DISCUSSION

I. INTRODUCTION

On January 19, 2012, the Estate of William Dan Powell ("Applicant") applied for an amendment (PLN110366) to a previously approved Coastal Administrative Permit (PLN070074) to allow the development of a test well and authorize the construction and use of the well for testing to establish a water source in a new location from the location that was previously approved. On the same day, the Applicant also applied for a Coastal Administrative Permit (PLN110367) to allow the conversion of the test well (previously approved under PLN070074 and amended under PLN110366) to a domestic production well. On August 9, 2012, the Zoning Administrator approved both the amendment to the Coastal Administrative Permit for the test well and the Coastal Administrative Permit for the production well.

On September 4, 2012, Glen R. Mozingo ("Appellant") filed timely appeals from the Zoning Administrator's approval of the amendment to the Coastal Administrative Permit (PLN110366) and the Coastal Administrative Permit (PLN110367). The appeals are brought on the basis that the findings or decision or conditions are not supported by the evidence and that the decision was contrary to law.

II. ANALYSIS

A. Factual Background

The property is located at 3072 Serra Avenue Carmel, (Assessor's Parcel Number 009-081-027-000), located at the intersection of Serra Avenue and Camino Del Monte, Carmel area, coastal zone. The project site is a 7,573 square foot lot is a corner lot that slopes gently (5 percent or less) upwards from Serra Avenue. Vegetation on the site consists primarily of grasses and Coast live oak trees. There are two projects being considered:

PLN110366: Amendment to Coastal Administrative Permit for a Test Well.
This project consists of an amendment to a previously approved Coastal Administrative Permit (PLN070074) which allowed the development of test well (authorizing the construction and use of the well for testing to establish a water source). The well was drilled in a location different than approved by the Coastal Administrative Permit. This Amendment would approve the new well site where the well was drilled and allow the completed test well to remain at its current location as a test well.

PLN110367: Coastal Administrative Permit for a Production Well
This project consists of a Coastal Administrative Permit to allow the conversion of the test well previously approved under PLN070074, as amended under PLN110366, to a domestic production well.

The Powell Coastal Administrative Permit (PLN070074) was approved by the Director of Planning on June 11, 2008 and not appealed. In the summer of 2008, the well drilling contractor, hired by the owner, contacted Environmental Health Bureau (EHB) staff, requesting a well site inspection for a new well location on the Powell property. The originally approved well site was located near large oak trees that were not approved for removal and would have interfered with the drilling rig. The original well site was also to have been constructed in a vault located within a future driveway, which is not considered to be an optimal well location. A new well site, approximately 50 feet north of the original site was approved in the field by EHB staff and the well was drilled in February of 2009. Prior to approving the new well location, EHB staff

confirmed that the well met the state-required setbacks from existing sewer mains, sewer laterals and wastewater lines within existing and proposed structures; however, the Applicant did not obtain an amendment to the Coastal Administrative Permit to move the location of the well, thus necessitating the amendment that is now before the Board.

The new well site is away from trees and out of any proposed driveway locations. The new well site is also farther from the existing residence on the Appellant's property and sewer laterals. However, the new well site is also located approximately 14.5 feet from the east property line shared with the Appellant's property. Regulations set forth in the 2010 California Plumbing Code, the California Well Bulletins 74-81 and 74-90, and Monterey County Code (Chapter 15.08 (Well Ordinance) establish setback distances from potential contaminating sources such as sewer and wastewater pipes. The required setback radius between water wells and sewer laterals or wastewater lines is 25 feet. The well where drilled met these state requirements. The required setback crosses the property line in an arc that extends approximately 10.5 feet into the Appellant's property.

In a letter dated April 12, 2010, the Environmental Health Bureau informed the Applicant that the well capacity, based on the pumping report, met the required capacity for a single family dwelling. County staff has determined that the existing well is consistent with all County requirements established to ensure the water source has sufficient water quantity and quality, and is recommending that the new well location be approved for the test well and that the test well be approved as a production well.

B. Staff Response to Appellant Contentions

The Appellant challenges the Zoning Administrator's decisions to approve the amendment to the Coastal Administrative Permit for the test well and the Coastal Administrative Permit for the production well on the following grounds: that the findings, or decision or conditions are not supported by the evidence and that the decision was contrary to law. Staff's response to each of the Appellant's contentions follows:

The Appeal of PLN110366 – Amendment to a Coastal Administrative Permit

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

The entity which is presently seeking the Amendment under PLN110366, the Estate of William Dan Powell (hereinafter referred to as "New Owner") is not the same Applicant who obtained the original permit PLN070074, William Dan 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 Dan Powell, the Prior Owner.

