MONTEREY COUNTY BOARD OF SUPERVISORS

MEETING: January 10, 2012
1:30 PM AGENDA NO: 

SUBJECT: Public hearing to consider:

a) Appeal by Warren Wayland from the Planning Commission’s decision denying the application for a Combined Development Permit (Wayland/PLN070366) consisting of: 1) a Minor Subdivision Vesting Tentative Map to allow the division of a 38-acre parcel into four parcels of 9.7 acres (Parcel 1), 5.3 acres (Parcel 2), 9.3 acres (Parcel 3), 5.2 acres (Parcel 4) and a remainder parcel of 8.8 acres; 2) Use Permit for development on slopes in excess of 25 percent for roadway improvements; 3) Use Permit for development in a visually sensitive area (“VS” District); and 4) Use Permit to allow the removal of approximately 39 oak trees; and

b) Appeal by Susan Merrill from the Planning Commission’s decision denying the application for a Combined Development Permit (Merrill/PLN070376) consisting of: 1) a Minor Subdivision Vesting Tentative Map to allow the division of a 37.8 acre parcel into three parcels of 10.5 acres (Parcel 1), 13.8 acres (Parcel 2), 7.5 acres (Parcel 3) and a remainder parcel of 6.0 acres; and 2) Use Permit for development in a visually sensitive area (“VS” District).

(Appeal, PLN070366/Wayland Minor Subdivision, 24975 Boots Road, Monterey)
(Appeal, PLN070376/Merrill Minor Subdivision, 24915 Boots Road, Monterey)
[Continued from May 3, 2011 hearing]

| Project Location: | 24975 Boots Road, Monterey (Wayland) |
| Project Location: | 24915 Boots Road, Monterey (Merrill) |
| APN: | 173-062-009-000 (Wayland) |
| APN: | 173-062-008-000 (Merrill) |
| Planning Number: | PLN110079 (Wayland Minor Subdivision) |
| Planning Number: | PLN110078 (Merrill Minor Subdivision) |
| Name: | Wayland Warren Trust |
| Name: | Merrill Thomas Trust |
| Plan Area: | Greater Monterey Peninsula Area Plan |
| Zoning Designation: | RDR/5.1-VS (Rural Density Residential, 5.1 acre per lot minimum, with Visual Sensitivity Overlay) |
| CEQA Action: | Statutorily exempt from CEQA per 15270 |
| DEPARTMENT: | RMA – Planning Department |

RECOMMENDATION:

It is recommended that the Board of Supervisors:

a) Adopt a Resolution (Exhibit B) to:
   1. Deny the appeal by Warren Wayland from the Planning Commission’s decision denying the application for a Combined Development Permit (Wayland/PLN070366); and
   2. Deny the application for a Combined Development Permit (Wayland/PLN070366) consisting of: 1) a Minor Subdivision Vesting Tentative Map to allow the division of a 38-acre parcel into four parcels of 9.7 acres (Parcel 1), 5.3 acres (Parcel 2), 9.3 acres (Parcel 3), 5.2 acres (Parcel 4) and a remainder parcel of 8.8 acres; 2) Use Permit for development on slopes in excess of 25 percent for roadway improvements; 3) Use Permit for development in a visually sensitive area (“VS” District); and 4) Use Permit to allow the removal of approximately 39 oak trees; and grading of approximately 3,800 cubic yards of cut and 3,800 cubic yards of fill, installation of individual septic systems, a 50 foot by 50 foot water tank easement with a 100,000 gallon water tank and 15 foot wide utility easement, a 60-foot wide road and utility easement and a 30-foot wide road and utility easement;
b) Adopt a Resolution (Exhibit C) to:
   1. Deny the appeal by Susan Merrill from the Planning Commission’s decision denying the application for a Combined Development Permit (Merrill/PLN070376); and
   2. Deny the application for a Combined Development Permit (Merrill/PLN070376) consisting of: 1) a Minor Subdivision Vesting Tentative Map to allow the division of a 37.8 acre parcel into three parcels of 10.5 acres (Parcel 1), 13.8 acres (Parcel 2), 7.5 acres (Parcel 3) and a remainder parcel of 6.0 acres; and 2) Use Permit for development in a visually sensitive area (“VS” District); and grading of approximately 3,100 cubic yards of grading, individual septic systems and 60 foot wide road and utility easements.

SUMMARY:

On November 2, 2007 and November 15, 2007, the Warren Wayland Trust et al and Thomas Merrill Trust et al, respectively, filed applications with the Monterey County RMA – Planning Department for Combined Development Permits (PLN070366 and PLN070376) for adjacent Minor Subdivisions. Staff thoroughly analyzed issues related to water quantity, water quality and sewage disposal, and due to significant concerns regarding these issues brought the matter forward to the Planning Commission with a recommendation for denial.

The projects were brought to public hearing before the Monterey County Planning Commission on January 26, 2011. The Planning Commission denied the applications by a 7-1 vote (2 members absent) (PC Resolution No. 11-005 and 11-006) (Exhibits H and I).

One of the key issues was water quality. Water quality tests for both projects, submitted to the Monterey County Environmental Health Bureau (“EBH”) indicated arsenic concentrations above the maximum contaminant level (“MCL”) of 10 parts per billion (ppb). Testing data for the existing well compiled between August 2007 and September 2010 showed that arsenic concentration levels range from 6 ppb to as high as 17 ppb, with the overall average being 10.08 ppb. These results did not demonstrate that the well could reliably stay in compliance with adopted thresholds. Based upon this evidence, the Planning Commission found that neither project has a reliable long-term sustainable water source, in regard to water quality, and therefore do not comply with 2010 General Plan policies nor required health and safety standards.

On February 9, 2011, applicants timely appealed the Planning Commission’s decision (Exhibits F and G). The appellants request that the Board grant the appeal and approve the Combined Development Permits for PLN070366 (Wayland) and PLN070376 (Merrill). The bases of the appeals are: a lack of fair or impartial hearing; the findings, decision or conditions are not supported by the evidence; and the decision is contrary to law. A more detailed discussion of these contentions for each appeal can be found in Exhibit A.

The appeals were scheduled for public hearing before the Monterey County Board of Supervisors on March 29, 2011. In a letter dated, March 17, 2011, the applicant’s representative, Brian Finegan, requested a continuance to April 12, 2011; however, during the March 29, 2011 Board hearing, at the request of Staff, the Board continued the matter to May 3, 2011, due to scheduling conflicts on the April 12, 2011 agenda. On May 3, 2011, a public hearing was held; however, the Board continued the matter to January 10, 2012, to allow the applicants to perform further water sampling.

Since May 3, 2011, the applicants have conducted additional water sampling tests in each of the months of May through November 2011. Each of the tests showed arsenic levels acceptable to the EHB and in
compliance with state law relative to the MCL. An arsenic concentration test is also expected in December 2011; however, the results were unavailable as of the preparation of this report.

Although it appears that the water quality may finally be acceptable, issues relative to conformance with the 2010 General Plan, traffic impacts, sewage/septic impacts, and other potential environmental impacts remain unresolved.

Staff recommends denial of both the Wayland Combined Development Permit (PLN110079) and Merrill Combined Development Permit (PLN110078) because neither map can be found in conformance with the 2010 General Plan. However, if the Board of Supervisors chooses to grant the appeal the Board cannot approve the minor subdivisions for Wayland and Merrill because additional project review and environmental analysis will be required (See the discussion in Exhibit A under “Options” on page 10). The matter should therefore be remanded for further project review and environmental analysis, and consideration by the Planning Commission in light of the new water quality data and the further project review.

**DISCUSSION:**

Detailed discussion is provided in Exhibit A.

**CEQA:**

Public Resources Code Section 21080(b) (5) and California Environmental Quality Act (CEQA) Guidelines Section 15270(a) statutorily exempt projects which a public agency rejects or disapproves. However, should one or both of the projects (Wayland and/or Merrill) move toward approval, that particular project would be subject to environmental review and would require the preparation of an Initial Study. Environmental impacts resulting from each application would need to be considered, including but not limited to: aesthetics, geologic/geology, traffic/circulation, water/water quality/hydrogeology, noise, and cumulative impacts.

**OTHER AGENCY INVOLVEMENT:**

The following agencies have reviewed the project and those that are checked (“✓”) have comments and/or recommended conditions:

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<td>Environmental Health Division</td>
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<td>Monterey County Regional Fire Protection District</td>
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<td>Greater Monterey Peninsula Land Use Advisory Committee</td>
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<td>Parks Department</td>
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<td>Regional Water Quality Control Board, District 3</td>
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**FINANCING:**

Funding for staff time associated with this project has been provided through payment of all appropriate appeal fees.
This report was reviewed by Jacqueline R. Onciano & Laura Lawrence, Planning Services Managers.

cc: Front Counter Copy; Board of Supervisor's (16); County Counsel; Environmental Health Division; Public Works; Monterey County Water Resources Agency; Monterey County Regional Fire Protection District; Monterey County Parks Department; Regional Water Quality Control Board (District 3); Mike Novo, Director-RMA Planning Department; Carl Holm, Asst. Director Resource Management Agency; Jacqueline R. Onciano, Planning Services Manager; Warren Wayland Trust, Owner (PLN070366); Tom and Susan Merrill, Owner (PLN070376); Maureen Wruck Planning Consultants LLC (Joel Panzer), Agent; Brian Finegan, Attorney; Whitney “Tinker” Stolich, Neighbor; Michael Weaver, Neighbor; Law Office of Michael Stamp (Molly Erikson), Interested Party; Land Watch Monterey County (Amy White), Interested Party; Planning File PLN070366 (Wayland) & PLN070376 (Merrill)

