response has admitted that Mr. Powell's Application for Amendment of Coastal Administrative Permit was actually a request for a new permit (see Staff Response No. 3, paragraph 1). As such, inappropriate notice was given.

(3) Interim Guidelines Reply

The Staff Response points to the fact the "May 21, 2012 Interim Guidelines for Well Permits and Processing of Well Permits" created by the Environmental Health Bureau (hereinafter referred to as "Guidelines") are only guidelines. However, these are the guidelines drafted by John Ramirez, the Director of Environment Health for use by the Staff and transmitted via Memo drafted by John Ramirez, The Director of Environmental Health directing that the:

> ***"...guidelines are consistent with the Local Coastal Plan and therefore the proposed revision should be used in the review of all applications until the Board of Supervisors adopts the ordinance amending Chapter 15.08 and the Coastal Commission certifies the adopted version of MCC 15.08."***

The Guidelines, as set out in the Appellant's moving papers, go on to state:

> ***"Anticipating that Ordinance 5160 will expire before the revised ordinance is adopted and General Plan policies are in effect, the following guidelines describe what requirements will be applied to well permits and how well applications will be processed and reviewed until the ordinance becomes effective."*** **(Emphasis added.)**

It is not likely that Mr. Ramirez prepared the memo and Guidelines and provided the same to Staff so that they would not be followed. Additionally, it may be that the Staff is redrafting the Guidelines, however, until a document is produced which negates the effect of the memo and Guidelines provided by John Ramirez as Director of Environmental Health which directs that the Guidelines are to be utilized until such time as MCC 15.08 has been adopted by the Board of Supervisors and Certified by the Coastal Commission, it is absolutely appropriate for the Board of Supervisor to comply with the Guidelines.

(4) Easement requirement from Monterey Peninsula Waste Management District Reply

Appellant concedes that the correct entity requiring easements is the Carmel Area Water District and not the Monterey Peninsula Waste Management District referred to in Appellant's moving appeal. Appellant apologizes for any confusion this may have created.

However, the February 18, 2010 letter from Mr. von Dohren referred to in the Staff Response specifically provides:

> **"...CAWD also recommends that in cases where the setback extends to adjacent properties, the County causes the encroachment to be recorded with the County Recorder's Office so that it will appear on subsequent title searches. Another option would be to require that the entire setback be located on the well applicant's property."**

The staff response then goes on to indicate that it is highly improbable that new sewer mains will be installed in an area anywhere close to the Powell well setback. This statement is speculative at best and does absolutely nothing to negate the need for recordation of an easement or the allegations presented by Appellant with regard to this subsection.

Additionally, the Environmental Health Bureau's "May 21, 2012 Interim Guidelines for Well Permits and Processing of Well Permits" also suggest an easement or other written recorded approval of the owner of the adjacent lot *must* be obtained.

(5) Allegations of potential contamination from the Appellant's property on the well Reply

As to this section of the Staff Response, Appellant is at a loss. There is no paved driveway on Appellant's property that extends to the common property line. There is an approximate three foot paved entrance from the street to the driveway on Appellant's property. However, the entire driveway on Appellant's driveway is gravel which would have been clearly visible by the individual who allegedly inspected the Powell property for the Environmental Health Bureau and determined that no permit was necessary for the relocation of the well to is present unauthorized location. It is also obvious from the aerial photographs obtained off the internet and attached as exhibits to Board Report No. 12-993. Therefore, the Staff Response has been based upon erroneous information, makes incorrect assumptions and fails in any way to address the real exposure to Appellant for potential contamination of the water source and liability.

Additionally, when the request to relocate the well was considered, the Environmental Health Bureau opined that location of the well in the driveway near a vault was not preferable. If locating the well in Mr. Powell's driveway area is not preferable, then reason dictates that it would not be preferable to locate the well in Appellant's driveway area for the same reason, exposure to contaminants.

(6) Prescriptive Easement Reply

The Staff Response confirms the prescriptive easement allegations of Appellant. It would not be difficult for a court to conclude that the use was adverse to the person in possession of the land since it creates a continuous exposure to contamination of the water source by the land owner. Neither would it be difficult for the court to establish that the easement was open or notorious or continued for five years without interruption since Appellant has been arguing against the intrusion and taking of his property throughout this appeal.