Staff's Response No. 1:

The Coastal Administrative Permit for the test well, PLN070074, was approved by the Director of Planning on June 11, 2008 (**Attachment E**) and not appealed. The owner at that time was the William Powell Trust with William David Powell as the 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 upon which they are issued—not with the particular owner. Therefore, the new owner of the property may apply for an amendment to the permit.

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 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's Response No. 2:
The Appellant's assertions 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 (David) Powell 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 Environmental 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 applications or the previous application (PLN070074) 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 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 Urgency 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 an authorized test well 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, 2010, 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. <u>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.</u> (emphasis added)

The Powell test well permit (Permit No. 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.

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.

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 PLN070074 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's 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, PLN110366, 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 (PLN110366) on August 9, 2012. In regard to Appellant's contention regarding action the Board of Supervisors allegedly took three years ago, see Staff's Response to Contention No. 2 above.

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 to 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's Response Nos. 4A and 4B:

1. Takings

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

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

The well setback is mandated by the California Plumbing Code for reasons of public health and safety. The required setback radius between water wells and building sewers is typically 50 feet. However, Table 7-7 in the 2010 California Plumbing Code sets the minimum horizontal distance for water supply wells from building sewers to be not less than 25 feet when the drainage piping is constructed of materials approved for use within a building. Regulations set forth in California Well Bulletins 74-81 and 74-90 and Monterey County Code (MCC) Chapter 15.08 (Well Ordinance) establish setback distances from potential contaminating sources such as sewer and wastewater pipes. The well setback requirement serves an important public health and safety purpose. Maintaining a setback provides distance between the well, a conduit to the groundwater supply, and the potential source of contamination in the event of a leak or pipe break. There are no sewer laterals or wastewater lines within 25 feet of the Powell well. When, at the approval of the enforcing agency, a water well is to be located closer to a source of pollution or contamination than allowed by the California Well Standards Bulletin 74-90, the annular space shall be sealed from ground surface to the first impervious stratum, if possible. The annular seal for all such wells shall extend to a minimum depth of 50 feet. The Powell well is sealed to a depth of 105 feet. Therefore, the relocated Powell well meets these setback requirements (**Attachment R**).

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

Chevron U.S.A., Inc., 544 U.S. 528, 538-39 (2005); Herzberg v. County of Plumas, 133 Cal App. 4th 1 (2005).)

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

The Appellant has provided no evidence that the well setback actually impacts the use of his property or diminishes the value of his property. A diminution in property value due to the well setback would not necessarily result in a taking, and in this case, the Appellant has supplied no evidence of a loss of use or value resulting from Powell's well. The facts show that the well setback serves an important public health purpose of preventing groundwater contamination, imposes limited restrictions on less than 1% of the Appellant's property, and does not deprive the Appellant of economically viable use of his property. The Appellant has also made no application to develop within the 55 foot area. His concern that the well setback might burden a

future use, for which he has not applied, is not proof of a substantial burden on or deprivation of use of his property. 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 scheduled 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 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 Californian* on July 28, 2012.

The hearing before the Board of Supervisors on this appeal has 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. The Board of Supervisors continued the hearing from October 23, 2012 to January 15, 2013 at the Applicant's request with concurrence of Appellant, and the Board continued the hearing from January 15, 2013 to February 26, 2013 at the Appellant's request with concurrence of Applicant. 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 decisions violate 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 setback 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 as 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 Supervisors, 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 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. Allegation 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 requirement 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 a 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 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 unpaved area. The paved driveway on the 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 groundwater. The purpose of the well seal is to prevent such contamination. See Staff's response to Nos. 4A and 4B above.

6. Prescriptive easement

Appellant contends the Zoning Administrator's decision creates a potential claim of 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.) The County's action itself does not create an easement in favor of the County nor create a prescriptive easement. A prescriptive easement is a matter of private dispute between Applicant and Appellant. The statements made in the January 15 staff report do not and were not intended to confirm the existence of a prescriptive easement, and to the extent they were subject to misinterpretation, have been omitted from the draft resolutions presented to the Board.

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.

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. 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's Response No. 5:

1. See Staff's 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 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 adverse change in the significance of a historical 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 is not visible from the Father Serra statue. 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.

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.
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.
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.
4. *The action was not supported by the evidence presented.* See Staff's response to Contentions 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.
6. *The action violated the previous rulings of the Monterey County Board of Supervisors.* See Staff's response to Contention 2.
7. *The initial permit signed June 11, 2008 was not complied with.* See Staff's response to Contention 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.
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.
10. *The existing, unauthorized, location of the well encroaches on the adjacent neighbor's property.* See Staff's response to Contentions 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.

