

**TOWN OF MORAGA
PLANNING COMMISSION MEETING**

Joaquin Moraga Intermediate School Auditorium
1010 Camino Pablo
Moraga, CA 94556

September 20, 2010

7:30 P.M.

MINUTES

I. CALL TO ORDER

Chairman Obsitnik called the Special Meeting of the Planning Commission to order at 7:30 P.M.

ROLL CALL

Present: Commissioners Driver, Richards, Socolich, Whitley, Wykle,
Chairman Obsitnik
Absent: Commissioner Levenfeld
Staff: Lori Salamack, Planning Director
Richard Chamberlain, Senior Planner
John Sherbert, Staff Engineer

B. Conflict of Interest

There was no reported conflict of interest.

II. ADOPTION OF MEETING AGENDA

On motion by Commissioner Whitley, seconded by Commissioner Wykle, and carried unanimously to adopt the meeting agenda, as shown.

III. ANNOUNCEMENTS

There were no announcements.

IV. PUBLIC COMMENTS

There were comments from the public.

V. ADOPTION OF THE CONSENT CALENDAR

A. September 7, 2010

The meeting minutes were moved to Item VIII. Routine & Other Matters given that Commissioners had revisions to be made.

VI. PUBLIC HEARINGS

- A. None

VII. PUBLIC MEETING

- A. **UP 10-10 - Dollar Tree (Applicant), Kimco (Property Owner) 542 Center Street, Rheem Valley Shopping Center**: Consideration of a permitted use application by Dollar Tree to operate a retail variety store in the Rheem Valley Shopping Center. The new business is proposed to be located in the existing vacant space that was previously occupied by Blockbuster, Lori's Perfect Tan, and The Beauty Source. (Zoning: Community Commercial - CEQA status: Categorically Exempt per CEQA Section 15301, Existing Facilities. (Continued from the August 23, 2010 and September 7, 2010 Planning Commission meetings)

Planning Director Lori Salamack reported that the item had been continued from the August 23, 2010 Special Meeting and the September 7, 2010 regular Planning Commission meeting. The item was an application for a permitted use subject to eight findings as contained in the Moraga Municipal Code (MMC). The application would be located in the Community Commercial Zoning District in the Rheem Valley Shopping Center. The Planning Commission had considered draft resolutions for approval or disapproval during the September 7 meeting but had been unable to reach a decision for findings either for the approval or for the disapproval of the application. A subcommittee comprised of Planning Commissioners Socolich and Whitley had provided staff with some concepts for conditions of approval which had been incorporated into the draft resolution.

Ms. Salamack explained that since staff had provided the resolution to the Planning Commission and the public staff had received some comments regarding the draft resolution. As such, further amendments had been made to the draft resolution and copies of the revised text had been made available to the public. The amendments related to Findings 3 and 6 and included additional text to provide the justification for the conditions of approval as articulated in the draft resolution.

Ms. Salamack advised that some of the conditions of approval, as contained in the draft resolution, were statements of fact that would be typically required for such an application. There were also conditions specifically related to the nature of the use which had been necessary because of the possibility of a potential adverse effect on neighboring uses if the use was not mitigated.

Additional conditions related to the aesthetics and operations of the use including conditions related to the height of the displays within the retail business, the height of displays in the front retail region, restocking of shelves, collection of litter, and the handling of garbage and recycling on the site.

Ms. Salamack stated that staff had reviewed the draft conditions and findings, as contained in the draft resolution, and had representation from Suzanne Brown with the Town Attorney's Office who was prepared to discuss any of the conditions of approval that had been contained in the draft resolution.

Linda Duncan, Regional Real Estate Manager, Dollar Tree stores, stated that Dollar Tree stores could not live with the conditions of approval as attached to the draft resolution in that most were arbitrary, capricious, and subjective in nature. Dollar Tree would like the opportunity to operate and be treated as every other tenant in the Rheem Valley Shopping Center. She noted that throughout the conditional use permit process Dollar Tree and Kimco Realty had been subjected to a lot of criticism and while they could respond to those comments, they had concluded that nothing would change the views of the Planning Commission.

