

**Before the Board of Supervisors in and for the
County of Monterey, State of California**

Resolution No. ____

Directing staff to negotiate)
An MOU with Cal Am and)
Conduct Environmental Review)

This resolution is made with reference to the following facts:

1. On December 4, 2012, the Board of Supervisors conducted a duly noticed public hearing to consider alternatives for the provision of safe, potable water to an approved nine-lot subdivision known as the “Oaks subdivision” and makes the findings and determinations set forth in this resolution.
2. The Oaks subdivision divided a 325.7- acre parcel into nine residential lots ranging in size from 1.7 to 13.6 acres and a remainder parcel of 285.7 acres (hereafter the “Oaks Subdivision”). The Board of Supervisors approved the vesting tentative map for the subdivision on May 8, 2001 and accepted the final map on June 20, 2006. The final map was recorded on June 30, 2006 at Volume 23, Cities and Towns, page 32, in the Office of the Recorder of the County of Monterey.
3. Under a settlement agreement in *Save Our Peninsula Committee v. County of Monterey et al* (Monterey County Superior Court Case No. M110694), the County agreed to analyze ten approved land use projects to determine “whether they are in compliance or non-compliance with mitigation measures imposed upon the project.” (Paragraph 3 of Settlement Agreement attached to Judgment pursuant to Stipulation for Entry of Judgment, filed September 21, 2011.) Under the terms of the settlement agreement, if the County determines that one of these projects is not in compliance with any mitigation measure imposed on the project, the County “shall remedy such non-compliance or will modify the applicable mitigation measure(s) as may be allowed pursuant to CEQA or other applicable law after conducting a noticed public hearing before the Board of Supervisors.” (Paragraph 3.) One of the ten projects subject to this review under the settlement agreement is the Oaks subdivision (listed as “Bollenbacher & Kelton, Inc. (Ferrini Oaks Subdivision)” [PLN94170]).
4. On June 27, 2012, Save Our Peninsula Committee (SOPC) filed a “Motion to For An Order to Enforce Terms and Conditions of Judgment Pursuant to Stipulation (Settlement Agreement) and Award of Attorney Fees.” Among other things, SOPC contends that the Oaks subdivision does not comply with conditions 34 and 35 of the vesting tentative map, that County has not brought the matter to the Board to remedy the non-compliance, and therefore, the County has violated the

settlement agreement. Pursuant to stipulation of the County and SOPC, the judicial hearing on the motion is scheduled for January 25, 2013.

5. Condition 34 of the Oaks' vesting tentative map required the subdivider; "to provide a signed written agreement between the subdivider and Ambler Park Water Utility (APWU) requiring: a) the subdivider to convey a newly constructed well complete with water distribution infrastructure and fire flow water supply; and b) APWU to operate the system as a satellite or stand alone system providing domestic and fire flow water supply to the subdivision in accordance with title 22 and the California Public Utility Commission standards. The total costs for item "a" is to be born [sic] by the developer and not APWU or its customers. If at any point in the future, the Toro B-8 zoning overlay is removed, and this stand alone system is to be consolidated with any other system, pumping of water (produced by this well) outside of Monterey County Water Resources Agency zones 2 & 2A is prohibited except in the case of emergency."
6. Condition 35 of the Oaks' vesting tentative map required the "Design the water system improvements to meet the standards as found in Title 22 of the California Code of Regulations and as found in the Residential Subdivision Water Supply Standards. Submit engineered plans for the water system improvements and any associated fees to APWU for review and approval prior to installing (or bonding) the improvements. Provide evidence that APWU has reviewed and approved the plans. Applicant shall pay all Land Use review fees prior to filing the final map."
7. Prior to the Board accepting the final map, staff advised the Board of Supervisors that the applicant had met all conditions of approval. Staff found that the subdivider had complied with condition 34 because the subdivider provided a copy to staff of the signed written agreement between the subdivider and Cal Am, as required by the condition. (Cal Am has purchased Ambler Park; therefore, the agreement is between the subdivider and Cal Am.) Staff found that subdivider had complied with Condition 35 based on the subdivider provided a letter from Cal Am stating that it had reviewed and approved the plans for the Oaks subdivision water system. SOPC points out that staff did not at that time fill out the Verification of Condition Compliance forms required by the Board's adopted mitigation monitoring procedures; however, notwithstanding the omission of the particular forms, the evidence shows staff "cleared" the conditions after receiving copies of the documentation required by the conditions. The Board's final map acceptance presumes that the conditions of compliance were met. (See Government Code section 66473.)
8. The Board also finds that a change in the federal arsenic water standard required treatment of Oaks' well water. The Oaks' well tested at 35 parts per billion (ppb) when the tentative map was approved. Between the tentative and final map approvals, the federal drinking water standard for arsenic was reduced from 50 ppb to 10 ppb, and the state was required to adopt a revised standard no less stringent than the federal standard. The new federal standard for arsenic of 10 ppb was adopted on February 22, 2002 and became enforceable on January 23, 2006. Although the Oaks' well was compliant with the earlier standard when the tentative map was approved, the well water exceeds the federal standard that went into effect in 2006.