Additionally, there can be no stronger evidence in support of Appellant's claim that allowing the unauthorized well to remain where it is creates an unconstitutional, unlawful taking of Appellant's property then the suggestion in the Staff Response under "6. Prescriptive easement" (page 10, paragraph 4), that:

> **"Appellant can avoid prescriptive easement by either recording a notice giving consent, post a notice on the land indicating that the use is by permission or negotiating an easement with the owner of the unauthorized well"**

and pointing to prior offer by the unauthorized well owner which has already been rejected."

There was never any discussion between the well owner and Appellant concerning purchasing of a proposed easement and Appellant has no interest in engaging in such discussion, consenting to giving away his property rights or granting permission for an easement. As reflected in the June 18, 2010 correspondence referred to in the Staff Response, the attorney for the well owner contacted the Appellant and offered to pay for the encroachment, which offer was rejected. Accordingly, the suggestions presented in the Staff response concerning possible way to avoid prescriptive easement were already known to be unacceptable to Appellant, and therefore, the Staff Response openly acknowledges that, should the well be allowed to remain at the unauthorized location, the result will be a prescriptive easement and unconstitutional, unlawful taking of property.

It is also interesting to note that the Staff Response has failed to address many of the issues outlined in Appellant's Contentions 4A and 4B as outlined in the Appeal, specifically, items 1 through 12 concerning the unknown individual who conducted an inspection in 2009 and approved the relocation of the well. Nor did the Staff Response address the project planner for the original well site's conclusion that the original well site was approved, there was no need for removal of trees, and there were no unusual circumstances found that would cause a potential significant environmental impact.

5. Appellant's Contention No. 5: False Conclusions Presented to Zone Administrator.

As demonstrated above, the County Staff provided several erroneous conclusions to the Zoning Administrator:

1. The well meets the County Regulations regarding site development standards and setback requirements for contaminant sources. The basis of this entire issue is the fact that the well has been placed in an unauthorized area and that it does not comply with the twenty-five (25) foot set back.
2. There was one production well within one thousand (1,000) feet of the Powell well at the time of the source capacity test of the Powell well. However, there are now two wells within one thousand (1,000) feet of the present location of the test well.
3. The County Staff has concluded that there are no violations created by the present well location. Considering all of the above, this representation is concerning at best, as there clearly are many violations.
4. The present well site is not located near historic resources. In fact it is within the location of a historic resource, the Father Serra statue carved by Joe Moro in 1922 which is an entrance point to the City of Carmel. The relocation of the well in question will require a well filtration system and a three thousand (3,000) gallon storage tank be placed within a location which will be visible to all who enter the City of Carmel at this historic site.

Staff Response No. 5

1. See Staff Response No. 4A and 4B.
2. The 72 hour pump test for the Powell well was complete between August 4 and August 7, 2009. A review of County records shows only one other well within 1,000 feet of the Powell well. The other well, permitted under the Chopin Enterprises (PLN080017), is located on Assessor's Parcel Number

009-012-013-000. While investigating the contention, Planning staff also checked with Henrietta Stern at the Monterey Peninsula Water Management District to verify the wells within the vicinity of the Powell well. Their records also confirm that the Chopin well is the only well documented within 1,000 feet of the Powell well.

3. See Staff's Response Nos. 3, 4A and 4B.

4. CEQA Guidelines section 15304 categorically exempts minor alterations to land, water and/or vegetation. The Powell well has been determined to be categorically exempt from environmental review under this section. The CEQA Guidelines also state exceptions to categorical exemptions, under section 15300.2, including but not limited to substantial adverse changes in the significance of a historic resource. The Powell well would not cause a substantial change in the significance of a historic resource as defined in CEQA Guidelines section 15064.5. A substantial adverse change in the significance of an historical resource means physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired. The Powell well and property are screened from the resource by fencing, vegetation and trees. The surrounding area is a developed residential neighborhood (Attachment J). Therefore, the Powell well does not interfere with the aesthetics of the statue.