Ms. Duncan referenced the vacancies in the Rheem Valley Shopping Center and suggested that all of the blame could not be placed on Kimco Realty. She commented that many landlords had lowered rents to keep tenants in business, many tenants had been floundering before the economic downturn and any reduction had not been helpful to keep them in the black. She emphasized that no landlord desired empty units, in fact, it cost more to replace existing tenants. She otherwise took the opportunity to thank those residents who had not been present at the public hearings but who had expressed their positive support through e-mails, voice messages, and telephone calls.

Commissioner Whitley asked Ms. Duncan to identify the conditions that were completely unacceptable to Dollar Tree. He noted that most of the conditions were essentially repeats of MMC requirements.

Ms. Duncan stated that the conditions subject to the MMC were not a concern. Those conditions that were a concern were characterized as unmeasurable based on opinion and to violate that opinion could result in a future lawsuit. She commented that she had gone over the conditions with staff and suggested that they appeared to be intentional and not measurable, whereby in one year a violation could occur. She suggested that this was not the venue to review all of the conditions in that regardless of the decision of the Planning Commission the losing party would probably appeal. As a result, she did not see that anything would be accomplished in a review of each condition at this time.

In response to the Chair, Ms. Salamack detailed in depth the conditions of approval, as contained in the draft resolution, which were statements of fact based on the requirements of the MMC. Those conditions had been specified in the draft resolution in order to clarify what needed to be done to allow the business to open. She described them as standard conditions that were not uncommon for any other approval by the Design Review Board (DRB) or the Planning Commission. She clarified that the term of approval for any land use in the Town was one year, and if a condition of approval was not satisfied or was violated a revocation of the use permit could occur. She also clarified that the application was not for a conditional use permit but was a permitted use subject to findings. Each condition was clarified in turn. She emphasized that some of the conditions were redundant but had been included to clarify to everyone their requirement in order for the business to be able to open.

Ms. Salamack explained that the additional conditions had been recommended by the subcommittee. Those conditions related to the hours of operation, time restrictions for deliveries to the business, coordination with color and architectural style, merchandise and fixtures to be of showroom display, restrictions on the height of displays and shelving near the front windows, regulations on window signage, layout of merchandise shelves and displays to be conducted in an orderly manner, and height limitations along the store side and back walls. In addition, aisles were to remain free and clear of merchandise other than for a brief period of restocking, and management would be responsible to ensure that the business was kept free of litter, with trash and recycling to be kept in the rear of the center as was the case with the other tenants in the Rheem Valley Shopping Center.

Ms Salamack recommended a change to the language in Condition 4 related to indemnifying the Town in the event of a lawsuit, not unlike conditions placed upon other applications. She recommended an adjustment to the conditions that if the Town was sued on the granting of the approval and the applicant did not want to establish a business in the Town, the Town could relinquish the approval instead of having to defend it. With respect to Condition 15 relating to an uncluttered appearance and display of merchandise, she recommended a revision or elimination of the first sentence of that condition. With those exceptions, she characterized the proposed conditions as workable and not unlike other approvals in the Town. She added that the conditions were specifically related to impacts the business could have on neighboring uses in the shopping center and were necessary conditions of approval.

Commissioner Richards asked Ms. Duncan to state her objections to the conditions.

Ms. Duncan stated that the main point was that whatever was approved throughout the process was for a one-year approval which would make it impossible for the business to spend its shareholders' money for a one-year right to terminate.

Ms. Salamack clarified that the one-year approval related to the pulling of building permits for the tenant improvements, which would be required to be pulled within one year of the approved use permit. That condition did not mean that the business would only be allowed to operate for one year.

Ms. Duncan advised that her legal department had interpreted that condition to mean that the business would only be permitted for one year. As to the remaining conditions, she stated that her legal department had advised her not to comment on the conditions.

Ms. Salamack clarified that the language in the condition had been included in MMC Section 8.16.020. The condition could be revised to clarify that code section and had been included in the draft resolution since that chapter of the MMC defined permits as variance, conditional use permit, or design review. In this case, the permitted use was subject to findings as opposed to a conditional use permit. The language normally applicable in the MMC had been used to clarify the Town's expectations. Essentially the applicant had one year to pull building permits to conduct the tenant improvements. If that was not done within a year's time the approval would lapse.

Commissioner Richards spoke to Condition 7 related to the use of sustainable building components and verified that it was not part of the current Building Code but would be required as of January 2011. He asked whether or not the existing tenants at the Rheem Valley Shopping Center would also be required to comply with that condition. He expressed concern imposing a condition on the subject application that had not been applied to the existing tenants.