9. Compliance with the new arsenic drinking water standard and protection of the public health requires the water from the Oaks' well to be treated. Staff arranged for Cal Am through its Monterey District Ambler Park system to serve the Oaks lots on the basis that Cal Am would draw water from the Oaks' well, treat the water for high arsenic at the Ambler Park water treatment plant, and then supply the treated water to the Oaks' lot. Consistent with the intent for water supply to be based on the Oaks well, not Ambler Park's water supply, the understanding was that the Cal Am would pump from the Oaks well into the Ambler system the same amount of treated water that the Ambler system would provide to the nine Oaks lots, resulting in no net transfer of water. In 2006, Cal Am committed to the Monterey County Water Resources Agency to monitor the Oaks' well production and the Oaks lots' consumption for this purpose.

10. The Board finds that, under the unique circumstances of this case, this arrangement for service to the Oaks, where the amount of water served by Ambler to the Oaks is to be balanced by an equal amount pumped from the Oaks well into the Ambler system, substantially complies with the conditions, is necessitated by the new federal standard for arsenic, is consistent with the County's B-8 zoning, and results in no net export of water from Monterey County Water Resources Agency's benefit assessment Zone 2C. The purpose of the County's B-8 zoning district is to "restrict development and/or intensification of land use in areas where, due to water supply ... or similar measurable public-facility type constraints, additional development and/or intensification of land use if [sic] found to be detrimental to the health, safety, and welfare of the residents of the area, or the County as a whole." The Oaks' well is not within the County's B-8 zone. Ambler's water supply is located in the County's B-8 zone. Because under the proposed MOU Cal Am would offset the water it supplies to the Oaks subdivision by an equal transfer of water from the Oaks' well into the Ambler system, Ambler's service to the Oaks would not result in intensification of water use in the B-8 zone. Conversely, the Oaks' well lies within Monterey County Water Resources Agency's benefit assessment "Zone 2C," which does not allow the export of water out of Zone 2C. The Ambler treatment plant lies outside Zone 2C. Because under the proposed MOU Cal Am would ensure that the volume of water it pumps from the Oaks' well into the Ambler Park water system does not exceed the amount of water supplied from Ambler to the Oaks, pumping water from the Oaks well into the Ambler system ~~does~~would not result in export of water out of Monterey County Water Resources Agency's benefit assessment Zone 2C. This manner of implementation protects the public health while meeting the intent of condition 34 not to intensify water use in the County's B-8 zone and not to export water out of MCWRA's benefit assessment Zone 2c and thus is in substantial compliance with the conditions.

11. Homes have been built on three lots in the Oaks subdivision, which received building finals on April 1, 2009. In 2010, County staff learned that Cal Am had begun to serve the Oaks' homes without yet bringing the Oaks' well on line. Staff notified Cal Am of its obligations, and staff also notified the subdivider that it would not issue additional building permits until the issue was resolved.

12. Cal Am has stated it will honor its 2006 commitment to the Monterey County Water Resources Agency to monitor the production of the Oaks well and perform the water accounting proposed in the attached MOU. Cal Am is awaiting approval from the California Department of Health to

operate the Oaks well. (November 6, 2012 correspondence from Cal Am.) Cal Am requests that the Monterey County Water Resources Agency be a party to the MOU.