The installation of the Powell well did not cause the physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings. The significance of the resource is not materially impaired. In addition, no well filtration system nor 3,000 gallon water tank are proposed at this time. The construction of a single family dwelling, a well filtration system, and a water tank would require a Coastal Administrative Permit. The impacts of that development on historic resources would be evaluated at the time the Coastal Administrative Permit is considered. The County applies a standard condition to projects that states if, during the course of construction, cultural, archaeological, historical or paleontological resources are uncovered

at the site (surface or subsurface resources) work shall be halted immediately within 50 meters (165 feet) of the find until a qualified professional archaeologist can evaluate it. The Father Serra statue is not on the project site. As stated above, the installation of the Powell well did not cause the physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings. The significance of the resource is not materially impaired. Therefore, the categorical exemption for the project is appropriate.

Reply to Staff Response 5

With respect to items 1 and 3, we would direct your attention to Appellant's Reply to Staff Response Nos. 4A and 4B.

With respect to item 2, after review of additional documents, we concede to the Staff Response with regard to this item.

With respect to item 4, pertaining to the Father Serra Statue, according to the plans that have been filed and approved for construction of the home to be located on Mr. Powell's lot, the areas of vegetation and fencing referred to by the Staff Response will be the location of the front of the home. Therefore the vegetation and fencing are temporary. Additionally, the well, as of the present time is an unauthorized test well. Were the well to be approved and converted to a production well, the well sight will be exponentially more visible including a filtration system and 3,000 gallon tank. Therefore, the Staff Response relying on the vegetation and fencing presently standing is misplaced.

Further, the comment that a 3,000 gallon storage tank is not proposed "at this time" leads to the logical conclusion that such application will be made as it is a requirement for the for the construction of a new home that services a mandated sprinkler system.

6. Appellant's Contention No. 6: The Appellant listed the following 29 contentions in the Notice of Appeal as grounds for the Appeal of both projects (citation to staff response follows each contention):

1. The action was taken in violation of the United States Constitution, Article 5 (as recognized by the 14th Amendment of the California State Constitution).

   See Staff's response to Contentions 4A and 4B.

   Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

2. The action was taken in violation of the Environmental Health Bureau's "May 21, 2012 Interim Guidelines for Well Permits and Processing of Well Permits.

   See Staff's response to Contentions 4A and 4B.

   Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

3. The action taken permits a wrongful taking of property by an adjacent property owner and creates a claim of prescriptive easement upon the property of the adjacent property owner based upon adverse possession.

   See Staff's response to Contentions 4A and 4B.

   Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

4. The action was not supported by the evidence presented.

   See Staff's response to Contentions 1, 2, 3, 4A, 4B, and 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 1, 2, 3, 4A, 4B and 5.

5. The action was contrary to both administrative and statutory law.

See Staff's response to Contentions 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

6. The action violated the previous rulings of the Monterey County Board of Supervisors.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

7. The initial permit signed June 11, 2008 was not complied with.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

8. A new permit to move the well was never requested or obtained and the Zoning Administrator made a false assumption that the Prior Owner, from whom the Zoning Administrator could not have received first hand knowledge for obvious reasons, was unaware of the requirement to seek a new permit.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

9. The adjacent property owner had a direct conversation with the Prior Owner at the time the well was being placed in its present location expressing his concern that the approved permit was not being followed. At that time the Prior Owner advised that he had an "inside man" at the Planning Department

and was not worried that he was not complying with the authorized permit as this "inside man" would take care of it.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

10. The existing, unauthorized, location of the well encroaches on the adjacent neighbor's property.

See Staff's response to Contentions 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

11. The existing, unauthorized, location of the well violates the 25-foot setback requirement to prevent contamination.

See Staff's response to Contentions 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

12. The existing, unauthorized, location of the well interferes with the esthetics of a historic monument, "Father Serra Statue" carved by Joe Morro in 1922.

See Staff's response to Contention No. 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 5.

13. There has been no proof presented that the Monterey County RMA - Planning Department has evaluated the impact of allowing the relocation of the well within approximately 100 feet of the historic monument, "Father Serra Statue" carved by Joe Morro in 1922.

See Staff's response to Contention No. 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 5.

14. Historically the Monterey County RMA - Planning Department has assigned a 50 meter (165 foot) setback to all projects involving all cultural, historical, archeological, paleontological sites, however, the subject project is approximately 100 feet from a historic monument.

See Staff's response to Contention No. 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 5.