Ms. Salamack explained that if any established tenant conducted a remodel that would require building permits to be issued after January 1, 2011, that tenant would also have to comply with the condition. In this case, staff was informing the applicant of the requirement that would be in the code as of January 2011. If the Planning Commission found the condition to be infeasible it would be covered by Condition 6, which required compliance with the Building Code at the time building permits were pulled.

Ms. Salamack further clarified, when asked, that deliveries to the use would be permitted between 7:00 A.M. and 7:00 P.M. For the other tenants in the center, deliveries were typically allowed during the hours of operation, with the exception of Safeway which involved deliveries after hours during hours of less traffic and congestion in the shopping center. She reported that some concern had been expressed by nearby residents for noisy deliveries to Home Goods, which was closest to Ascot Drive. No deliveries could occur after 7:00 P.M. The conditions of approval that had been proposed would be consistent to avoid impacts to the neighboring properties.

Suzanne Brown, representing the Town Attorney's Office, clarified the intent of Conditions 4 and 5 which required the applicant to indemnify the Town against any legal action which may be brought after or a challenge of the approval, if granted. She acknowledged that Conditions 4 and 5 did overlap somewhat and Condition 5 could be eliminated with Condition 4 to be modified to clarify that the defense of indemnity included payment of the Town's reasonable legal expert and other fees and expenses incurred in relation to the defense of any legal action to the application.

PUBLIC COMMENTS OPENED

Cavin McCarthy, 256 Rheem Boulevard, Moraga, opposed the Dollar Tree store in Moraga. She commented that she had visited a Dollar Store located in the City of Pleasant Hill and had taken photographs of the interior of that store which she presented to the Planning Commission. The photographs depicted the condition of the store and boxes and merchandise being stored in the aisles. She spoke to the cost of some of the many items sold in the Pleasant Hill Dollar Tree as compared to the cost of some of the same items sold by CVS Pharmacy and commented that the items she had purchased were more expensive at the Dollar Store than at CVS Pharmacy. She questioned why Moraga would want a Dollar Tree store in the community. She noted the limited sales taxes that may be generated by the use and the potential negative impacts to property values.

Kathy Mocke, Moraga, referenced the Moraga General Plan and read into the record its stated values and guiding principles. She commented that she had researched Dollar Tree on the Internet and could find no information where a community had supported the business. She also referenced the corporation's background of whether or not it gave back to a local community. Based on her research, the Dollar Tree was not a specialty retail store and would not meet any of the goals and policies as outlined in the adopted General Plan.

Holly Ericson King, 479 Fernwood Drive, Moraga, suggested that the approval of the Dollar Tree would impact the value of her property. In fact, she stated that she had decided not to improve her property based on the potential impact. She suggested that the Dollar Tree would also impact the perception of the existing tenants in the Rheem Valley Shopping Center as a low end retail shopping destination. She read into the record some of the goals and policies of the City of Lafayette's Downtown Specific Plan and recommended that Moraga similarly adopt a retail plan to preserve Moraga's retail character before the Dollar Tree store defined it for the community.

Hollie Lucas-Alcaly, 128 Devin Drive, Moraga, commented that she had recently received the Moraga Chamber of Commerce Guide which included demographics of the Moraga population, annual incomes, average prices of homes and the like. She referenced the Moraga General Plan which had been written and adopted in 2002. She also spoke to the value of her home in 2002 as compared to when she had purchased her residence after that time. She expressed concern with the cost to purchase her home in terms of the need for local retail to reflect the investment in the community and the need for a vision to be executed well for the retail community.

Muriel Hamstead, Moraga, also expressed concern with the potential impact to property values if the Dollar Tree store was approved. While an empty storefront was a concern, she expressed concern that if the store was permitted and once in operation it would be difficult to remove. She found Dollar Tree stores to be cheap and not of the higher quality that Moraga residents preferred. She expressed concern that the Rheem Valley Shopping Center would become a discount center. She pointed out that the City of Lafayette had better retail and restaurants than the Town of Moraga.

Jonathan Levy, 751 Crossbrook, Moraga, suggested that a Dollar Tree would be an unsafe store and would not offer a good perception for the Town. He also suggested that Kimco Realty was assisting an entity that did not care for the Town. He understood that Loard's Ice Cream, a local business, had to relocate from the Rheem Valley Shopping Center because of a substantial increase in rent. He questioned allowing a cheap store in the Rheem Valley Shopping Center.