Attachments: Exhibit A Discussion of Proposed Projects
Exhibit B Draft Board Resolution - PLN070366 – Wayland
Exhibit C Draft Board Resolution - PLN070376 – Merrill
Exhibit D Project Location Map – PLN070366 – Wayland
Exhibit E Project Location Map – PLN070376 – Merrill
Exhibit F Notice of Appeal (2/09/11) – PLN070366 – Wayland
Exhibit G Notice of Appeal (2/09/11) – PLN070376 – Merrill
Exhibit H Planning Commission Resolution No. 11-005 - PLN070366 – Wayland
Exhibit I Planning Commission Resolution No. 11-006 - PLN070376 – Merrill
Exhibit J Planning Commission Staff Report from January 26, 2011.
Exhibit K Greater Monterey Peninsula LUAC Meeting Minutes – PLN070366 – Wayland
Exhibit L Greater Monterey Peninsula LUAC Meeting Minutes – PLN070376 – Merrill
Exhibit M Letter from Environmental Health Bureau (Janna Faulk), dated March 18, 2010
Exhibit N Board of Supervisors Board Order from October 16, 2007
EXHIBIT A

PROJECT OVERVIEW AND BACKGROUND:
The project sites are located adjacent to Highway 68 about 4 miles north of Monterey, across from the Bishop Ranch/Pasadera development. Each project involves the minor subdivision of adjacent parcels. The Wayland parcel, approximately 38 acres, is proposed to be subdivided into four separate parcels of 9.7 acres (Parcel 1), 5.3 acres (Parcel 2), 9.3 acres (Parcel 3), 5.2 acres (Parcel 4) and a remainder parcel of 8.8 acres. The Merrill parcel, approximately 37.8 acres, is proposed to be subdivided into three separate parcels of 10.5 acres (Parcel 1), 13.8 acres (Parcel 2), 7.5 acres (Parcel 3) and a remainder parcel of 6.0 acres. Together, the adjacent subdivisions would convert two existing parcels into seven separate parcels and two remainder lots (9 lots total), on land located adjacent to State Route 68 (a designated Scenic Highway). The properties are zoned LDR/5.1-VS (Low Density Residential, with a Visual Sensitivity Overlay), and considered “Highly Sensitive” in Figure 14 (Scenic Highway Corridors & Visual Sensitivity) of the 2010 Monterey County General Plan.

The Wayland Minor Subdivision (PLN070366) and Merrill Minor Subdivision (PLN070376) were scheduled for consideration by the Monterey County Planning Commission on January 26, 2011. The Planning Commission denied both the Wayland Minor Subdivision and Combined Development Permit (PLN070366) and Merrill Minor Subdivision and Combined Development Permit (PLN070376) by a 7-1 vote, with 2 members absent (Exhibits H and I).

ANALYSIS:
In order to approve the Combined Development Permit for either the Wayland Minor Subdivision (PLN070366) or the Merrill Minor Subdivision (PLN070376) specific findings are required to be made including but no limited to: 1) Proof of a reliable long-term sustainable water supply (quantity and quality); 2) 2010 General Plan consistency; and 3) compliance with public health and safety standards.

Water Quantity
The proposed water supply for the projects is a common well (off-site adjacent parcel) that lies within the court adjudicated Seaside Groundwater Basin (in the Laguna Seca sub-basin). The Superior Court’s decision in the adjudication of the Laguna Seca sub-basin finds that 5 acre-feet or less of annual water use by any person or entity is considered diminimus and not likely to significantly contribute to a material injury to the Seaside Basin [California American Water v. City of Seaside et al (Case No. M66343)]. In addition, the Court precluded environmental review regarding the impact of taking water from the Seaside basin as long as the proposed project’s water use is less than the 5 acre feet. For these reasons, the County is compelled to acknowledge that the applicant has a long-term sustainable water supply with respect to quantity.

Water Quality
Title 22 of the California Code of Regulations sets forth the maximum contaminant level (“MCL”) for arsenic at .010 mg/l or commonly expressed as 10 ppb. When a public water system (15 connections or more) as defined in Title 22 exceeds a quarterly annual average of 10 ppb then that public water system must either provide treatment or secure another water source so that the water delivered to the consumer meets the MCL for arsenic.

Monterey County Code Section 15.04.050.a.2 requires that a small water system (5-14 connections) must show “adequate capability to assure the delivery of pure and wholesome water for human consumption”. Monterey County Code Section 19.03.015.L.2.C.6 (applicable through section 19.04.15) requires evidence demonstrating how technical, managerial, and financial capacity (“TMF”) shall be achieved. The Monterey County Environmental Health Bureau (“EHB”) and California Department of
Public Health staff are continually confronting the challenges that small systems face locally and throughout the state in addressing arsenic exceedences as well as other regulatory issues through regulatory interaction with small water systems. These small systems do not have the TMF to maintain and operate treatment plants. Based on local/state experience and United States Environmental Protection Agency documentation of small water systems, EHB has determined that creation of new water systems for subdivisions that are less than 15 connections and that must employ treatment technology do not have the TMF to “assure the delivery of pure and wholesome water for human consumption”. The 1982 General Plan and the new 2010 General Plan both encourage consolidation of water systems acknowledging the larger water systems (15 connections or more) have the TMF to operate and maintain water systems so as to be able to provide pure and wholesome water.

According to the submitted test data for the Wayland and Merrill applications, the arsenic levels have been fluctuating above and below the MCL of 10 ppb with a high of 17 ppb and a low of 6 ppb. Prior to the Planning Commission hearing of January 26, 2011, the annual quarterly average for arsenic was 10.08 ppb. This average represents the test data between October 7, 2005 and June 30, 2010 (See attached table of results). It is EHB’s opinion that a calendar quarterly average of 10 ppb does not allow any safety margin for fluctuations of arsenic concentration that would require treatment. Given the sampling results showing that the arsenic has fluctuated above and below the MCL, EHB could not, at that time, recommend a finding of a long-term sustainable water supply in regards to water quality.

EHB was asked by the Planning Commission what concentration of arsenic would be acceptable in order to consider recommending approval relative to potable water. Richard LeWarne, Assistant Director of EHB, opined that an annual quarterly average of 8 ppb would provide a safety margin considering the fluctuations that have been documented.

While the appeal period from the decision of the Planning Commission was pending the applicant supplied more water quality test results for arsenic concentrations to EHB. Those additional tests are included in the referenced table. The time period that includes the samples is October 7, 2005 through April 1, 2011, and the recalculated annual quarterly average is 9.04 ppb.

On May 3, 2011, a public hearing was held before the Board of Supervisors on the appeal. At the applicant’s request, the Board continued the matter to January 10, 2012, to allow the applicants to continue conducting water sampling. Since that time, the applicants have conducted additional tests in the months of May through November 2011. Each test showed arsenic levels that appear to be in compliance with state law relative to the MCL. These additional tests have been included in the referenced table. An arsenic concentration test is also expected in December 2011; however, the test results were unavailable as of the preparation of this report.

In reviewing the recent tests and prior testing results, it is EHB’s opinion that the June 5, 2008 test result of 17 ppb appears to be an anomalous test result. Therefore, EHB will not consider this result in calculating the annual Quarterly Average. This practice is consistent with EHB’s regular and ongoing analysis of water quality results from water systems to determine compliance with water quality standards. The recalculated annual quarterly average (October 7, 2011 to November 15, 2011) is 7.9. Therefore, unless the December test result changes the Annual Quarterly Average above 8 ppb, it is EHB’s opinion there has been demonstrated a reasonable safety margin and a long-term sustainable water supply in regards to water quality.
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* 6/5/08 Result considered anomalous, not used in calculating 2nd quarterly averages.

NOTE: Only 1 sample each quarter can be used; therefore during periods of multiple samples in the same quarter, the samples were average for that quarter.
2010 General Plan Consistency
Both the Wayland and Merrill Minor Subdivision applications were evaluated for consistency with objectives and policies of the 2010 General Plan; specifically policies related to visual sensitivity along State Route 68 (GMP 3.3-Figure 14), sustainable long-term water (GMP 3.14, PS-3.1, PS-3.2, and PS-3.9) and development on slopes in excess of 25% (OS-3.5). The analysis concluded that both subdivision applications were not consistent with the objectives and policies of the 2010 General Plan. The evidence supporting this conclusion can be found in Finding and Evidence No. 1 – Inconsistency.

Development Evaluation System
2010 General Plan Policy LU-1.19 identifies Community Areas, Rural Centers and Affordable Housing Overlay Districts as the top priority for development in the unincorporated areas of the County. Outside of those areas, a Development Evaluation System shall be established and used to evaluate developments of five or more lots or units and development of equivalent or greater traffic, water and wastewater intensity. Evaluation criteria shall include but are not limited to: site suitability, infrastructure, resource management, environmental impacts and potential mitigation, and proximity to multiple modes of transportation.

At this time, the County has not established a Development Evaluation System (DES); however, the Wayland and Merrill projects would be subject to this requirement, as neither project is located within a Community Area, Rural Center or Affordable Housing Overlay District. In addition, each project involves a greater intensity of traffic, water and wastewater service(s). While the DES is not yet in place, an analysis of these sites would be required prior to project approval.

Sewage Feasibility
The applicant prepared Sewage Feasibility reports for both the Wayland and Merrill Minor Subdivisions and the EHB reviewed the reports.

After comprehensive review of the reports for the Wayland property, the EHB concluded that this property possesses marginal soil composition and percolation rates required for the installation of conventional septic disposal systems. The reports do not demonstrate that there is a consistent rate of percolation within and among all of the proposed lots to give the EHB the level of confidence necessary to support the subdivision utilizing the proposed On-site Wastewater Treatment System (OWTS) design. The EHB determined that the Merrill property contained soil compositions having generally acceptable rate of percolation, suitable for the installation of conventional septic disposal systems.

In the event that the Board were inclined to approve the subdivision proposals, Staff would recommend that the Wayland Minor Subdivision application be connected to a sanitary sewer system due to the inadequate soil composition and marginal percolation rates associated with this property. Should the Wayland property be connected to a sewer network, the adjacent Merrill property would also be conditioned to connect, as routing of sewer lines would traverse the Merrill property.

The closest sanitary sewer system, which could potentially serve the proposed projects, is located across State Route 68, within the Pasadera (Bishop Ranch) subdivision.