15. The issue of relocation of the well was raised during the initial hearings before the Monterey County Board of Supervisors approximately three years ago, at which time this intended relocation was denied by the County Board of Supervisors due to the fact that no application to amend the authorized permit

had ever been filed. At no time during this hearing process was any claim of approval of the relocation or any documentation supporting approval or relocation of the well by Environmental Health Bureau ever presented.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

16. If, in fact, the Environmental Health Agency authorized the relocation of this well from its original location, as is now being claimed by County Staff, this information was never presented to the County Board of Supervisors three years ago. However, there is no question about its relevance to that hearing.

See Staff's response to Contentions 2, 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 2, 4A and 4B.

17. If, in fact, the Environmental Health Agency alleged authority was provided after the hearing in which the Monterey County Board of Supervisor denied the attempt to relocate the well due to the Prior Owner's failure to file an application to amend the authorized permit, no authority to overturn the prior ruling of the Monterey County Board of Supervisors was ever provided.

See Staff's response to Contentions 2, 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 2, 4A and 4B.

18. No authority of any kind has been provided to support the alleged authorization by the Environmental Health Agency for relocation of the well.

See Staff's response to Contentions 2 and 3.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 2 and 3.

19. The identity of the alleged individual who allegedly gave this ultra vires authorization for a fifty (50) foot relocation without requiring the applicant to apply for a new permit as required by the Monterey County Board of Supervisors, Ordinances, Guidelines and laws of this state has never been provided.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

20. It is unknown whether the alleged individual who allegedly gave this ultra vires authorization for a fifty (50) foot relocation without requiring the applicant to apply for a new permit as required by the Monterey County Board of Supervisors, Ordinances, Guidelines and laws of this state was present at the Zoning Administrator hearing, but this individual never testified or provided any support for the alleged authorization given.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

21. No documents substantiating that the County ever received a request to relocate the well site have ever been produced.

See Staff's response to Contentions 1 and 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 1 and 2.

22. No documents substantiating that authorization for the relocation of the well was ever given have ever been produced.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

23. No authority was ever provided substantiating that the alleged twenty-five (25) foot setback could be abandoned.

See Staff's response to Contentions 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

24. The Monterey County Planning Department has conceded that an authorization allowing the relocation of the original well by some fifty (50) feet required an application for a new permit, which would necessarily provide notice to the public and allow objection by the public to be filed.

See Staff's response to Contentions 2, 3, 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 2, 3, 4A and 4B.

25. No authority was provided allowing the Monterey County Planning Department to dismiss the requirement for an application for new permit prior to allowing relocation of the test well.

See Staff's response to Contention 2.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 2.

26. The County Staff erroneously concluded that the well meets the County Regulations regarding site development standards and setback requirements for contaminant sources. The basis of this entire issue is the fact that the well has been placed in an unauthorized area and that it does not comply with the twenty-five (25) foot set back.

See Staff's response to Contentions 4A and 4B.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 4A and 4B.

27. The County Staff erroneously concluded there was one production well within one thousand (1,000) of the Powell well at the time of the source capacity test of the Powell. However, there are now two wells within one thousand (1,000) feet of the present location of the test well.

See Staff's response to Contention 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 5.

28. The County Staff erroneously concluded that there are no violations created by the present well location. Considering all of the above, this representation is concerning at best, as there clearly are many violations.

See Staff's response to Contentions 1, 2, 3, 4A, 4B, and 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response Nos. 1, 2, 3, 4A, 4B and 5.

29. The County Staff erroneously concluded the present well site is not located near historic resources. In fact it is within the location of a historic resource, the Father Serra statue carved by Joe Moro in 1922 which is an entrance point to the City of Carmel. The relocation of the well in question will require a well filtration system and a three thousand (3,000) gallon storage tank be placed within a location which will be visible to all who enter the City of Carmel at this historic site.

See Staff's response to Contention No. 5.

Reply: Appellant directs your attention to Appellant's Appeal and Appellant's Reply to Staff Response No. 5.

THE APPEAL OF PLN110367 – COASTAL ADMINISTRATIVE PERMIT FOR THE PRODUCTION WELL

1. **Appellant's Contention No. 1: Final ruling on the Amendment to the Coastal Administrative Permit.**

Since a final ruling has not been made to date concerning the requested amendment under PLN110366 to the original permit PLN070074, there is no basis to allow conversion of a well that has not been approved under PLN110366.