George Atashkarian, Moraga, commented on his background as a business operator for many years. He understood that Kimco Realty had been raising its rents and many tenants had vacated as a result, leaving empty tenant spaces. He questioned a large corporation wanting to locate in the Rheem Valley Shopping Center given its location, the fact there were only two lanes into Moraga, and the size of the community.

Mr. Atashkarian opposed allowing the Dollar Tree store in the community given the potential increase in traffic and the quality of merchandise. He sought good quality stores in the Rheem Valley Shopping Center.

Bill Durkin, Moraga, suggested that the Dollar Tree was not a good match for the Town, commenting on the Dollar Tree's history with the Federal Consumer Product Safety Commission, numerous and a very high volume of recalled merchandise, and the philosophy of the store selling cheap items. He urged the Planning Commission to adopt guidelines for new businesses to promote and acquire sustainable products and practices, and to require businesses to actively engage in community efforts to build a healthy neighborhood as other communities had done. He also urged the Commission to plan a community that rather than being cheap and sickly would be prudent and thriving.

John Welter identified himself as the Director of Real Estate for Kimco Realty and the Director of Real Estate for the Rheem Valley Shopping Center. In response to a member of the audience, he clarified that Kimco Realty had not doubled or tripled the rent for Loard's Ice Cream. He noted that during the summer Kimco Realty had reduced an existing tenant's rent 20 percent and had not asked that tenant to pay it back.

Mr. Welter spoke to the conditions that had been proposed for the Dollar Tree and sought broader conditions in that a precedent could be set where larger retailers, or Mom and Pop retailers, would not open their doors in Moraga. While many of the conditions were factual and had been reiterated for the Building Department, he suggested that some were not feasible. He suggested that it made sense for the Town Attorney and Dollar Tree's attorney to review the conditions to determine whether or not an agreement could be reached. At this time he did not see that would occur.

Phyllis Schultz, Moraga, a long-term resident who noted that she had seen many changes in the community, saw no reason not to allow the Dollar Tree. She commented that she had not seen such a store in the condition that had been depicted in the photographs of the Pleasant Hill location although she understood that the Pleasant Hill site was old. She emphasized that many in Town were seniors on fixed incomes and would likely patronize the store given the low prices of available merchandise. She added that the Town had limited resources and must recoup its losses. The Town would realize sales taxes from the business. She understood that some of the Dollar Tree store locations were attractive and well kept. She expressed her hope that the Planning Commission would keep that in mind.

Lynn Davis, 48 Corliss Drive, Moraga, reiterated the comments that she had made over the two last meetings on the application regarding her Internet research where she had found numerous consumer product cases against Dollar Tree related to recalls and fines on the sale of substandard merchandise over a number of years for a number reasons. She again read into the record a number of the recalled items and cases against Dollar Tree. She suggested that this was not what the community needed. She asked the applicant to respond to the quality of merchandise to be sold in the store.

PUBLIC COMMENTS CLOSED

Ms. Duncan stated that nothing she could say would matter in that everyone had their own opinion. She commented that Dollar Tree was one of the largest retailers in the country, were one of the first to automatically be notified of recalled items, and voluntarily recalled those items. She emphasized that many other retailers such as WalMart, Toys-R-U's, Babies-R-U's, CVS, Longs Drugs, Rite-Aid and Safeway all carried the same items as the Dollar Tree, albiet not in the same quantity. She stated that she could provide recalled lists from those retailers if the Commission wanted that list.

Commissioner Socolich spoke to the public testimony on the potential loss of property values and asked staff whether or not there was any evidence of such an impact from any store or potential store in Moraga.

Ms. Salamack reported that the Town had no evidence to document such a claim.

Commissioner Whitley recommended considering Finding 6 which included a statement that there was a potential for reduction of property values if the mitigation factors in the resolution were not adopted.

Commissioner Socolich commented that he and Commissioner Whitley had met as the subcommittee to discuss potential conditions. He noted it was important that the establishment be consistent with the other tenants in the Rheem Valley Shopping Center. Having both walked the shopping center, they had tried to impose conditions that would result in an operation that would be competitive from the standpoint of aesthetics leading to the conditions regarding the height of the shelving in front of the windows, for instance, in order to mitigate the potential adverse impacts of the use as compared to the other tenants in the center. He reported that he had also visited a Dollar Tree store in another community and understood that the shelving was five feet six inches high.