The projects could connect to the Pasadera/Laguna Seca/York wastewater treatment facility, operated by Cal Am. That facility has a permitted capacity of 110,000 gallons per day ("GPD") and is presently running at about 60,000 GPD with 385 connections. Thus, the facility has an additional 50,000 GPD capacity and the possibility of an additional 300 +- connections.
The Wayland property is located about 500 ft. from the sewer treatment plant. A pump station and a sewer line running under Highway 68 would be needed to connect to the treatment plant. Monterey County Code Section 15.20.040 “Required Connection to Public Sewer” would require the Merrill property to connect to the Cal Am facility unless certain conditions apply:

A. Except as provided in subdivision B of this Section, no person shall use or maintain any building or structure where people reside, congregate, or are employed which is within two hundred (200) feet of an approved sanitary sewer, or which is located on a parcel of land which abuts a road, street, or alley in which any such sewer has been installed, unless it is connected to such sewer.

B. The sewer connection specified in subdivision A of this Section shall not be required if:

1. Such building or structure was in existence on June 26, 1981 and is connected to a septic tank which is functioning in a lawful manner. A system that requires the pumping of contents more frequently than twice a year to prevent overflow or other malfunction shall be conclusively presumed to be functioning in a lawful manner, or,
2. The owner of the sewer refuses to permit such connection; or,
3. The owner or lawful possessor of the building or structure is unable to obtain any necessary easement for the connection pipe; or,
4. Topographical conditions would make an impossible grade for a connection pipe.

Roger Van Horn, of the EHB, spoke with a Cal AM representative on the morning of December 27, 2011, regarding the possible connection of these two subdivisions to the Cal Am facility. The Cal Am representative indicated that the company is always looking for more connections for the treatment plant.

APPEAL(S):
On January 26, 2011, the Planning Commission denied both the Wayland Combined Development Permit and Minor Subdivision (PLN070366) and the Merrill Combined Development Permit and Minor Subdivision (PLN070376); each by a 7-1 vote, with 2 members absent. An appeal was timely filed for each application, by the respective property owners (“appellants”) Warren Wayland and Susan Merrill, on February 9, 2011. Each appellant requests that the Board grant the appeal and approve the Combined Development Permits and Minor Subdivision Applications (PLN070366 and PLN070376). The appeals allege: there was a lack of fair or impartial hearing; the findings and decision are not supported by the evidence; and the decision is contrary to law. The contentions are contained in the notice of appeal (Exhibit F and G).

Responses to appellants’ contentions are found within each of the proposed resolutions presented to the Board. One of the issues raised in both appeals is which General Plan applies to these applications. Both appeals contend that, under Government Code section 66474.2, the 2010 General Plan does not apply to these applications because they were deemed complete in 2008. Because the issue is foundational, we address this contention here. As explained below, legally the 2010 General Plan is the plan applicable to these applications.

Government Code section 66474.2 (part of the state Subdivision Map Act) provides that, “Except as otherwise provided in subdivision (b) or (c), in determining whether to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined the application complete.” (Government
Code § 66474.2(a), emphasis added.) The applications in this case come under the exception provided in subdivision (b) of section 66474.2. It states that if a local agency has “initiated proceedings by way of ordinance, resolution, or motion” and also published a notice containing a description sufficient to notify the public of the nature of the proposed change in the general plan, then the local agency “may apply any ordinances, policies, or standards enacted or instituted as a result of those proceedings which are in effect on the date the local agency approves or disapproves the tentative map.” (Gov’t Code sec. 66474.2(b).)

The County has met the requirements of the exception set out in Government Code section 66474.2(b). Prior to October 16, 2007, a public hearing notice on the draft General Plan was published, and the Board initiated public hearings beginning September 25, 2007 and continuing on October 16 and November 6, 2007 and completed the public hearing in 2010. In the course of those hearings, on October 17, 2007, the Board adopted a motion “informing the public that any subdivision applications deemed complete after October 16, 2007 will be subject to the plans, policies, ordinances, and standards that result from the current General Plan Update proceedings and that are in effect at the time the application is considered for approval.” (See Board order dated October 16, 2007/Exhibit M)

Additionally, on October 23, 2007, the Board adopted Ordinance No. 5090, which extended for one year the relevant provisions of Interim Ordinance No. 5080 related to processing of applications during the General Plan update, and the ordinance provided that subdivision applications that were not deemed complete as of October 16, 2007 but which may be processed under that ordinance would be subject to the standards that, as a result of the General Plan Update, may be in effect at the time the County takes action on the application. Finally, pursuant to Government Code section 66474.2(b), the County elected to apply the 2010 General Plan to subdivision applications deemed complete after October 16, 2007 through the adoption of Policy LU-9.3 of the General Plan. Policy LU-9.3 provides, in relevant part, “Applications for standard and minor subdivisions that were deemed complete on or before October 16, 2007 shall be governed by the plans, policies, ordinances and standards in effect at the time the application was deemed complete. Applications for standard and minor subdivision maps that were deemed complete after October 16, 2007 shall be subject to this General Plan and the ordinances, policies, and standards that are enacted and in effect as a result of this General Plan.”

The Wayland and Merrill applications were deemed complete in 2008, after October 16, 2007. Therefore, pursuant to Government Code section 66474.2(b) and General Plan Policy LU-9.3, the applications are subject to the policies of the 2010 General Plan.

It is important to note that while the appellants identify different findings and evidence as reasons for the appeal, not every finding need to be negative in order to deny the map(s). All findings must be in the affirmative to approve a subdivision map; just one negative finding will result in denial. In this particular case, the Planning Commission determined that a long-term sustainable water supply (water quality) is not available to these projects; thus the projects were denied by the Planning Commission. In addition, the projects are located in an area designated as highly visually sensitive. General Plan policies preclude new development in highly sensitive locations. In addition, the Wayland subdivision cannot support septic waste disposal which would require connection to a public sewer system.

OPTIONS
If the Board of Supervisors chooses to grant the appeal the Board cannot approve the minor subdivisions for Wayland and Merrill, at this time. Additional project review and environmental analysis are still required. Although it appears that the water quality may finally be acceptable, issues relative to conformance with the 2010 General Plan, traffic impacts, sewage/septic impacts, and other potential environmental impacts remain unresolved. These impacts would need to be analyzed in an initial study. For example:

Wayland Minor Subdivision Appeal (PLN110079)
Merrill Minor Subdivision Appeal (PLN110078)
Traffic. A traffic analysis was prepared for the project, analyzing the potential impacts to the adjacent intersection (Boots Rd/State Route 68). Denial of this application would result in no impacts to the Boots Road/SR-68 intersection. However, approval of the application would create impacts that require analysis and potential mitigation.

Sewage Disposal. The soil composition and percolation rates of the Wayland property do not comply with standards for septic disposal (Monterey County Code Chapter 15.20). The rate of percolation varied greatly on the lots. Consequently, there is not a consistent rate of percolation within and among all of the lots to support the subdivision utilizing the proposed Onsite Wastewater Treatment System (OWTS) design. Approval of the application would create impacts that require analysis and potential mitigation.

Affordable Housing. The project was reviewed by the Housing and Redevelopment Office relative to the County’s Inclusionary Housing Ordinance No. 04185, as codified in Chapter 18.40 of the Monterey County Code. Ordinance No. 04185 requires that all new development consisting of three or more lots or residential units contribute to the Inclusionary Housing Program. The project would be subject to this requirement, as it is developing 4 new lots; however because the Board is denying the subdivision, the requirement does not apply. Approval of the application would require review of the appropriate mechanism for compliance with the requirement.

Parks and Recreation. The project was reviewed by the Monterey County Parks Department relative to County recreation requirements and/or payment of recreation fees. The project would be subject to this requirement, due to the creation of 4 new lots; however because the Board is denying the subdivision, the requirement does not apply. Approval of the application would require review of the appropriate mechanism for compliance with the requirement.

Therefore, the Board could, as an alternative to denying the appeal, grant the appeal, but remand the matter for further project review and environmental analysis, and for consideration by the Planning Commission in light of the new water quality data, and any further project review.
Exhibit B
Draft Resolution – Wayland

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

Resolution No.
Resolution by the Monterey County Board of Supervisors

1. Deny the appeal by Warren Wayland from the
   Planning Commission’s decision denying the
   application for a Combined Development Permit
   (Wayland/PLN070366); and

2. Deny the application for a Combined Development
   Permit (Wayland/PLN070366) consisting of: 1)
   Minor Subdivision Vesting Tentative Map to allow
   the division of a 38-acre parcel into four parcels of
   9.7 acres (Parcel 1), 5.3 acres (Parcel 2), 9.3 acres
   (Parcel 3), 5.2 acres (Parcel 4) and a remainder
   parcel of 8.8 acres; 2) Use Permit for development
   of areas in excess of 25 percent for roadway
   improvements; 3) Use Permit for development in a
   visually sensitive area (“VS” District); and 4) Use
   Permit to allow the removal of approximately 39
   oak trees; and grading of approximately 3,800 cubic
   yards of cut and 3,800 cubic yards of fill, individual
   septic systems, a 50 foot by 50 foot water tank
   easement with a 100,000 gallon water tank and 15
   foot wide utility easement, a 60-foot wide road and
   utility easement and a 30-foot wide road and utility
   easement.

The appeal by Warren Wayland from the Planning Commission’s denial of the Wayland Combined Development Permit and Minor Subdivision Vesting Tentative Map (PLN070366) came on for public hearing before the Board of Supervisors of the County of Monterey. Having considered all the written and documentary evidence, the administrative record, the staff report, oral testimony, and all other evidence presented, the Board of Supervisors hereby finds and decides as follows:

FINDINGS

1. FINDING: INCONSISTENCY – The Project, as designed is inconsistent with the applicable plans and policies which designate this area as appropriate for development.