Staff's Response No. 1

Staff agrees if the Board of Supervisors upholds the appeal of the amendment to the Coastal Administrative Permit (PLN110366) and thus does not approve the relocation of the well site, then the Coastal Administrative Permit for the production well (PLN110367) cannot be approved at this time. The Coastal Administrative Permit for the production well

is for the location where the well has been drilled and therefore can only be approved if the test well permit amendment authorizing the relocation of the well site is approved.

Reply to Staff Response No. 1

Appellant will rest on its appeal and has nothing to add with regard to the Staff Report.

2. **Appellant's Contention No. 2: Basis for the Appeal of the Coastal Administrative Permit for the production well.**

The bases for the appeal to the request of the New Owner, the Estate of William Dan Powell under PLN110366, to amend the well permit obtained by the Prior Owner, William David Powell, deceased under PLN007074, apply equally to this request under PLN110367 to convert the subject test well to a domestic production well, and are therefore, repeated in this appeal. However, since the arguments are the same for both appeals, Appellant herein advises the Board of the consistency of argument, so as to avoid the necessity of the reviewing Board reading the same arguments twice.

Staff's Response No. 2

As the Appellant has stated, the rest of his appeal to the production well is the same as the test well above. Please review the responses to the Appellant's Contentions under the appeal of PLN110366 above.

Reply to Staff's Response No. 2

Due to the fact that the appeal to the production well is the same as the test well and the Staff Response refers to the Staff Responses provided under appeal of PLN110366, Appellant requests the Board Review the Appeal and Appellant's responses to the Staff Responses provided in response to appeal PLN110366.

APPELLANT'S CONCLUSION

The Staff Responses included in Board Report No. 12-993 conclusively support Appellant's contention that allowing the unauthorized well to remain where Mr. Powell placed it, instead of where the Coastal Administrative Permit authorized it, will result in a prescriptive easement and unconstitutional, unlawful taking. In fact, the Staff Response specifically outlined the ways in which the Staff believes the Appellant can avoid prescriptive easement as either recording a notice giving consent, posting a notice on the land indicating that the use is by permission or negotiating an easement with the owner of the unauthorized well and pointed to prior offer by the unauthorized well owner.

Appellant is uncertain of the basis upon which Staff relies for its contention of prior negotiations with the well owner for purchase of an easement. There were never any negotiations concerning the purchase of an easement between the well owner and Appellant beyond the well owner's attorney offering to pay for an encroachment which was rejected and Appellant is not interested in participating in such discussions or consents or granting of permission. Therefore, it was already understood that the suggestions presented in the Staff Response to avoid prescriptive easement were not acceptable. Accordingly, there has been a concurrence by the Staff that allowing this unauthorized well to remain where it has been drilled will absolutely result in a prescriptive easement and an unconstitutional, unlawful taking of Appellant's property.

Appellant is also uncertain as to the basis upon which the conclusion was made by the Staff that the driveway on Appellant's land is paved. The driveway is now and has always been either dirt or gravel.

Appellant is also uncertain about why with respect to Mr. Powell's unauthorized well the guidelines, procedures, advisory recommendations, etc. are not required to be followed. Appellant questions why these guidelines, procedures, advisory recommendations, etc. have been drafted if there is no requirement for their use. Were that true, there is no purpose or use for them or the direction they provide and one wonders why they were created.

Additionally, while the Staff Responses included in Board Report No. 12-993 are quick to reveal the names of individuals in other departments within the County from whom information and facts were gathered, the Staff Response continues to be vague and fails to provide:

1. The name of one single individual at the Planning Department or Environmental Health Staff with whom Mr. William David Powell allegedly spoke;

2. The name of any individual at the Environmental Health Bureau who allegedly inspected the property where the unauthorized well was placed;

3. The name of any individual at the Environmental Health Bureau who allegedly authorize the Fifty (50) foot relocation of the well to unauthorized location;

4. Under what authority such alleged authorization was allowed or granted;

5. Any document showing that any alleged authorization for placement of the well at the unauthorized location was ever provided.

Appellant is of the belief that, despite the numerous requests for such information, the reason the information has not been forthcoming is due to the fact that it simply does not exist. If it did exist there can be no reason why this information has not been provided in light of the many requests that have been made.