Commissioner Whitley understood that the proposed use created a difficulty for the Town from a planning perspective. He acknowledged the public testimony and objections to the proposed use. He emphasized that the Planning Commission was limited in what it could evaluate in approving or disapproving a permitted use. The Planning Commission, for instance, could not base a decision on the merchandise sold in the store or the number of recalled items and was limited to making its decision based on the required findings as outlined in the staff report and subject to the MMC.

Commissioner Whitley noted that the Planning Commission had discussed Findings 3 and 6 at length. Finding 3 was that the potential adverse characteristics of the use will be mitigated to the extent necessary, and Finding 6 was that the use will not create an excessive public economic problem. He explained that the subcommittee had discussed the merchandise sold in the store and could not regulate those items and were therefore limited on the conditions that could be imposed. The subcommittee had conducted on-site inspections of existing stores and had reviewed the public testimony. Based on the Dollar Tree operation and tenant improvements, he noted that it tended to be marginal and was operated economically lean with low staffing. He described Dollar Tree as tattered at the edges and dirty, inconsistent with neighboring uses in the Rheem Valley Shopping Center and Moraga at large. The subcommittee determined that mitigating factors, if implemented, would make the use consistent with neighboring uses. The mitigating factors had not been arbitrary but had been measured and weighed carefully to mitigate the operational inadequacies of the Dollar Tree store.

Commissioner Whitley commented that there were mitigation factors as required by the MMC to clarify the Town's position on operations and there were certain mitigation factors designed to mitigate the operational inadequacies that the subcommittee was of the opinion were inconsistent with the values of the Town and the neighboring uses.

Commissioner Whitley reiterated the findings required to approve the proposed use. He noted that Finding 3 had been supplemented to better describe the rationale for the conditions of approval, as recommended. Finding 6 had similar language to Finding 3. In light of the statement that there was no solid evidence that the use would lower property values, he asked that the statement be stricken from the findings.

Chairman Obsitnik commented that this was the third meeting to consider the application. He noted that the subcommittee had been created to craft conditions to allow the Commission to reach a majority decision with respect to Findings 3 and 6.

Commissioner Wykle remained concerned with Finding 6. He had visited a Dollar Tree store located on International Boulevard in the City of Oakland. He suggested that the empirical data was clear that Dollar Tree stores typically locate in depressed areas. He recognized staff's perception and the public perception on the lowering of property values in terms of the interpretation of Finding 6. He understood that the writers of the MMC had paralleled that with the General Plan in terms of new commercial uses which were intended to strengthen the character and attractiveness of the Town's commercial centers. In his opinion, the Dollar Tree store was not compatible with the surrounding uses and would create a public economic problem.

Commissioner Socolich supported the approval of the permitted use based on the fact that it would be better than a vacant space. In addition, the use would provide jobs and taxes to the Town and would be beneficial to the community.

Chairman Obsitnik thanked everyone for the public testimony. He understood that if there was a Specific Plan in place for the Rheem Valley Shopping Center similar to the Moraga Center Specific Plan (MCSP), there might have been a different discussion. He commented that he had researched the Internet for similar communities set back from the highway such as the cities of Lafayette, Orinda, and Mill Valley in terms of their retail and what those communities wanted. He noted that Moraga's General Plan and the MMC were not prescriptive in terms of what the Town wanted. He noted that he would have to remove his personal opinion on the application and base his decision on the parameters of the Planning Commission's consideration.

Chairman Obsitnik commented that he could not find anything in the application that would not support Findings 3 and 6. While he was supportive of approving the permitted use application, he could not support the draft resolution as conditioned. He remained concerned with any regulation of the interior of the store and suggested that the resolution was actually more stringent than the previous iteration in that regard.

Commissioner Richards stated that he too had to separate his personal views from his job as a Planning Commissioner. As a community, he suggested that what was desired had to be weighed against what was possible. While the Dollar Tree was not desired in the community, he was familiar with the impacts of blight on a community where the situation of vacant tenant spaces could become worse. He commented that he liked some of the changes made to the draft resolution. He too had visited a Dollar Tree store and had viewed the conditions that many in the audience had identified which could impact the character of the Town.