   EVIDENCE: a) During the course of review of this application, the project has been reviewed for consistency with the text, policies, and regulations in:
   - 2010 Monterey County General Plan, including the Greater Monterey Peninsula Area Plan,
   - Monterey County Zoning Ordinance (Title 21)
   - Monterey County Subdivision Ordinance (Title 19)
   - Monterey County Public Service Ordinance (Title 15)

   Conflicts were found to exist during the course of review of the project

   Exhibit B

   1 of 12
b) The proposed project is a Combined Development Permit consisting of:
   1) Minor Subdivision Vesting Tentative Map to allow the division of a
      38-acre parcel into four parcels of 9.7 acres (Parcel 1), 5.3 acres (Parcel
      2), 9.3 acres (Parcel 3), 5.2 acres (Parcel 4) and a remainder parcel of
      8.8 acres; 2) Use Permit for development of areas in excess of 25
      percent for roadway improvements; 3) Use Permit for development in a
      visually sensitive area ("VS" District); and 4) Use Permit to allow the
      removal of approximately 39 oak trees; and grading of approximately
      3,800 cubic yards of cut and 3,800 cubic yards of fill, individual septic
      systems, a 50 foot by 50 foot water tank easement with a 100,000 gallon
      water tank and 15 foot wide utility easement, a 60-foot wide road and
      utility easement and a 30-foot wide road and utility easement.

c) The property is located at 24975 Boots Road, Monterey (Assessor's
   Parcel Number: 173-062-009-000), Greater Monterey Peninsula (GMP)
   Area Plan. The parcel is zoned RDR/5.1-VS (Rural Density
   Residential, 5.1 acre per lot minimum, with Visual Sensitivity Overlay),
   which allows residential development of a rural density and intensity.
   Residences are an allowed land use for this site.

d) 2010 General Plan Policy GMP 3.3 refers to the Greater Monterey
   Peninsula Scenic Highway Corridors and Visual Sensitivity Map
   (Figure 14) to designate visually "sensitive" and "highly sensitive" areas
   generally visible from designated Scenic Highways. The subject
   property is designated as "highly sensitive" in Figure 14. Subsection (d)
   of GMP 3.3 states that new development shall not be sited on those
   portions of property that have been mapped "highly sensitive", unless
   such development maximizes the goals, objectives, and policies of the
   Greater Monterey Peninsula Area Plan. The proposed minor
   subdivision would result in the creation of three new residential parcels
   (and one remainder lot) located within the designated "highly sensitive"
   area. This would not maximize the goals, objectives, and policies of the
   Greater Monterey Peninsula Area Plan; therefore the project is
   inconsistent with 2010 General Plan Policy GMP 3.3.

e) 2010 General Plan Policy OS-3.5 prohibits development on slopes in
   excess of twenty-five percent (25%) unless no feasible alternative exists
   or the development better achieves the resource protection objectives
   and polices contained in the General Plan and accompanying Area
   Plans. The proposed project involves the subdivision of an existing
   parcel into four new lots (and one remainder), requiring the construction
   of roads on slopes in excess of 25%. This would not be consistent with
   2010 General Plan Policy OS-3.5 and would not achieve the resource
   protection objective of either the General Plan or Greater Monterey
   Peninsula Area Plan. Feasible alternatives do exist, as the existing 38
   acre parcel could be developed for residential use, without development
   on slopes in excess of 25%, which would be consistent with this policy.

f) The project includes application for a Use Permit for the removal of 39
   oak trees and a Use Permit for development in a Visually Sensitive (VS)
   zone. The requirements for issuance of said Use Permits have not been
   addressed at this time, as the project is denied for other reasons. (See
   Exhibit B

   2 of 12
Finding 2).

g) Title 19 inconsistency – See Finding and Evidence 2 below.

h) The project was referred to the Greater Monterey Peninsula Land Use Advisory Committee (LUAC) for review on December 5, 2007. Based on the LUAC Procedure guidelines adopted by the Monterey County Board of Supervisors per Resolution No. 08-338, this application did warrant referral to the LUAC because the project is subject to CEQA review and involves a discretionary permit application and land use matter which raises significant land use issues. The GMPLUAC recommended approval of the project by a 3-0 vote (1 absent, 1 abstain). It should be noted however, that at the time of the recommendation, the 2010 General Plan had not been implemented, and substantial issues relative to septic feasibility and water quality had yet to be discovered.

i) The project planner conducted a site inspection on August 9, 2007 and December 28, 2010.

j) The application, project plans, and related support materials submitted by the project applicant to the Monterey County RMA - Planning Department for the proposed development found in Project File PLN070366.

2. FINDING: SUBDIVISION – Section 66474 of the California Government Code (Subdivision Map Act) and Title 19 (Subdivision Ordinance) of the Monterey County Code requires that a request for subdivision be denied if any of the following findings are made:

1. That the proposed map is not consistent with the applicable general plan and specific plans.

2. That the design or improvement of the proposed subdivision is not consistent with the applicable general plan and specific plans.

3. That the site is not physically suitable for the type of development.

4. That the site is not physically suitable for the proposed density of development.

5. That the design of the subdivision or the proposed improvements is likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

6. That the design of the subdivision or type of improvements is likely to cause serious public health problems.

7. That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of property within the proposed subdivision.

EVIDENCE: a) Inconsistency. The project as designed and conditioned is inconsistent with the 2010 Monterey County General Plan, and Greater Monterey Peninsula Area Plan, and Monterey County Subdivision Ordinance (Title 19) (See Finding 1).

b) Design. The lot design is consistent with the Lot Design Standards of Section 19.10.030 of the Monterey County Code.

c) Site Suitability. The project has been reviewed for site suitability by the following departments and agencies: RMA - Planning Department, Monterey County Regional Fire Protection District, Housing and Redevelopment Office, Parks, Public Works, Environmental Health Bureau, and Water Resources Agency. The site is physically unsuitable.
for the proposed use due to septic feasibility concerns and inconsistency with adopted policies of the 2010 General Plan (GMP-3.3, OS-3.5).

d) Staff identified potential impacts to Biological Resources, Archaeological Resources, Soil/Slope Stability, and on-site wastewater treatment feasibility. Technical reports by outside consultants indicate that there are physical or environmental constraints rendering the site not suitable for the use proposed. County staff independently reviewed these reports and concurs with their conclusions. The following reports have been prepared:


e) The percolation and groundwater report prepared by the applicant’s consultant for the proposed Wayland Property did not demonstrate adequate feasibility for the installation of septic systems and associated leach fields, to the satisfaction of the Environmental Health Bureau (“EHB”) and Monterey County Code Chapter 15.20. The study identified soil make-up consisting of clay and silts, which form impermeable layers, resulting in sheet flow of subsurface water, requiring complex engineering (curtain drains and berms) to collect and divert subsurface water before it would infiltrate and hydraulically overload the wastewater system. In addition, the percolation data suggests the upper soils are not suitable and would require deep trenches to allow for slow percolation; which allow little or no air filtration for the aerobic treatment of effluent. According to the Environmental Health Bureau, the combination of soil characteristics, evidence of subsurface sheeting water and moderate to failing percolation test results would result in a rapid failure of the septic disposal system, despite the engineering mitigations that are proposed. The lack of reliable onsite wastewater treatment systems for the proposed minor subdivision makes the site unsuitable for such development.

f) **Health and Safety.** The proposed project as designed will, under the...
circumstances of the particular application, be detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing and working in the neighborhood and the general welfare of the County.

g) Necessary public facilities are not available and are not provided for the proposed project. On-site wastewater systems have been determined to not be feasible on the subject property. See Sewage Disposal sections below.

h) **Easements.** The subdivision or the type of improvements will not conflict with easements. The project, as designed, would require the creation and conveyance of easements necessary for drainage, utilities, the off-site well, and development and construction of roadways.

i) **Water Supply.** Monterey County Code (MCC) Section 19.10.070 requires that provisions shall be made for such domestic water supply as may be necessary to protect public health, safety, or welfare, that the source of supply is adequate and potable, and that there is proof of a long term water supply with the proposed project. Section 19.03.015.L MCC, applicable through section 19.04.15, requires Water Supply and Nitrate Loading Information in order to assess these conditions. The proposed water supply for the project is a common well, located off-site on an adjacent parcel. Title 22 of the California Code of Regulations sets forth the maximum contaminant level ("MCL") for arsenic at .010 mg/l or commonly expressed as 10 parts per billion (ppb). Water sources exceeding the MCL require treatment of the water supply prior to delivery to the consumers so that the MCL is not exceeded. Monterey County Code Chapter 15.04 requires that a state small water system "has adequate financial, managerial, and technical capability to assure the delivery of pure and wholesome water for human consumption". (Section 15.04.050.a.2.) Monterey County Code Chapters 19.03 and 19.04 require evidence demonstrating how technical, managerial, and financial capacity ("TMF") will be achieved. (Section 19.03.15.L.2.C.6, applicable through section 19.04.015.) Based on local/state experience and United States Environmental Protection Agency documentation of small water systems, EHB had determined that creation of new water systems for subdivisions that are less than 15 connections and must employ treatment technology do not have the TMF to "assure the delivery of pure and wholesome water for human consumption". Testing data compiled between October 2005 and September 2010 have shown that arsenic concentration levels range from 6 ppb to as high as 17 ppb. At the time of the Planning Commission hearing the quarterly average of arsenic was 10.08 ppb indicating that an exceedance of the MCL would most likely occur and treatment technology would be required. While the appeal period was pending the applicant supplied more water quality test results for arsenic. The time period that includes these samples is October 7, 2005 – April 1, 2011, and the recalculated annual quarterly average is 9.04 ppb indicating that the exceedance would most likely to occur and treatment technology would be required. On May 3, 2011, a public hearing was held, which resulted in the Board continuing the matter to January 10, 2012, to allow the applicants to continue conducting water sampling. Since that time, the applicants have conducted additional tests in the months of May through
November 2011. The recalculated annual quarterly average (October 7, 2005 to November 15, 2011) is 7.9 ppb. Based on the recalculated annual quarterly average of 7.9 ppb, this allows sufficient safety margin to determine that a long-term sustainable water supply exists in regards to water quality. The project has proven a reliable source of long-term sustainable water that meets water quality standards; therefore the project is consistent with 2010 General Plan Policy PS-3.9.

j) **Sewage Disposal** (Section 19.03.015.K MCC).
The soil composition and percolation rates of the Wayland property do not comply with standards for septic disposal (Monterey County Code Chapter 15.20). The rate of percolation varied greatly at different depths and locations on each lot. Some percolation holes performed at rates that are within the acceptable range and while other test holes failed according to Monterey County Code Chapter 15.20. The percolation data suggests that the upper soils are not suitable for septic dispersal. Deep trenches would be needed to function primarily to dispose of effluent. With this approach there would be little to no air in the soil/sidewalls of the trench to allow growth of aerobic bacteria that would provide additional treatment of the effluent. Normally shallow trenches in permeable soils are preferred over deep trenches to provide for as much aerobic treatment as possible. Due to the low permeability of the upper soils a shallow system is infeasible for this project. There is not a consistent rate of percolation within and among all of the lots to support the subdivision utilizing the proposed Onsite Wastewater Treatment System (OWTS) design.

k) The application, tentative map and supporting materials submitted by the project applicant to the Monterey County Planning Department for the proposed development are found in Project File PLN070366.

l) The project planner conducted a site inspection on August 9, 2007 and December 28, 2010.