Based upon all of the above and the arguments presented by Appellant's Appeal, it is respectfully requested, that the Monterey County Board of Supervisors:

1) Determine that the action of the New Owner to be exactly what it is, a request by a New Owner for a new well permit;

2) Apply the Environmental Health Bureau May 21, 2012 Interim Guidelines for Well Permits and Processing of Well Permits;

3) Overturn the Decision of the Zoning Administrator due to the misrepresentations of the New Owner in attempting to disguise this application for a new well permit to make it appear to be an application to amend permit PLN 070074 which effectively authorizes the use of a well that is not in substantial conformance with the terms and conditions of Permit PLN 070074 and is in violation of County Regulations; and,

4) Overturn the Decision of the Zoning Administrator allowing the unauthorized well to remain where it was drilled which will result in a prescriptive easement, as admitted by the Staff Response.

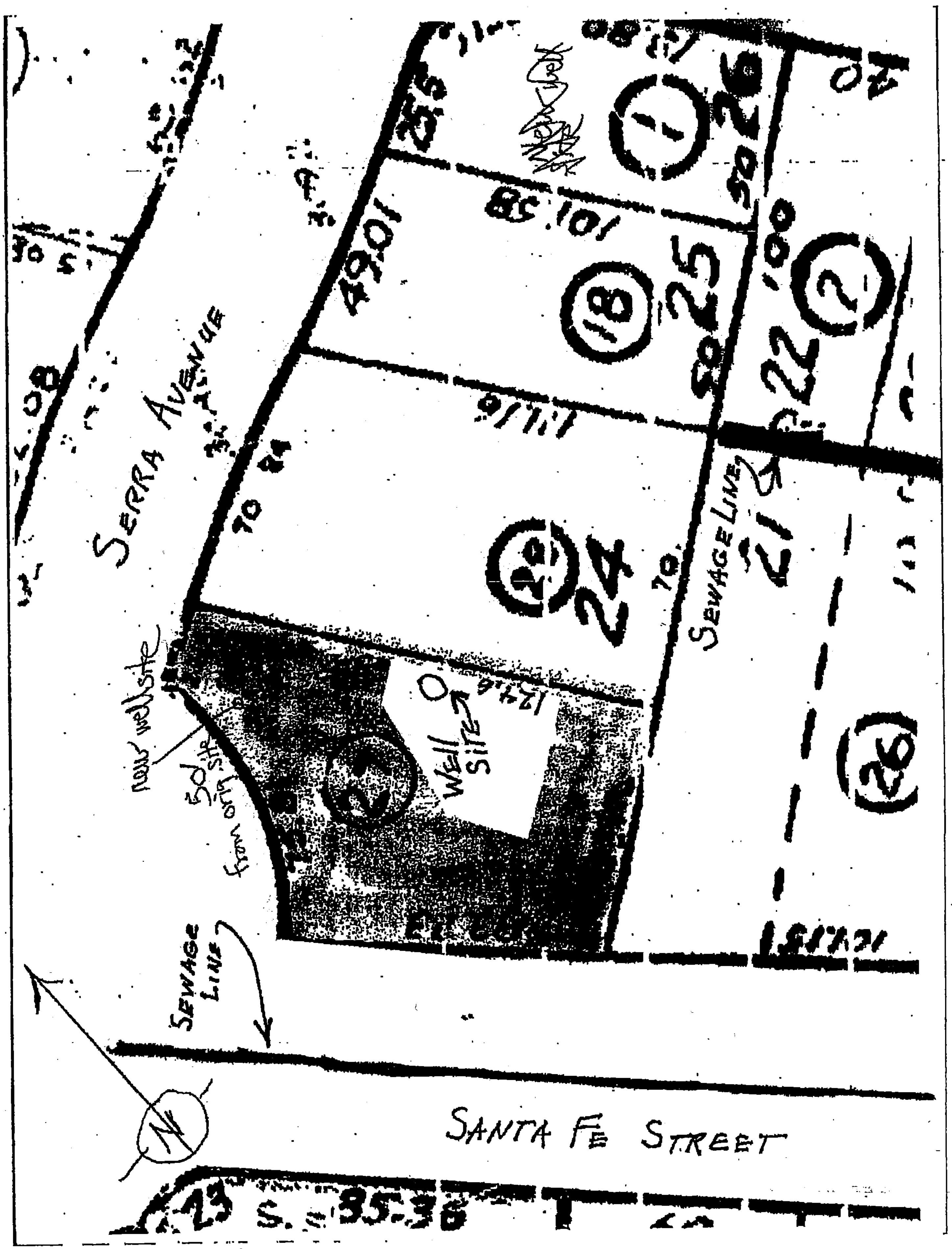
Respectfully submitted,

Glen R. Mozingo, Esq.