Commissioner Richards added that he found the additional conditions to be mitigating factors. He suggested that if the Dollar Tree was willing to listen to the community and adhere to the conditions and concerns, he would be willing to approve the draft resolution.

Commissioner Driver noted that he also had concerns with Finding 3 and recognized the concerns with respect to getting too involved with the interior of the space. He was disappointed that the applicant had been advised by legal counsel not to discuss the conditions of approval. He was unsure how that helped the process. He also commented that since the September 7 Planning Commission meeting, a great deal of correspondence overwhelmingly in opposition to the Dollar Tree had been received by the Town, particularly related to Finding 6.

Given the level of concern from the community, Commissioner Driver suggested that Finding 6 was a strict standard and he recognized there was no credible information to determine whether or not there would be a negative impact on property values in the long term. He was unsure that there was a reasonable burden of proof to show an economic public problem based on the public input over the last few weeks.

Commissioner Driver suggested that the case could be made that the proposed use was inconsistent with the goals and principles of the General Plan although there was no clear connection of General Plan policies in the planning document to anything in the MMC, with no guidance for the Planning Commission to act on, which was troubling to him.

At this time, the Planning Commission discussed the draft resolution and the recommended conditions in depth. The Commission made the following revisions:

- Page 2 of 6, Findings for Approval of a Permitted Use in Accordance with MMC Section 8.36.020B; Finding 3 as drafted in the revised version of the draft resolution to be inserted as Finding 3;
- Page 3 of 6, Findings for Approval of a Permitted Use in Accordance with MMC Section 8.36.020B; replace Finding 6 as shown, with the original language contained in Finding 6;
- Page 3 of 6, Findings for Approval of a Permitted Use in Accordance with MMC Section 8.36.020B; revise the third and fourth sentences of Finding 6 to read:

No empirical evidence has been found that links the establishment of discount or bargain stores with changes in residential home values. However, the lack of tax revenue from vacant stores in a community can adversely impact community services and school funding.

- Page 3 of 6, Conditions of Approval; revise the second sentence of Condition 1 to read:

Within the year, the applicant must establish the use consistent with the requirements of Section 8.16.020 of the Moraga Municipal Code (MMC) in accordance with the approved conditions of approval or reapply to the Town of Moraga for a new approval.

- Page 3 of 6, Conditions of Approval; revise the first sentence of Condition 4 to read:

The applicant, as a condition of this approval, hereby agrees to defend, indemnify, and hold harmless (including payment of Town's reasonable legal and expert fees and expenses) the Town, its agents, officers, and employees, from any claim, action, or proceeding against the Town as a result of the action or inaction of the Town, or from any claim to attack, set aside, void, or annul this approval by the Town of the applicant's project; or applicant's failure to comply with conditions of approval.

- Page 4 of 6, Conditions of Approval; strike Condition 5;
- Page 4 of 6, Conditions of Approval; strike Condition 7; and
- Page 5 of 6, Conditions of Approval; strike the first sentence and revise the second sentence of Condition 15, to read:

Shelves and display cases shall be limited in height to 6 feet 1 inch.

Commissioner Socolich made a motion seconded by Commissioner Whitley to adopt Resolution next in number to approve UP 10-10 for Dollar Tree at 542 Center Street, Rheem Valley Shopping Center, subject to the findings and conditions as shown, and as modified.

On the motion, Commissioner Whitley understood that if there was a similar application in the future, it was likely the same types of conditions would be imposed.

As to conferring with Dollar Tree stores on the conditions, Commissioner Whitley agreed that should be done in the interest of being a good neighbor although he emphasized that the time to do so would be now. He suggested that Dollar Tree had been almost absent with no operations personnel having been present at the meetings who could have offered input on shelving height, as an example. He was shocked that Dollar Tree thought so little of the Town that it had not participated in the process.

On motion by Commissioner Socolich, seconded by Commissioner Whitley to adopt Resolution next in number to approve UP 10-10 for Dollar Tree at 542 Center Street, Rheem Valley Shopping Center, subject to the findings and conditions as shown, and as modified above. The motion carried by the following vote:

Ayes: Commissioners Driver, Richards, Socolich, Whitley
Noes: Chairman Obsitnik
Abstain: Commissioner Wykle
Absent: Commissioner Levenfeld

Ms. Salamack identified the 10-day right of appeal of a decision of the Planning Commission in writing to the Planning Department subject to an applicable appeal fee. She acknowledged in this case that the appeal fee may not be required and would be clarified by staff in the event of an appeal. A statement stating the basis for an appeal would be required.