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.
13. *There has been no proof presented that the Monterey County RMA - Planning 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.
14. *Historically the Monterey County RMA - Planning 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.
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.
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.
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.
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.
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.
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.
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.
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.
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.
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.

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.
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.
27. *The County Staff erroneously concluded 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. 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.
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.
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.

<u>The Appeal of PLN110367 –Coastal Administrative Permit for the Production Well</u>

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.

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 Dan 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.

C. Staff Response to Appellant's letter dated January 9, 2013

The Appellant submitted a letter, dated January 9, 2013, replying to the Staff Responses to Appellant's contentions as set forth in the January 15, 2013 Staff Report. Appellant's letter repeats contentions to which the staff reports in this matter have already responded. Without belaboring points already made, staff responds briefly as follows to Appellants' "replies" to staff responses to his contentions:

Staff Response to Appellant's Reply No. 1:

The Appellant contends that William David Powell never applied for an Amendment to the Coastal Administrative Permit. Staff concurs, but the permit runs with the land. Therefore, nothing precludes the current owner from applying for an amendment to the permit, which is what has happened in this case. The current Applicant, the Estate of William Dan Powell, applied for an amendment to the Coastal Administrative Permit on January 19, 2012.

Staff Response to Appellant's Reply No. 2:

Appellant's guesses about what may have been in staffs' minds are speculative. The documentary evidence shows the location of the test well that was authorized by the Coastal Administrative Permit (CAP). (See map attached to Resolution No. 070074, Exh. 1 to **Attachment E** of the January 15 and February 26 staff reports.[i]) The evidence also shows that the well was drilled in a different location than authorized by the CAP (**Attachment L**). Staff concurs that the required setback from the well where originally approved was within the boundaries of the Powell property and that the setback from the well where actually drilled is not entirely within the Powell property lines. (Exh. 1 to **Attachment E; Attachment K**) The Coastal Administrative Permit, which is discretionary, is different than the well permit issued by Environmental Health. Both were required. The Environmental Health permit is a ministerial well construction permit. Environmental Health inspectors typically review placement of wells in regard to required public health setbacks (ie, the distance of the well from the sewer main and laterals) and other construction issues. There is no state regulation requiring that the public health setbacks be within property lines. The Powell well permit issued by Environmental Health (**Attachment P**) required compliance with all conditions of the Coastal Administrative Permit. As the facts show, this compliance did not occur. The names of the individual staff involved at the time the well was drilled, which Appellant seeks, are not relevant to the land use decision now before the Board, which is to determine whether to approve the application for amendment to the Coastal Administrative Permit, which would cure the violation, and, if that amendment is approved, whether to approve conversion of the test well to a production well.

With regard to Appellant's arguments about the application of the Interim Ordinance, the ordinance was in effect at the time the application for the amendment was made. However, the ordinance expired before the application was approved, and therefore, is no longer applicable. The rules that govern these applications currently before the Board are the rules in effect when the Board considers the application, not those in effect when the application was filed. Moreover, as explained in the staff report, the interim ordinance would not have precluded the applications currently before the Board. Regarding Appellant's contention that the well where

located would grant a prescriptive easement or private eminent domain, the facts do not support these contentions, as explained in the staff reports as well as the reply to number 4 below.

Staff Response to Appellant's Reply No. 3:

Appellant has suffered no prejudice from the fact that the Applicant's proposal is an amendment to a Coastal Administrative Permit rather than a new Coastal Administrative Permit. The Appellant's reply contends that the difference between a Coastal Administrative Permit and an Amendment to a Coastal Administrative Permit matters because they require different notice. The public notice for a new Coastal Administrative Permit and an Amendment to a Coastal Administrative Permit are the essentially the same if, as occurred here, a person requests a public hearing. For both, notices are mailed to property owners and legal residents within 300 feet of the subject property, and notices are posted in three public places on and near the subject property. New Coastal Administrative Permits also require a public notice to be published in a newspaper of general circulation in the County of Monterey, where amendments of a "minor and trivial" nature do not. If objections are received to the notice of the proposed amendments of a minor and trivial nature, the amendment is referred to public hearing. (Monterey County Code section 20.76.115.) The Appellant received notice of the proposed Amendment and objected, whereupon the proposed Amendment was referred to a public hearing before the Zoning Administrator. That hearing was noticed in a newspaper of general circulation. The Zoning Administrator conducted a noticed public hearing, at which Appellant had an opportunity to be heard, and the Zoning Administrator approved the Amendment (PLN110366) on August 9, 2012. The Appellant had the opportunity to appeal the Zoning Administrator's decision to the Board of Supervisors. The Board of Supervisors conducts a de novo public hearing on the appeal. The hearing before the Board of Supervisors on this appeal was noticed for October 23, 2012. The Board continued the hearing to January 15, 2013 and then to February 26, 2013, with Appellant and Applicant's consent, and Appellant will have the opportunity to be heard at the Board hearing. Therefore, the fact that the permit is an amendment to a Coastal Administrative Permit has not deprived Appellant of notice and the opportunity to be heard.