3. **FINDING:** 

**CEQA (Exempt):** - The project is statutorily exempt from environmental review.

**EVIDENCE:** a) Public Resources Code Section 21080(b)(5) and California Environmental Quality Act (CEQA) Guidelines Section 15270(a) statutorily exempt projects which a public agency rejects or disapproves.

4. **FINDING:** 

**PROCEDURAL BACKGROUND** – The project has been processed in compliance with Chapter 21.76 for Combined Development Permits.

**EVIDENCE:** a) On November 2, 2007 the Warren Wayland Trust et al filed an application with the Monterey County RMA – Planning Department for a Combined Development Permit (PLN070366) for a Minor Subdivision.

b) The Combined Development Permit (PLN070366) was deemed complete on October 9, 2008.

c) Action on the project required policy level decisions and the project was referred to the Planning Commission. The project was brought to public hearing before the Monterey County Planning Commission on January 26, 2011. The Planning Commission denied the application by a 7-1 vote (2 members absent) (PC Resolution No. 11-005).

Exhibit B

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d) An appeal was timely filed by Warren Wayland, the property owner ("appellant") for PLN070366 (Wayland) on February 9, 2011.

e) The appeal was brought to public hearing before the Board of Supervisors on March 29, 2011 and continued to May 3, 2011, and again continued to January 10, 2012. At least 10 days prior to the public hearing, notices of the public hearing before the Board of Supervisors were published in the Monterey County Herald and were posted on and near the property and mailed to the property owners within 300 feet of the subject property as well as interested parties.

f) Staff report, minutes of the Board of Supervisors, information and documents in Planning file PLN110079.

5. FINDING: APPEAL AND APPLICANT CONTENTIONS

The appellant requests that the Board grant the appeal, and approve the Combined Development Permit and Minor Subdivision Application (PLN070366). The appeal alleges: there was a lack of fair or impartial hearing; the findings or decision or conditions are not supported by the evidence; and the decision was contrary to law. The contentions are contained in the notice of appeal (Exhibit F) and listed below with responses from staff. The Board of Supervisors makes the following findings regarding the appellant’s contentions:

Contention 1 – Lack of Fair or Impartial Hearing

The appellant contends that the following are examples of the lack of a fair and impartial hearing:

a) Application of 2010 General Plan policies to a subdivision map application filed in 2007 and found complete in 2008.

Government Code section 66474.2 (part of the state Subdivision Map Act) provides that, “Except as otherwise provided in subdivision (b) or (c), in determining whether to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined the application complete.”

(Government Code § 66474.2(a), emphasis added.) The application in this case comes under the exception. The exception provided in subdivision (b) of section 66474.2 states that if a local agency has “initiated proceedings by way of ordinance, resolution, or motion” and also published a notice containing a description sufficient to notify the public of the nature of the proposed change in the general plan, then the local agency “may apply any ordinances, policies, or standards enacted or instituted as a result of those proceedings which are in effect on the date the local agency approves or disapproves the tentative map.” (Gov’t Code sec. 66474.2(b).)

The County has met the requirements of the exception set out in Government Code section 66474.2(b). Prior to October 16, 2007, a public hearing notice on the draft General Plan was published, and the Board initiated public hearings on the draft General Plan beginning September 25, 2007 and continuing on October 16 and November 6, 2007 and completed the public hearings in 2010. In the course of those hearings, on October 17, 2007, the Board adopted a motion “informing the public that any subdivision applications deemed complete after October 16, 2007 will be subject to the plans, policies, ordinances, and standards that result from the current General Plan Update proceedings and that are in effect at the time the application is considered for approval.” (See Board order dated October 16, 2007.) Additionally, on October 23, 2007, the Board adopted Ordinance No. 5090, which extended for one year the relevant provisions of Interim Ordinance No. 5080 related to processing of applications during the General Plan update, and the ordinance provided that subdivision applications that were not deemed complete as of October 16, 2007 but which may be processed under that ordinance would be subject to the standards that, as a result of the General Plan Update.
Update, may be in effect at the time the County takes action on the application. Finally, pursuant to Government Code section 66474.2(b), the County elected to apply the 2010 General Plan to subdivision applications deemed complete after October 16, 2007 through the adoption of Policy LU-9.3 of the General Plan. Policy LU-9.3 provides, in relevant part, “Applications for standard and minor subdivisions that were deemed complete on or before October 16, 2007 shall be governed by the plans, policies, ordinances and standards in effect at the time the application was deemed complete. Applications for standard and minor subdivision maps that were deemed complete after October 16, 2007 shall be subject to this General Plan and the ordinances, policies, and standards that are enacted and in effect as a result of this General Plan.”

The Wayland application was deemed complete on October 9, 2008 after October 16, 2007. Therefore, pursuant to Government Code section 66474.2(b) and General Plan Policy LU-9.3, the application is subject to the policies of the 2010 General Plan.

b) Departure from adopted standard MCL for the presence of arsenic in water.

The January 26, 2011 Planning Commission decision to deny the application did not represent a departure from adopted standard MCL for the presence of arsenic in water. Title 22 of the California Code of Regulations sets forth the MCL for arsenic at .010 mg/l or commonly expressed as 10 ppb. Water sources exceeding the MCL require treatment of the water supply prior to delivery to the consumers so that the MCL is not exceeded. Monterey County Code Chapter 15.04 requires that a state small water system “has adequate financial, managerial, and technical capability to assure the delivery of pure and wholesome water for human consumption”. (Section 15.04.050.a.2) Monterey County Code Chapters 19.03 and 19.04 require evidence demonstrating how technical, managerial, and financial capacity (TMF) shall be achieved (Section 19.03.015.L.2.C.6 applicable through section 19.04.015.) Environmental Health has determined that creation of new water systems with less than 15 connections (i.e local small and state small water systems) and must employ treatment technology do not have the TMF to “assure the delivery of pure and wholesome water for human consumption” and thus do not effectively protect the public health and safety.

Testing data compiled between August 2007 and September 2010 has shown that arsenic concentration levels range from 6 ppb to as high as 17 ppb. At the time of the Planning Commission hearing the quarterly average of arsenic was 10.08 ppb. Arsenic levels can fluctuate based on season (wet/dry), groundwater level (dry years vs. wet years), and amount of rainfall, as is demonstrated in the fluctuating levels of arsenic in this well. The professional opinion of Environmental Health staff is that an MCL of 10 ppb does not allow any safety margin for fluctuations of arsenic concentration. If the project was approved and conditions change such that the MCL level continues to exceed the acceptable threshold, there would not be sufficient TMF to treat the water and protect public health and safety. The Planning Commission did not find it an acceptable practice to approve a project with a water source that does not comply with state public health and safety thresholds and where if MCL concentrations were to increase in the future there would be no way to the treat the water. Thus the project could not be found to have a long-term sustainable water supply based on the information available as of the time of the Planning Commission decision.

The applicants have conducted additional tests in the months of May through November 2011. The recalculated annual quarterly average (October 7, 2005 to November 15, 2011) is 7.9 ppb. Based on the recalculated annual quarterly average of 7.9 ppb, this allows sufficient safety margin to determine that a long term sustainable water supply exists in regards to water quality. The project has proven a reliable source of long-term sustainable water that meets water quality standards; therefore the project is consistent with 2010 General Plan Policy PS-3.9.

Exhibit B
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c) Departure from adopted standard for septic percolation tests;

The January 26, 2011 Planning Commission decision to deny the application did not represent a departure from adopted standard(s) for septic percolation tests. At the request of the Environmental Health Bureau (EHB), the applicant prepared a Septic Feasibility Report, which stated that the Wayland property contained marginal soil composition and percolation rates required for the installation of conventional septic systems. The report prepared by the applicant’s consultant identified an engineering option for the subdivision, but this solution is not a preferred method, is prone to failure and would require extensive maintenance, which is often not provided on single family lots. A letter from EHB containing detailed information relative to the Wayland soil composition and percolation rates is attached to the staff report (Exhibit M of May 3, 2011 Board of Supervisors Staff Report). After reviewing all relevant composition and percolation rate data supplied for the Wayland Application, Staff did not have the level of confidence necessary to support the subdivision utilizing the proposed Onsite Wastewater Treatment System (OWTS) design; therefore staff recommended connection to a sanitary sewer system.

d) Disregard of LUAC recommendation for project approval.

The January 26, 2011 Planning Commission decision to deny this application did not represent a disregard of the Greater Monterey Peninsula Land Use Advisory Committee (LUAC) recommendation for project approval. The LUAC reviewed each project relative to visual aesthetics from State Route 68, locations of proposed residences and nearby land uses. The issues of septic feasibility and water quality were not known by the LUAC, in addition, the 2010 General Plan had yet to be adopted; therefore these issues and 2010 General Plan consistency were not addressed or discussed during at the time of LUAC review. The minutes, notes and comments from the December 5, 2007 LUAC meeting were attached to the January 26, 2011 Planning Commission Staff Report for review and consideration by the Planning Commission. The LUAC recommendations are advisory only and did not limit the discretion of the Planning Commission.

Contestation 2 – Findings and Decision Not Supported by the Evidence
The appellant contends that the following are examples Findings and Decision not supported by the evidence:

a) Numerous citations of “evidence” are actually conclusory findings not supported by evidence (e.g. Finding #2 [c], [e], [f], and [g]).