13. A public hearing to consider alternatives for the provision of safe, potable water to the Oaks subdivision was noticed for October 9, 2012. At least ten days prior to the hearing, notice of the hearing was published in a newspaper of general circulation and mailed to the owners of the subject property and property within 300 feet of the subject property. At the request of SOPC and with concurrence of staff, the Board of Supervisors continued the hearing to December 4, 2012, at which time all members of the public had an opportunity to be heard.
14. The staff report presented several options for the Board's consideration for provision to the Oaks subdivision of safe, potable water supply, including the following:
 - A. Pursue a MOU between the County and Cal Am to memorialize Cal Am's commitment to balance the volume of treated waters provided to the Oaks subdivision with the volume of water pumped from the Oaks well into the Ambler Park water system, so as to result in no net transfer of water;
 - B. Require Cal Am to build a new treatment plant that is not in County's B-8 zone to treat the water from the Oaks' well.
 - C. Require a new well be drilled on the Oaks' site.
 - D. Provide water from Zone 2c from a different water utility.
 - E. Require water to be trucked into the Oaks lots.
15. At the public hearing, the Board had the opportunity review the circumstances and history that lead to the current status of the water supply to the Oaks subdivision, hear public testimony, and provide direction to staff as to which mechanism to pursue to ensure a safe, potable water supply to the Oaks that is consistent with County zoning and respects the right, title and interest of the existing lot owners. Although the County does not believe it is out of compliance with the settlement agreement in *SOPC v. County*, the noticed public hearing also satisfies the requirement in the settlement agreement for the Board to remedy the alleged non-compliance following a noticed public hearing.
16. The Board finds that certain options are infeasible to the extent they would impose an additional burden on the current owners of the nine lots and alter their rights, title, or interest in their property. The final map has been recorded and some lots sold into individual ownership. Following recordation of the final map, the County may modify the final map only if the County finds that "there are changes in circumstances that make any or all of the conditions of the map no longer appropriate or necessary and that the modifications do not impose any additional burden on the fee owners of the real property, and if the modifications do not alter any right, title, or interest in real property reflected on the recorded map." (Gov't Code sec. 66472.1.) Thus, any alternative the Board directs staff to pursue must not impose any additional burden on the current owners of the nine lots nor alter any of their rights, title, or interest in their property.

17. The Board finds that, subject to further analysis, refinement of terms, and environmental review, the proposed MOU is the method of providing safe, potable drinking water to the Oaks subdivision that is the most feasible, most capable of success, and therefore most protective of public health under the unique circumstances of this case. Cal Am through its Ambler Park water treatment plant has the technical, managerial and financial capability to treat water. Cal Am also has the ability to serve the Oaks subdivision because Cal Am already owns the Oaks' well and its infrastructure and has extended its Monterey District Ambler Park service area to include the Oaks subdivision. Because the MOU enforces no net transfer of water from Ambler to the Oaks and vice versa, it would not intensify water use in the County's B-8 zone. It is also the option least costly to ratepayers because it relies on a well and water infrastructure whose cost was already borne by the Oaks' subdivider and would require no new construction. It is also the least disruptive to the existing owners of the nine lots because the obligations to balance the water supply would fall entirely on Cal Am and would cause no disruption of service to the homeowners. The MOU would create a binding contractual obligation on the part of Cal Am to offset Cal Am Monterey District Ambler Park's water service to the Oaks subdivision with an equal amount of water to be pumped from the Oaks well into the Ambler Park water system, so as to result in no net transfer of water. The MOU would flesh out the details of implementation and monitoring The Board directs staff to include in the MOU strict monitoring requirements and enforcement mechanisms. The Board also directs that the MOU include a provision whereby the Oaks well would replenish all water provided by Ambler to the Oaks lots preceding the execution of the MOU to ensure that the Oaks subdivision does not result in loss of water to the B-8 zone. The Board further finds that the no net transfer arrangement is necessitated by the unique circumstances of this case and protection of public health, that the MOU is limited to its facts, and that the MOU is not intended to establish policy or serve as precedent for any other project.
18. The MOU as drafted is consistent with County's B-8 zoning because Ambler's service to the Oaks subdivision under the terms set forth in the MOU will not result in an intensification of water use in the B-8 zone and is not detrimental to the public health, safety, and welfare.
19. The MOU as drafted serves to protect the public health, safety and welfare by ensuring a water supply to the Oaks' subdivision that meets federal and state drinking water standards without intensifying water use in the County's B-8 zone or exporting water out of benefit assessment Zone 2C.
20. The draft MOU is subject to environmental review under CEQA. Therefore, the Board is not making a decision or commitment to the MOU but rather is selecting an option to enable staff to negotiate the terms with Cal Am and conduct environmental review based on a definitive project description. The Board intends for staff to return to the Board for the Board's further consideration of the MOU following the environmental review.

NOW, THEREFORE, the Board of Supervisors does hereby:

- A. Find that the above recitals and findings are true and correct;
- B. Receive and accept the report of staff;

- C. Direct staff to proceed to negotiate a Memorandum of Understanding (MOU) between California American Water Company, Monterey County Water Resources Agency, and the County for the provision of safe potable water to the approved nine-lot Oaks subdivision due to the high arsenic level in the subdivision well water; and
- D. Conduct appropriate environmental review and return to the Board for further action.

PASSED AND ADOPTED on this ____ day of _____, 2012 by the following vote:

AYES:

NOES:

ABSENT:

I, Gail T. Borkowski, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof of Minute Book _____ for the meeting on _____.

Dated:

Gail T. Borkowski, Clerk of the Board of Supervisors
County of Monterey, State of California

By _____
Deputy