cc: Richard LeWarner, Assistant Director of Environmental Health Bureau
John Ramirez, Director of Environmental Health Bureau
Mike Novo, Director of Planning, RMA - Planning Department
Benny Young, Director of Resource Management Agency
Carl Holm, Interim Deputy Director of Resource Management Agency
Michael Rodriguez, Chief Building Official, Resource Management Agency
Paul Greenway, Acting Director of Public Works, Resource Management Agency
Shawne Ellerbee, Finance Manager of Resource Management Agency
Liz Fuchs, AICP, Manager, Statewide Planning, California Coastal Commission
Rick Hyman, Sr. Planner, Statewide Planning Unit, California Coastal Commission
Dan Carl, Central Coast District Director, California Coastal Commission
Silvio Bernardi, Director of Water Resources Agency
Richard Ortiz, Director of Water Resources Agency
Doug Smith, Director of Water Resources Agency
Ken Ekelund, Director of Water Resources Agency
Mike Scantini, Director of Water Resources Agency

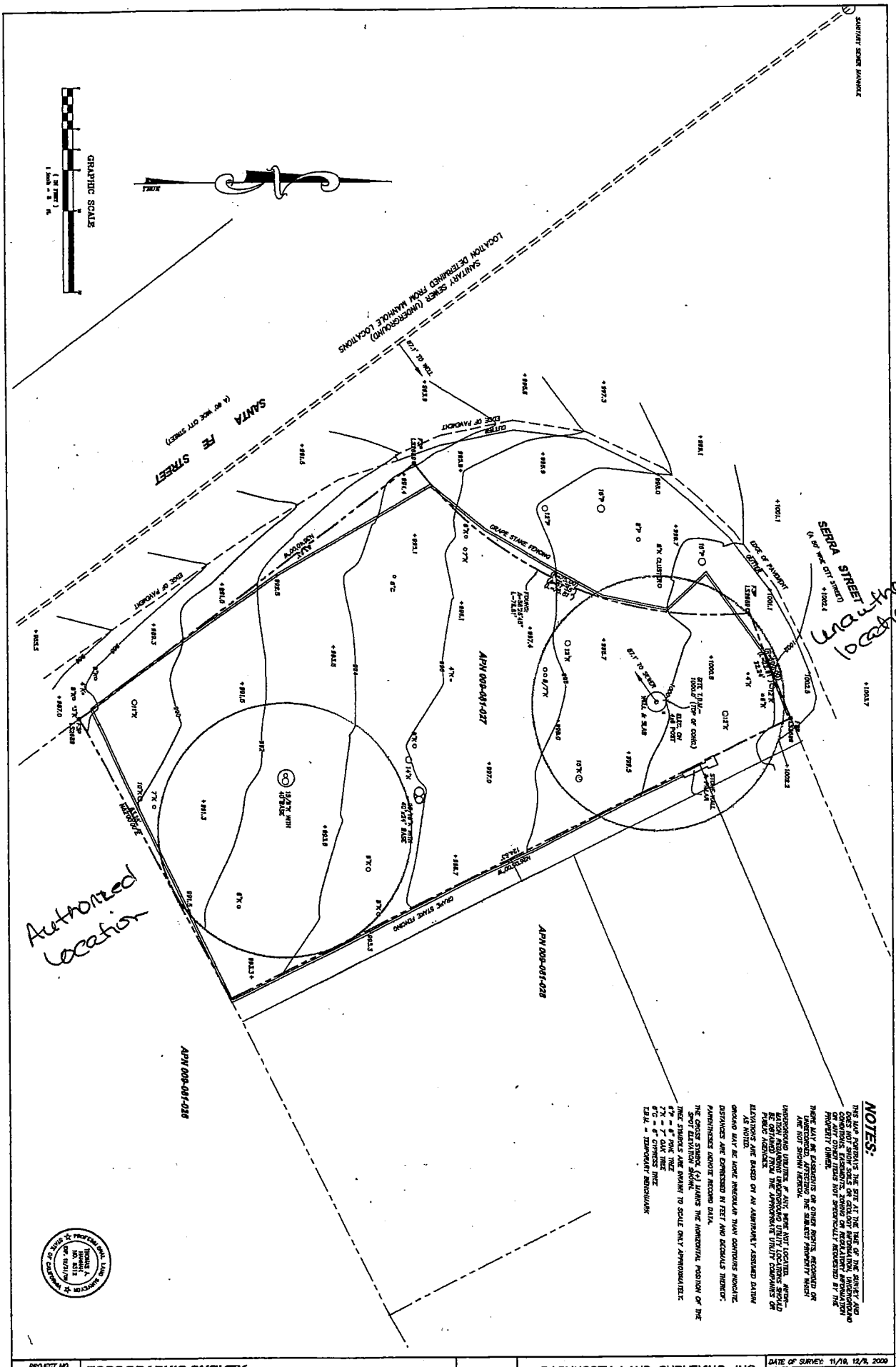
Claude Hoover, Director of Water Resources Agency
David Hart, Director of Water Resources Agency
Fred Ledesma, Director of Water Resources Agency
Jacqueline R. Onciano, Zoning Administrator
Laura Lawrence, Planning Services Manager
Ramon Montano, Project Planner
Delinda Robinson, Senior Planner
Barbara Buikema, General Manager, Carmel Area Waste Water District
Supervisor Fernando Armenta
Supervisor Louis R. Calcagno
Supervisor Jane Parker
Supervisor Dave Potter
Supervisor Simon Salinas
Board of Supervisors, County Clerk
Charles J. McKee, Esq., Monterey County Counsel
Wendy S. Strimling, Esq., Monterey County Counsel

