

Exhibit A
Discussion of Proposed Projects

Merrill (PLN110078)
Wayland (PLN110079)

Board of Supervisors
February 7, 2012

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 not 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)

Exhibit A.

Wayland Minor Subdivision Appeal (PLN110079)

Merrill Minor Subdivision Appeal (PLN110078)

Page 1 of 7

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 December 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.

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.

Exhibit A

Wayland Minor Subdivision Appeal (PLN110079)

Merrill Minor Subdivision Appeal (PLN110078)

Page 2 of 7

Merrill Wayland Subdivision Water System Arsenic Sampling Results by Calendar Quarter (ppb)					
Calendar Quarter					Annual Quarterly Average
Date	1	2	3	4	
10/7/05				9	
8/16/07			6		
6/5/08		17			
8/4/08			6		
9/24/09			10		
10/29/09				9	
2005 - 2009 Quarterly Averages			7.3	9	
1/27/10	11				
6/7/10		11			
6/30/10		11			
9/6/10			6		
12/26/10				8	
2010 Quarterly Averages	11.00	11.00	6.00	8.00	9.00
2/28/11	7				
4/1/11		7			
5/18/11		6			
6/14/11		6			
7/18/11			6		
8/24/11			6		
9/14/11			6		
10/25/11				6	
11/15/11				6	
12/15/11				8	
2011 Quarterly Averages	7.00	6.33	6.00	6.66	6.50

					2005 - 2011 Annual Quarterly Average
2005 - 2011 Quarterly Averages	9	8.7*	6.4	7.9	8.0

Exhibit A

* 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.

Exhibit A

Wayland Minor Subdivision Appeal (PLN110079)

Merrill Minor Subdivision Appeal (PLN110078)

Page 4 of 7

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.

Exhibit A

Wayland Minor Subdivision Appeal (PLN110079)

Merrill Minor Subdivision Appeal (PLN110078)

Page 5 of 7

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

Exhibit A

Wayland Minor Subdivision Appeal (PLN110079)

Merrill Minor Subdivision Appeal (PLN110078)

Page 6 of 7

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:

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 projects were 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 projects would both individually be subject to this requirement, as the Merrill property would result in the creation of 3 developable lots and 1 remainder (4 lots total); and the Wayland property would result in the creation of 4 developable lots and 1 remainder (5 lots total). However because the Board is denying the subdivisions, the requirements do 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 projects would both individually be subject to this requirement, as the Merrill property would result in the creation of 3 developable lots and 1 remainder (4 lots total); and the Wayland property would result in the creation of 4 developable lots and 1 remainder (5 lots total). However because the Board is denying the subdivisions, the requirements do 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.