Regarding Appellant's contention that the well where located would grant a prescriptive easement or private eminent domain, tantamount to an unlawful taking of private property, the facts do not support these contentions, as explained in the staff reports as well as the reply to number 4 below.

Staff Response to Appellant's Reply Nos. 4A and 4B:

Appellant contends that the action of approving the well would be a taking because it is an unlawful taking of property by a private citizen for a private purpose. This contention is without merit because any effect on Appellant of the project approval is as result of the well setback regulation, and the well setback regulation clearly serves a public purpose. The regulation is the California Plumbing Code requirement of a prescribed minimum distance between drainage (sewer) piping and water wells (**See Attachment Q**). The minimum distance serves the important purpose of protecting the groundwater quality from contamination and degradation and hence protecting the public health, safety, and welfare. (California Well Standards Bulletin 74-90 (California Dep't of Water Resources, June 1991, at pp. 3, 12-14.)) (**Attachment R**) The takings inquiry is whether the regulation substantially burdens Appellant's use of his property or denies him all economically viable use of his property. The answer on the facts is no. Factually, the regulation has only an incidental effect on Appellant's property. It disallows installation of a sewer lateral or sewer main in that small portion of Appellant's property that is within the

minimum required setback distance from the well, but does not prevent use of the property. As explained in greater detail above in the staff report, the well setback does not affect the existing or future uses of the property, including most uses of the well setback area other than installation of a sewer main or lateral. On these facts, the well regulation does not effect a taking of Appellant's property.

Appellant also expresses concern that the well in its current location would expose Appellant to contamination to the water source since the well setback area on Appellant's property is Appellant's driveway. Appellant is concerned with "potential exposure to oils, lubricants, chemicals and contaminants" from vehicles being driven and washed over the gravel or dirt driveway. The fact that the Appellant's driveway is not paved does not change the conclusion in the Staff Report. It is highly improbable that contaminants from the Appellant's property 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 groundwater. The purpose of the well seal is to prevent such contamination. See Staff's response to Nos. 4A and 4B in the Staff Report.

Appellant also contends that the "unauthorized well location would grant a prescriptive easement." The County's action itself does not create an easement in favor of the County nor create a prescriptive easement. A prescriptive easement is a matter of private dispute between Applicant and Appellant. The statements made in the January 15, 2013 staff report that it is within Appellant's power to prevent a prescriptive easement do not and were not intended to confirm the existence of a prescriptive easement, and to the extent they were subject to misinterpretation, have been omitted from the draft resolutions presented to the Board.

The Appellant contends that staff's response with regard to the location of sewer mains is speculative. Staff disagrees. Factually, Carmel Area Wastewater District's (CAWD) sewer lines in that geographic 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. Because this is a developed, urban area and sewer mains already are in place, it <u>is</u> improbable that CAWD would go to the expense of relocating sewer mains and securing new easements.

D. <u>Staff Response to Applicant's letter dated January 11, 2013</u>

In the letter dated January 11, 2103, the Applicant asserts that no amendment to the Coastal Administrative Permit (PLN070074) was necessary in the first instance. Staff disagrees. Resolution No. 070074 (**Attachment E**) states that the Coastal Administrative Permit was granted <u>as shown on the attached sketch</u> and subject to the attached conditions (page 4). The sketch attached to the resolution shows the well location on the southerly portion of the Powell property. Therefore, relocating the well to a location on the property <u>other than what was shown on the attached sketch</u> required an amendment to the Coastal Administrative Permit. Applicant argues that Environmental Health's approval of the alternative site is consistent with Condition 1 of the original Coastal Administrative Permit. Staff does not interpret Condition 1 as meaning that the well permit could override the location authorized by the Coastal Administrative Permit. Condition #19 of the Environmental Health ministerial well permit required compliance with all conditions of the Coastal Administrative Permit (See **Attachment P)**.

[i] References to Attachments are to the staff reports for January 15 and February 26, 2013.