Exhibit A



POWELL SUBMISSION TO EHB EXHIBIT A

Exhibit B



NOTES:

THIS MAP PORTRAYS THE SITE AT THE TIME OF THE SURVEY AND MAY NOT REFLECT SUBSEQUENT CHANGES TO BOUNDARY CONDITIONS, EASEMENTS, ZONING OR REGULATORY INFORMATION OR ANY OTHER ITEMS NOT SPECIFICALLY REQUESTED BY THE PROPERTY OWNER.

THERE MAY BE EASEMENTS OR OTHER RIGHTS, RECORDED OR UNRECORDED, AFFECTING THE SUBJECT PROPERTY WHICH ARE NOT SHOWN HEREON.

UNDERGROUND UTILITIES, IF ANY, WERE NOT LOCATED. INFORMATION REGARDING SUCH UTILITIES SHOULD BE OBTAINED FROM THE APPROPRIATE UTILITY COMPANIES OR PUBLIC AGENCIES.

ELEVATIONS ARE BASED ON AN ARBITRARILY ASSUMED DATUM AS NOTED.

GROUND MAY BE MORE IRREGULAR THAN CONTOURS INDICATE.

DISTANCES ARE EXPRESSED IN FEET AND DECIMALS THEREOF.

BEARINGS/ANGLES INDICATE RECORD DATA.

THE CROSS SECTION SHOWN REMARKS THE HORIZONTAL POSITION OF THE TREE STRUCKS ARE DRAWN TO SCALE ONLY APPROXIMATELY.

8"ø = 8" PINE TREE
7"X = 7" OAK TREE
6"C = 6" CYPRESS TREE
T.B.M. = TEMPORARY BENCHMARK

PROJECT NO. 29084	**TOPOGRAPHIC SURVEY** OF EXISTING CONDITIONS ON THE PROPERTY DESCRIBED AS FIRST ADDITION TO CARMEL WOODS, LOT 23, BLOCK 158, MONTEREY COUNTY RECORDS, CALIFORNIA	RLS	RASMUSSEN LAND SURVEYING, INC. P.O. BOX 3135 MONTEREY, CALIFORNIA 93942 (831)375-7240 (831)375-2545 FAX	DATE OF SURVEY: 11/19, 12/9, 2009
	PREPARED FOR: HOLLY BRUCE			DRAWING SCALE: 1" = 8'
				DRAWN BY: TR/BG
				REVISED: DEC. 8, 2009

EXHIBIT B