Evidence provided in Finding No. 2 in the January 26, 2011 Planning Commission resolution for the Wayland Combined Development Permit (PLN070366) are factual statements supported by the information in the record. Factual evidence taken directly from reports and tests prepared by the applicants consultants has been provided relative to marginal soil composition and uneven percolation rates relative to septic feasibility (Evidence [e]) and the lack of a proven sustainable long-term water source relative to water quality (Evidence [f]).

The appellant was afforded due process. The Planning Commission received presentations from both staff and the applicant, followed by testimony from the public. The applicant was given the staff report with attached recommended Findings and Evidence for each project, and granted the opportunity for rebuttal. Upon the close of the public hearing, staff and counsel responded to questions from the Commission. Following staff’s responses, the Commission publicly discussed the facts and merits of all evidence presented. Subsequently, a motion to deny the Wayland
Combined Development Permit (PLN070366) was moved and seconded, followed by a 7-1 vote, with 2 members absent.

b) The evidence cited in support of Finding #2 is the 2010 General Plan which is inapplicable to this application.

The 2010 General Plan does apply to these applications. See Response 1a above.

c) Finding #2 (1) and (2) the proposed project is not consistent with applicable general plan is not supported by substantial evidence (see Contention 1a above).

Finding No. 2 contains the required findings for subdivisions; items (1) and (2) of that finding require the project to be evaluated for consistency with policies in the applicable general plan and specific plans. No specific plan has been developed for the Toro area; the applicable general plan for this Application is the 2010 General Plan; therefore the project was analyzed in relation to the policies of the appropriate document. See Response 1a above.

d) Finding #2 (3) and (4) that site is not suitable for the type and density of development proposed is not supported by substantial evidence in the record.

Finding No. 2 contains the required findings for subdivisions; items (3) and (4) of that finding require that the decision making body determine whether the site is suitable for the type and density of development proposed. This specific threshold of site suitability can not be supported. The projects were reviewed by numerous County departments; the Environmental Health Bureau and RMA – Planning Department expressed concerns relative to septic feasibility and long-term sustainable water supply (water quality). Evidence demonstrating that the site is physically unsuitable for the type and density of the development is contained in subsections [j -Water Supply] and [k – Sewage Disposal] of Finding No. 2 of the January 26, 2011 Wayland Planning Commission resolution.

Sewage disposal could be served by a connection to the Pasadera/ Laguna Seca/York wastewater treatment facility. The Pasadera/ Laguna Seca/York wastewater treatment facility operated by Cal Am has a permitted capacity of 110,000 gallons per day (GPD) and is presently running at about 60,000 GPD with 385 connections. A representative from Cal Am indicated that the company is always looking for more connections for the treatment plant.

The applicants have conducted additional tests in the months of May through November 2011. The recalculated annual quarterly average (October 7, 2005 to November 15, 2011) is 7.9 ppb. Based on the recalculated annual quarterly average of 7.9 ppb, this allows sufficient safety margin to determine that a long term sustainable water supply exists in regards to water quality. The project has proven a reliable source of long-term water that meets water quality standards; therefore the project is consistent with 2010 General Plan Policy PS-3.9.

e) Finding #2 (5) that the design of the project is likely to cause substantial environmental damage and substantially and avoidably injure fish or wildlife or their habitat is not supported by substantial evidence.

Finding No. 2 contains the required findings for subdivision, item (5) is related to subdivision improvements causing adverse environmental damage. This specific threshold point was not
addressed in the January 26, 2011 Planning Commission staff report, as this was not a factor in the Planning Commission’s decision.

f) Citations to the 2010 General Plan are not substantial evidence to support Finding #2 (See Contention 1a above).

See Response 1a above.

**Contention 3 – The Decision was Contrary to Law**
The appellant contends that the following are examples of the decision being contrary to law:

a) Application of 2010 General Plan policies to subdivision map application filed in 2007 and found complete in 2008 is contrary to Government Code §66474.2.

Application of the 2010 General Plan does not violate Government Code §66474.2. See Response 1a above.

b) Departure from adopted standard (MCL) for the presence of arsenic in water is arbitrary and capricious.

See Response 1b above.

c) Departure from adopted standard for septic percolation tests is arbitrary and capricious.

See Response 1c above.

d) Citing as evidence conclusory statements not supported by evidence (e.g. Finding #2, [c], [e], [f], and [g]) is contrary to law.

See Response 2a above.

**Contention 4 – Disagreement with Findings.**
The appellant states they disagree with findings based on the following:

a) Numerous citations of “evidence” are actually conclusory findings not supported by evidence (e.g. Finding #2 [c], [e], [f], and [g]).

See Response 2a above.

b) The evidence cited in support of Finding #2 is the 2010 General Plan which is inapplicable to this application.

See Response 1a above.

c) Finding #2 (1) and (2) the proposed project is not consistent with applicable general plan is not supported by substantial evidence (see Contention 1a above).

See Response 2c and 1a above.

d) Finding #2 (3) and (4) that site is not suitable for the type and density of development proposed is not supported by substantial evidence in the record.
See Response 2d above.

e) Finding #2 (5) that the design of the project is likely to cause substantial environmental damage and substantially and avoidably injure fish or wildlife or their habitat is not supported by substantial evidence.

See Response to 2e above.

II. DECISION

NOW, THEREFORE, BASED ON THE ABOVE FINDINGS AND EVIDENCE, BE IT RESOLVED, that the Board of Supervisors does hereby:

1. Deny the appeal by Warren Wayland from the Planning Commission’s decision denying the application for a Combined Development Permit (Wayland/PLN070366); and

2. Deny the application for a Combined Development Permit (Wayland/PLN070366) consisting of: 1) Minor Subdivision Vesting Tentative Map to allow the division of a 38-acre parcel into four parcels of 9.7 acres (Parcel 1), 5.3 acres (Parcel 2), 9.3 acres (Parcel 3), 5.2 acres (Parcel 4) and a remainder parcel of 8.8 acres; 2) Use Permit for development on slopes in excess of 25 percent for roadway improvements; 3) Use Permit for development in a visually sensitive area ("VS" District); and 4) Use Permit to allow the removal of approximately 39 oak trees; and grading of approximately 3,800 cubic yards of cut and 3,800 cubic yards of fill, installation of individual septic systems, a 50 foot by 50 foot water tank easement with a 100,000 gallon water tank and 15 foot wide utility easement, a 60-foot wide road and utility easement and a 30-foot wide road and utility easement.

PASSED AND ADOPTED on this 10th day of January, 2012, by the following vote, to-wit:

AYES: 
NOES: 
ABSENT: 
ABSTAIN: 

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

Exhibit B

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**Exhibit C**

**Draft Resolution – Merrill**

**Before the Board of Supervisors in and for the**

**County of Monterey, State of California**

**Resolution No.**

Resolution by the Monterey County Board of Supervisors to:

1. Deny the appeal by Susan Merrill from the Planning Commission’s decision denying the application for a Combined Development Permit (Merrill/PLN070376); and

2. Deny the application for a Combined Development Permit (Merrill/PLN070376) consisting of: 1) Minor Subdivision Vesting Tentative Map to allow the division of a 37.8 acre parcel into three parcels of 10.5 acres (Parcel 1), 13.8 acres (Parcel 2), 7.5 acres (Parcel 3) and a remainder parcel of 6.0 acres; and 2) Use Permit for development in a visually sensitive area (“VS” District); and grading of approximately 3,100 cubic yards of grading (combination of cut/fill), individual septic systems and 60 foot wide road and utility easements.

The appeal by Susan Merrill from the Planning Commission’s denial of the Merrill Combined Development Permit and Minor Subdivision Vesting Tentative Map (PLN070376) came on for public hearing before the Board of Supervisors of the County of Monterey. Having considered all the written and documentary evidence, the administrative record, the staff report, oral testimony, and all other evidence presented, the Board of Supervisors hereby finds and decides as follows:

**FINDINGS**

1. **FINDING:** INCONSISTENCY – The Project, as designed is inconsistent with the applicable plans and policies which designate this area as appropriate for development.

   **EVIDENCE:** a) During the course of review of this application, the project has been reviewed for consistency with the text, policies, and regulations in:
   - 2010 Monterey County General Plan, including the Greater Monterey Peninsula Area Plan,
   - Monterey County Zoning Ordinance (Title 21)
   - Monterey County Subdivision Ordinance (Title 19)
   - Monterey County Public Service Ordinance (Title 15)

   Conflicts were found to exist during the course of review of the project indicating inconsistencies with the text, policies, and regulations in these documents.

   b) The proposed project is a Combined Development Permit consisting of:
   1) Minor Subdivision Vesting Tentative Map to allow the division of a 37.8 acre parcel into three parcels of 10.5 acres (Parcel 1), 13.8 acres (Parcel 2), 7.5 acres (Parcel 3) and a remainder parcel of 6.0 acres; and 2) Use Permit for development in a visually sensitive area (“VS” District); and grading of approximately 3,100 cubic yards of grading (combination of cut/fill), individual septic systems and 60 foot wide road and utility easements.
Use Permit for development in a visually sensitive area ("VS" District); and grading of approximately 3,100 cubic yards of grading (combination of cut/fill), individual septic systems and 60 foot wide road and utility easements.

c) The property is located at 24915 Boots Road, Monterey (Assessor's Parcel Number: 173-062-008-000), Greater Monterey Peninsula (GMP) Area Plan. The parcel is zoned RDR/5.1-VS (Rural Density Residential, 5.1 acre per lot minimum, with Visual Sensitivity Overlay), which allows residential development of a rural density and intensity. Residences are an allowed land use for this site.

d) 2010 General Plan Policy GMP 3.3 refers to the Greater Monterey Peninsula Scenic Highway Corridors and Visual Sensitivity Map (Figure 14) to designate visually "sensitive" and "highly sensitive" areas generally visible from designated Scenic Highways. The subject property is designated as "highly sensitive" in Figure 14. Subsection (d) of GMP 3.3 states that new development shall not be sited on those portions of property that have been mapped "highly sensitive", unless such development maximizes the goals, objectives, and policies of the Greater Monterey Peninsula Area Plan. The proposed minor subdivision would result in the creation of three new residential parcels (and one remainder lot) located within the designated "highly sensitive" area. This would not maximize the goals, objectives, and policies of the Greater Monterey Peninsula Area Plan; therefore the project is inconsistent with 2010 General Plan Policy GMP 3.3.

e) The project includes application for a Use Permit for the removal of 39 oak trees and a Use Permit for development in a Visually Sensitive (VS) zone. The requirements for issuance of said Use Permits have not been addressed at this time, as the project is denied for other reasons. (See Finding 2).

f) Title 19 inconsistency – See Finding and Evidence 2 below

g) The project was referred to the Greater Monterey Peninsula Land Use Advisory Committee (LUAC) for review on December 5, 2007. Based on the LUAC Procedure guidelines adopted by the Monterey County Board of Supervisors per Resolution No. 08-338, this application did warrant referral to the LUAC because the project is subject to CEQA review and involves a discretionary permit application and land use matter which raises significant land use issues. The GMPLUAC recommended approval of the project by a 4-0 vote (1 absent). It should be noted however, that at the time of the recommendation, the 2010 General Plan had not been implemented, and substantial issues relative to water quality had yet to be discovered.

h) The project planner conducted a site inspection on August 9, 2007 and December 28, 2010.

i) The application, project plans, and related support materials submitted by the project applicant to the Monterey County RMA - Planning Department for the proposed development found in Project File PLN070366.