Chairman Obsitnik declared a recess at 9:58 P.M. The Planning Commission reconvened at 10:06 P.M. with all Commissioners initially shown as present and absent.

B. GRADING and HDP 01-10 - Mr. and Mrs. Robert White (Owner/Applicant), 32 Buckingham Drive: Application for a Hillside Development Permit and Grading Permit to grade a hillside with a slope greater than 25 percent including an approximately 50 cubic yard excavation for an in-ground storage building and related improvements. In accordance with MMC Section 14.16.020, the Planning Commission shall make a recommendation to the Town Council regarding the proposed application. The work that is the subject of this application including the hillside excavation and partial storage room construction was commenced without benefit of any Town approvals. The Town will evaluate the proposed application as if the work had not been started. This application will receive no special consideration because it was started without permits.

The property is zoned 3 Dwelling Units per acre. APN 256-203-012.
(Continued from the August 2, 2010 and September 7, 2010 Planning
Commission meeting)

Ms. Salamack reported that the application had been continued from the Planning Commission meeting of September 7, 2010. A subcommittee comprised of two Planning Commissioners had been appointed to propose findings and conditions of approval. A draft resolution with the proposed conditions had been included for the Commission's review. The Commission was asked to make a recommendation to the Town Council which was expected to consider the recommendation at its next meeting.

When asked, Ms. Salamack affirmed that the Planning Commission was being asked to review and make a recommendation to the Town Council and was not being asked to approve the item.

Commissioner Wykle explained that the subcommittee had met electronically to discuss the findings that must be made, as identified in the September 7, 2010 staff report. The subcommittee had been asked not to consider the work that had already been done but to consider the work as if it had not begun. However, the subcommittee recognized the work that had been done and the conditions had been worded in such a way to reflect that situation. No comments had been received from the neighboring properties. He added that efforts had been made to impose conditions that made sense.

Chairman Obsitnik added that the subcommittee had considered the reduction in the number of retaining walls, the fact that there had been some soils sludge toward the main home putting a strain on the existing retaining walls, and the general overall safety improvements while trying to consider what would occur if the work had to be reversed, which reversal would impact the neighboring properties and the safety of the hillside.

When asked by Commissioner Socolich whether or not the plans would have been acceptable prior to the start of any work, Senior Planner Richard Chamberlain stated that with the findings currently required for new grading permits it would be difficult to approve the plans.

Robert White, 32 Buckingham Drive, Moraga, described the draft resolution as rational and reasonable, however, he asked for clarification since he understood that the Hillside Development Permit would be approved by the Planning Commission and that the Commission would then recommend either approval or disapproval to the Town Council of the Grading Permit. He otherwise thanked the Planning Commission for its time.

Ms. Salamack clarified that the Hillside Development Permit would be decided by the component of the planning agency deciding the underlining approval. In this case since the Town Council would approve the Grading Permit it would consider the factors for the approval of the Hillside Development Permit. The MMC called for the Planning Commission to make a recommendation on the Grading Permit with no recommendation required for the Hillside Development Permit.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

Commissioner Wykle noted subsequent correspondence about the storage area and inquired whether or not there were any plans for a roof.

Mr. White affirmed that a roof would be placed on the storage area with concrete and reinforced rebar with an impermeable layer of sod that would not drip into the structure and onto the roof, with proper drainage, which would also serve as a determinant as to the height of the retaining walls. He clarified that there would really only be one retaining wall. He explained that the only visible retaining wall would be one of the three that had originally been built and located behind everything. Due to the level of the roof, the soil on top of the roof would be kept under three feet.

Mr. Chamberlain reiterated, when asked, the code requirements for retaining walls, a building, and the issue of a possible required variance for the western retaining wall.

The Planning Commission discussed the findings and conditions for the draft resolution for 32 Buckingham Drive, and made the following revisions:

- Page 2 of 4, draft resolution recommendation to the Town Council, Part 1- Findings Based on MMC Section 14.16.030; revise the second sentence of Finding 1 to read:

Pending a physical survey to determine the actual property line, a variance may be required for the western retaining wall/building which will be only two feet eight inches from the fence line.