2. FINDING: SUBDIVISION – Section 66474 of the California Government Code (Subdivision Map Act) and Title 19 (Subdivision Ordinance) of the Exhibit C
Monterey County Code requires that a request for subdivision be denied if any of the following findings are made:

1. That the proposed map is not consistent with the applicable general plan and specific plans.
2. That the design or improvement of the proposed subdivision is not consistent with the applicable general plan and specific plans.
3. That the site is not physically suitable for the type of development.
4. That the site is not physically suitable for the proposed density of development.
5. That the design of the subdivision or the proposed improvements is likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
6. That the design of the subdivision or type of improvements is likely to cause serious public health problems.
7. That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of property within the proposed subdivision.

EVIDENCE: a) Inconsistency. The project as designed and conditioned is inconsistent with the 2010 Monterey County General Plan, and Greater Monterey Peninsula Area Plan, and Monterey County Subdivision Ordinance (Title 19) (See Finding 1).

b) Design. The lot design is consistent with the Lot Design Standards of Section 19.10.030 of the Monterey County Code.

c) Site Suitability. The project has been reviewed for site suitability by the following departments and agencies: RMA - Planning Department, Monterey County Regional Fire Protection District, Housing and Redevelopment Office, Parks, Public Works, Environmental Health Bureau, and Water Resources Agency.

d) Staff identified potential impacts to Biological Resources, Archaeological Resources, and on-site wastewater treatment feasibility. Technical reports by outside consultants indicate that there are physical or environmental constraints rendering the site not suitable for the use proposed. County staff independently reviewed these reports and concurs with their conclusions. The following reports have been prepared:

- “Biological survey report for the Tom and Susan Merrill Property” (LIB080571) prepared by Ed Mercurio Biological Consultant, Salinas, California, October 31, 2007.
- “Percolation & Groundwater Study for Parcels 1 & 2 – Merrill Exhibit C”
Subdivision” (LIB110032) prepared by Grice Engineering and Geology, Inc., Salinas, California, April 2009.

e) **Health and Safety.** The proposed project as designed will not, under the circumstances of the particular application, be detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing and working in the neighborhood and to the general welfare of the County.

f) **Easements.** The subdivision or the type of improvements will not conflict with easements. The project, as designed, would require the creation and conveyance of easements necessary for drainage, utilities, the off-site well, and development and construction of roadways.

g) **Water Supply.** Monterey County Code (MCC) Section 19.10.070 requires that provisions shall be made for such domestic water supply as may be necessary to protect public health, safety, or welfare, that the source of supply is adequate and potable, and that there is proof of a long term water supply with the proposed project. Section 19.03.015.L MCC, applicable through section 19.04.15, requires Water Supply and Nitrate Loading Information in order to assess these conditions. The proposed water supply for the project is a common well, located off-site on an adjacent parcel. Title 22 of the California Code of Regulations sets forth the maximum contaminant level (MCL) for arsenic at .010 mg/l or commonly expressed as 10 parts per billion (ppb). Water sources exceeding the MCL require treatment of the water supply prior to delivery to the consumers so that the MCL is not exceeded. Monterey County Code Chapter 15.04 requires that a state small water system “has adequate financial, managerial, and technical capability to assure the delivery of pure and wholesome water for human consumption”. (Section 15.04.050.a.2.) Monterey County Code Chapters 19.03 and 19.04 require evidence demonstrating how technical, managerial, and financial capacity (TMF) will be achieved. (Section 19.03.15.L.2.C.6, applicable through section 19.04.015.) Based on local/state experience and United States Environmental Protection Agency documentation of small water systems, EHB had determined that creation of new water systems for subdivisions that are less than 15 connections and must employ treatment technology do not have the TMF to “assure the delivery of pure and wholesome water for human consumption”. Testing data compiled between October 2005 and September 2010 has shown that arsenic concentration levels range from 6 ppb to as high as 17 ppb. At the time of the Planning Commission hearing the quarterly average of arsenic was 10.08 ppb indicating that an exceedance of the MCL would most likely occur and treatment technology would be required. While the appeal period was pending the applicant supplied more water quality test results for arsenic. The time period that includes these samples is October 7, 2005 – April 1, 2011, and the recalculated annual quarterly average is 9.04 ppb indicating that the exceedance would occur and treatment technology would be required. On May 3, 2011, a public hearing was held, which resulted in the Board continuing the matter to January 10, 2012, to allow the applicants to continue conducting water sampling. Since that time, the applicants have
conducted additional tests in the months of May through November 2011. The recalculated annual quarterly average (October 7, 2005 to November 15, 2011) is 7.9 ppb. Based on the recalculated annual quarterly average of 7.9 ppb, this allows sufficient safety margin to determine that a long term sustainable water supply exists in regards to water quality. The project has proven a reliable source of long-term water that meets water quality standards; therefore the project is consistent with 2010 General Plan Policy PS-3.9.

h) **Sewage Disposal** (Section 19.03.015.K MCC).
The percolation and groundwater studies for the proposed Merrill Property demonstrates adequate feasibility for the installation of septic systems and associated leach fields, to the satisfaction of the Environmental Health Bureau (EHB) and Monterey County Code 15.20, based upon soil make-up and percolation rates. Specific design requirements for individual septic systems are contained within the technical reports prepared for the project. However, Monterey County Code Section 15.20.040.A. (Required Connection to Public Sewer) would require the Merrill property to connect to the Pasadera/Laguna Seca/York wastewater facility if the Wayland Minor Subdivision (PLN110079) is approved and required to connect to the wastewater facility.

i) The application, tentative map and supporting materials submitted by the project applicant to the Monterey County Planning Department for the proposed development are found in Project File PLN070366.

j) The project planner conducted a site inspection on August 9, 2007 and December 28, 2010.

3. **FINDING:**

   **CEQA (Exempt):** - The project is statutorily exempt from environmental review.

   **EVIDENCE:**
   
a) Public Resources Code Section 21080(b)(5) and California Environmental Quality Act (CEQA) Guidelines Section 15270(a) statutorily exempts projects which a public agency rejects or disapproves.

4. **FINDING:**

   **PROCEDURAL BACKGROUND** – The project has been processed in compliance with Chapter 21.76 for Combined Development Permits.

   **EVIDENCE:**
   
a) On November 15, 2007 the Thomas Merrill Trust et al filed an application with the Monterey County RMA – Planning Department for a Combined Development Permit (PLN070376) for a Minor Subdivision.

b) The Combined Development Permit (PLN070376) was deemed complete on October 9, 2008.

c) Action on the project required policy level decisions and the project was referred to the Planning Commission. The project was brought to public hearing before the Monterey County Planning Commission on January 26, 2011. The Planning Commission denied the application under the same motion with a 7-1 vote (2 members absent) (PC Resolution No. 11-006).

d) An appeal was timely filed by Susan Merrill, the property owner ("appellant") for PLN070376 (Wayland) on February 9, 2011.

e) The appeal was brought to public hearing before the Board of Supervisors on March 29, 2011 and continued to May 3, 2011, and again continued to January 10, 2012. At least 10 days prior to the public
hearing, notices of the public hearing before the Board of Supervisors were published in the Monterey County Herald and were posted on and near the property and mailed to the property owners within 300 feet of the subject property as well as interested parties.

f) Staff report, minutes of the Board of Supervisors, information and documents in Planning file PLN110078.

5. FINDING: APPEAL AND APPLICANT CONTENTIONS
The appellant requests that the Board grant the appeal and approve the Combined Development Permit and Minor Subdivision Application (PLN070376). The appeal alleges: there was a lack of fair or impartial hearing; the findings or decision or conditions are not supported by the evidence; and the decision was contrary to law. The contentions are contained in the notice of appeal (Exhibit G) and listed below with responses from staff. The Board of Supervisors makes the following finding regarding the appellant’s contentions:

Contention 1 – Lack of Fair or Impartial Hearing
The appellant contends that the following are examples of the lack of a fair and impartial hearing:

a) Application of 2010 General Plan policies to a subdivision map application filed in 2007 and found complete in 2008.

Government Code section 66474.2 (part of the state Subdivision Map Act) provides that, “Except as otherwise provided in subdivision (b) or (c), in determining whether to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined the application complete.” (Government Code § 66474.2(a), emphasis added.) The application in this case come under the exception. The exception provided in subdivision (b) of section 66474.2 states that if a local agency has “initiated proceedings by way of ordinance, resolution, or motion” and also published a notice containing a description sufficient to notify the public of the nature of the proposed change in the general plan, then the local agency “may apply any ordinances, policies, or standards enacted or instituted as a result of those proceedings which are in effect on the date the local agency approves or disapproves the tentative map.” (Gov’t Code sec. 66474.2(b).)