- Page 2 of 4, Finding 2; revise the second sentence to read:

The western retaining wall will alter the slope in the east/west direction; however this wall will be screened from the street view.

- Page 2 of 4, revise Finding 3 to read:

The grading is not detrimental to public safety because the proposed design had been prepared by a licensed civil engineer and the improvements will greatly improve the stability of the hillside over the pre-existing conditions where a substantial amount of soil sloughed towards the main house structure on the property.

- Page 3 of 4, revise the last sentence of Finding 5 to read:

To ensure there are no further visual or aesthetic concerns, a condition of approval will be added to have the Design Review Board review the design with respect to Town of Moraga requirements.

- Page 3 of 4, Part II - Recommended Conditions of Approval; revise Condition 1 to read:

Design for the work remaining (approximately 25%) must be submitted to the Design Review Board for its review and approval prior to the restart of work.

- Page 4 of 4, Part II - Recommended Conditions of Approval; revise Condition 2 to read:

Town of Moraga shall inspect the site prior to the restart of work to ensure site is safe for work to resume and conduct periodic inspections to ensure work is progressing as designed and approved in accordance with Condition 1.

Staff Engineer John Sherbert clarified, when asked as to Finding 4, that the drainage for the project had been reviewed and no issues had been identified.

Mr. Chamberlain also clarified the intent of Finding 6, as shown, in terms of the fact that the slope in question was not a pristine natural slope.

On motion by Commissioner Wykle, seconded by Commissioner Socolich to adopt Resolution next in number to recommend to the Town Council the approval of a Hillside Development Permit and Grading Permit for retaining walls and a storage building for White at 32 Buckingham, subject to the findings and conditions as shown, and as modified above.

The motion carried by the following vote:

Ayes: Commissioners Driver, Richards, Wykle, Obsitnik
Noes: Commissioners Socolich, Whitley
Abstain: None
Absent: Commissioner Levenfeld

Ms. Salamack reported that there was no right of appeal of the decision of the Planning Commission since the item was a recommendation to the Town Council. The item had been scheduled for consideration by the Town Council on October 13.

In response to Mr. White, Ms. Salamack stated that staff would check the dates in the recital for the approved resolution to ensure accuracy. In the event of any errors corrections would be made prior to forwarding the recommendation to the Town Council.

VIII. ROUTINE & OTHER MATTERS

A. September 7, 2010 Minutes

Commissioner Socolich requested the following revisions to the minutes of the September 7, 2010 meeting:

To the first sentence of paragraph two on Page 8:

Commissioner Socolich believed that a Dollar Tree store would revitalize the Rheem Center and the store would provide a number of jobs which would go to Saint Mary's College students or others.

Chairman Obsitnik requested a revision to the motion as shown on Page 14:

On motion by Commissioner Driver, seconded by Commissioner Socolich and carried unanimously to appoint Commissioners Socolich and Whitley to serve on a subcommittee of the Planning Commission to develop possible conditions of approval to support Finding 3 for UP 10-10 for Dollar Tree prior to the next Planning Commission meeting scheduled for September 20, 2010.

To the ninth paragraph of Page 25:

Commissioner Wykle and Chairman Obsitnik volunteered to serve on the subcommittee.

On motion by Commissioner Driver, seconded by Commissioner Socolich and carried unanimously to adopt the minutes of the September 7, 2010 meeting, as amended.

IX. COMMUNICATIONS

A. None

X. REPORTS

A. Planning Commission

There were no reports.

B. Staff

1. Update on Town Council Actions and Future Agenda Items

Ms. Salamack reported that the Design Review Board (DRB) had recently disapproved a new residence at 120 Moraga Road. That decision had been appealed to the Planning Commission and had been scheduled for Commission consideration on October 4.

XII. ADJOURNMENT

On motion by Commissioner Driver, seconded by Commissioner Socolich to adjourn the Planning Commission meeting at approximately 10:49 P.M. to a regular meeting of the Planning Commission on Monday, October 4, 2010 at 7:30 P.M. at the Moraga Library Meeting Room, 1500 Saint Mary's Road, Moraga, California.

A Certified Correct Minutes Copy

Secretary of the Planning Commission