The County has met the requirements of the exception set out in Government Code section 66474.2(b). Prior to October 16, 2007, a public hearing notice on the draft General Plan was published, and the Board initiated public hearings on the draft General Plan beginning September 25, 2007 and continuing on October 16 and November 6, 2007 and completed the public hearings in 2010. In the course of those hearings, on October 17, 2007, the Board adopted a motion “informing the public that any subdivision applications deemed complete after October 16, 2007 will be subject to the plans, policies, ordinances, and standards that result from the current General Plan Update proceedings and that are in effect at the time the application is considered for approval.” (See Board order dated October 16, 2007.) Additionally, on October 23, 2007, the Board adopted Ordinance No. 5090, which extended for one year the relevant provisions of Interim Ordinance No. 5080 related to processing of applications during the General Plan update, and the ordinance provided that subdivision applications that were not deemed complete as of October 16, 2007 but which may be processed under that ordinance would be subject to the standards that, as a result of the General Plan Update, may be in effect at the time the County takes action on the application. Finally, pursuant to Government Code section 66474.2(b), the County elected to apply the 2010 General Plan to subdivision applications deemed complete after October 16, 2007 through the adoption of Policy LU-9.3 of Exhibit C.
the General Plan. Policy LU-9.3 provides, in relevant part, “Applications for standard and minor subdivisions that were deemed complete on or before October 16, 2007 shall be governed by the plans, policies, ordinances and standards in effect at the time the application was deemed complete. Applications for standard and minor subdivision maps that were deemed complete after October 16, 2007 shall be subject to this General Plan and the ordinances, policies, and standards that are enacted and in effect as a result of this General Plan.”

The Merrill application was deemed complete on October 9, 2008; after October 16, 2007. Therefore, pursuant to Government Code section 66474.2(b) and General Plan Policy LU-9.3, the applications are subject to the policies of the 2010 General Plan.

b) Departure from adopted standard MCL for the presence of arsenic in water.

The January 26, 2011 Planning Commission decision to deny the application did not represent a departure from adopted standard MCL for the presence of arsenic in water. Title 22 of the California Code of Regulations sets forth the MCL for arsenic at .010 mg/l or commonly expressed as 10 ppb. Water sources exceeding the MCL require treatment of the water supply prior to delivery to the consumers so that the MCL is not exceeded. Monterey County Code Chapter 15.04 requires that a state small water system “has adequate financial, managerial, and technical capability to assure the delivery of pure and wholesome water for human consumption” (Section 15.04.050.a.2). Monterey County Code Chapter 19.03 and 19.04 require evidence demonstrating how technical, managerial, and financial capacity (TMF) shall be achieved (Section 19.03.015.L.2.C.6, applicable through section 19.04.015). Environmental Health has determined that creation of new water systems with less than 15 connections (i.e local small and state small water systems) and must employ treatment technology do not have the TMF to “assure the delivery of pure and wholesome water for human consumption” and thus do not effectively protect the public health and safety.

Testing data compiled between August 2007 and September 2010 has shown that arsenic concentration levels range from 6 ppb to as high as 17 ppb. At the time of the Planning Commission hearing the quarterly average of arsenic was 10.08 ppb. Arsenic levels can fluctuate based on season (wet/dry), groundwater level (dry years vs. wet years), and amount of rainfall, as is demonstrated in the fluctuating levels of arsenic in this well. The professional opinion of Environmental Health staff is that an MCL of 10 ppb does not allow any safety margin for fluctuations of arsenic concentration. If the project was approved and conditions change such that the MCL level continues to exceed the acceptable threshold, there would not be sufficient TMF to treat the water and protect public health and safety. The Planning Commission did not find it an acceptable practice to approve a project with a water source that does not comply with state public health and safety thresholds and where if MCL concentrations were to increase in the future the water system would not have the TMF to install and maintain the treatment system. Thus the project could not be found to have a long-term sustainable water supply.

c) Disregard of LUAC recommendation for project approval.

The January 26, 2011 Planning Commission decision to deny this application did not represent a disregard of the Greater Monterey Peninsula Land Use Advisory Committee (LUAC) recommendation for project approval. The LUAC reviewed each project relative to visual aesthetics from State Route 68, locations of proposed residences and nearby land uses. The issues of septic feasibility and water quality were not known by the LUAC, in addition, the 2010 Exhibit C
General Plan had yet to be adopted; therefore these issues and 2010 General Plan consistency were not addressed or discussed during at the time of LUAC review. The minutes, notes and comments from the December 5, 2007 LUAC meeting were attached to the January 26, 2011 Planning Commission Staff Report for review and consideration by the Planning Commission. The LUAC recommendations are advisory only and did not limit the discretion of the Planning Commission.

Contention 2 – Findings and Decision Not Supported by the Evidence
The appellant contends that the following are examples Findings and Decision not supported by the evidence:

a) Numerous citations of “evidence” are actually conclusory findings not supported by evidence.

Appellant’s allegation relative to cited evidence being conclusory for the Merrill Combined Development Permit (PLN070376) is non-specific so it is not possible to respond to the applicant’s contention. Evidence in the record supports the findings.

The appellant was afforded due process. The Planning Commission received presentations from both staff and the applicant, followed by testimony from the public. The applicant was given the staff reports with attached recommended Findings and Evidence for each project, and granted the opportunity for rebuttal. Upon the close of the public hearing, staff and counsel responded to questions from the Commission. Following staff’s responses, the Commission publicly discussed the facts and merits of all evidence presented. Subsequently, a motion to deny the Merrill Combined Development Permit (PLN070376) was moved and seconded, followed by a 7-1 vote, with 2 members absent.

b) The evidence cited in support of Finding #2 is the 2010 General Plan which is inapplicable to this application.

The 2010 General Plan does apply to these applications. See Response 1a above.

c) Finding #2 (1) and (2) the proposed project is not consistent with applicable general plan is not supported by substantial evidence (see Contention 1a above).

Finding No. 2 contains the required findings for subdivisions; items (1) and (2) of that finding require the project to be evaluated for consistency with policies in the applicable general plan and specific plans. No specific plan has been developed for the Toro area; the applicable general plan for this Application is the 2010 General Plan; therefore the project was analyzed in relation to the policies of the appropriate document. See Response 1a above.

d) Finding #2 (3) and (4) that site is not suitable for the type and density of development proposed is not supported by substantial evidence in the record.

Finding No. 2 contains the required findings for subdivisions; items (3) and (4) of that finding require that the decision making body determine whether the site is suitable for the type and density of development proposed. This specific threshold of site suitability can not be supported. The projects were reviewed by numerous County departments; the Environmental Health Bureau and RMA – Planning Department expressed concerns relative to septic feasibility and long-term sustainable water supply (water quality). Evidence demonstrating that the sites are physical unsuitability of the type and density of the development is contained in subsections [h – Water

Exhibit C
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Evidence [h] of the Merrill Planning Commission resolution provides specific information on arsenic testing conducted on the proposed water source between August 2007 and September 2010. Arsenic levels within this time period fluctuated above and below the maximum contaminant level (MCL) of 10 ppb, ranging from as low as 6 ppb (parts per billion) to as high as 17 ppb, with an overall average of 10.08 ppb. Based on this average, the Planning Commission could not find that the project has a reliable source of water. See Response 1b above.

The lack of a proven sustainable long-term water source of potable water demonstrated unsuitability of the type and density of development as proposed in the Merrill Combined Development Permit (PLN070376).

e) Finding #2 (5) that the design of the project is likely to cause substantial environmental damage and substantially and avoidably injure fish or wildlife or their habitat is not supported by substantial evidence.

Finding No. 2 contains the required findings for subdivision, item (5) is related to subdivision improvements causing adverse environmental damage. This specific threshold point was not addressed in the January 26, 2011 Planning Commission staff report, as this was not a factor in the Planning Commission’s decision.

f) Citations to the 2010 General Plan are not substantial evidence to support Finding #2 (See Contention 1a above).

See Response 1a above.

Contention 3 – The Decision was Contrary to Law
The appellant contends that the following are examples of the decision being contrary to law:

a) Application of 2010 General Plan policies to subdivision map application filed in 2007 and found complete in 2008 is contrary to Government Code §66474.2.

Application of the 2010 General Plan does not violate Government Code §66474.2. See Response 1a above.

b) Departure from adopted standard (MCL) for the presence of arsenic in water is arbitrary and capricious.

See Response 1b above.

c) Citing as evidence conclusory statements not supported by evidence is contrary to law.

See Response 2a above.

Contention 4 – Disagreement with Findings.
The appellant states they disagree with findings based on the following:

a) Numerous citations of “evidence” are actually conclusory findings not supported by evidence.
See Response 2a above.

b) The evidence cited in support of Finding #2 is the 2010 General Plan which is inapplicable to this application.

See Response 1a above

c) Finding #2 (1) and (2) the proposed project is not consistent with applicable general plan is not supported by substantial evidence (see Contention 1a above).

See Response 2c and 1a above.

d) Finding #2 (3) and (4) that site is not suitable for the type and density of development proposed is not supported by substantial evidence in the record.

See Response 2d above.

e) Finding #2 (5) that the design of the project is likely to cause substantial environmental damage and substantially and avoidably injure fish or wildlife or their habitat is not supported by substantial evidence.

See Response to 2e above.

II. DECISION

NOW, THEREFORE, BASED ON THE ABOVE FINDINGS AND EVIDENCE, BE IT RESOLVED, that the Board of Supervisors does hereby:

1. Deny the appeal by Susan Merrill from the Planning Commission’s decision denying the application for a Combined Development Permit (Merrill/PLN070376); and

2. Deny the application for a Combined Development Permit (Merrill/PLN07376) consisting of: 1) Minor Subdivision Vesting Tentative Map to allow the division of a 37.8 acre parcel into three parcels of 10.5 acres (Parcel 1), 13.8 acres (Parcel 2), 7.5 acres (Parcel 3) and a remainder parcel of 6.0 acres; and 2) Use Permit for development in a visually sensitive area ("VS" District); and grading of approximately 3,100 cubic yards of grading (combination of cut/fill), individual septic systems and 60 foot wide road and utility easements.

PASSED AND ADOPTED on this 10th day of January, 2012, by the following vote, to-wit:

AYES:
NOES:
ABSENT:
ABSTAIN:
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

Exhibit C
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