TOWN OF MORAGA
PLANNING COMMISSION MEETING

Joaquin Moraga Intermediate School Auditorium September 7, 2010
1010 Camino Pablo
Moraga, CA 94556 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, Levenfeld, Richards, Socolich, Whitley, Wykle, Chairman Obsitnik
Absent: None
Staff: Lori Salamack, Planning Director
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 Socolich and carried unanimously to adopt the meeting agenda, as shown.

III. ANNOUNCEMENTS

Planning Director Lori Salamack reported that staff had received correspondence after the Planning Commission packets had been distributed, copies of which had been made available to the Planning Commission and to the public.

IV. PUBLIC COMMENTS

There were no comments from the public.

V. ADOPTION OF THE CONSENT CALENDAR

A. August 23, 2010 Minutes

On motion by Commissioner Driver, seconded by Commissioner Socolich and carried unanimously to adopt the Consent Calendar, as shown.

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 Planning Commission meeting)

Planning Director Salamack reported that the item had been continued from the August 23, 2010 Special Meeting of the Planning Commission at the request of the Planning Commission in order to consider the item in a timely fashion and since there had been no quorum of the Commission during its regular August meeting. While she had not been present at the August 23 meeting, she had been briefed on the application. She acknowledged numerous concerns that had been raised during the meeting on the application, specifically concerns that had been raised in the past related to similar applications for which the Town was aware and had answered in the past. For the subject application, concern had been raised specifically with respect to Finding 6, that the use would not create an excessive public economic problem. The same concern had been raised in 2004 with respect to the Orchard Supply Hardware (OSH) application. Staff had communicated with the Town Attorney on the issue, said attorney being the same Town Attorney at the time of the OSH application.

Ms. Salamack advised that the Town Attorney had confirmed that there were no factors that had changed her opinion as to the meaning of Finding 6. The Town Attorney's advice to the Town Council would be the same in this case as in the prior case for OSH. When the Town considered economic problems, it considered the use and any aspects that would generate an economic problem for the Town related to services required by the Town and revenue that would reasonably be derived from the activity. If the Town believed that the proposed use would require more than average police response or some other involvement by Town staff requiring the commitment of Town resources, and there were not enough sufficient revenues returned to the Town for that use it could be argued that the use created an excessive public economic problem.

However, there were many uses in the Town where no sales taxes were paid or there was no system for the payment of sales taxes to be paid to the Town.

Ms. Salamack stated that could be a factor for the Planning Commission in considering whether or not to approve a particular use. The Town did not engage in weighing the private economic advantages of particular applications. It was the Town's responsibility to look at an application as it related to the requirements of the Moraga Municipal Code (MMC) and to consider how the application would impact on the Town's resources.

Ms. Salamack recognized the volume of correspondence on the application and encouraged the Planning Commission to focus on the standards specified by the MMC in evaluating applications.

PUBLIC COMMENTS OPENED

Ellen Beans, 20 Carr Drive, Moraga, asked the length of the lease for the Dollar Tree store if the application was approved. She suggested that if the Town were to develop a Specific Plan for the Rheem Shopping Center in the future it may be too restrictive for a long-term lease.

Ms. Salamack clarified that it was the Town's responsibility to approve the use and not the lease terms. Lease terms were not something the Town inquired in its applications given that it was not a factor in the approval or disapproval of an application.

Caroline Wood, 26 Hardie Drive, Moraga, asked that the Planning Commission deny the use permit request. She sought a clearer idea of what the community would be getting. She suggested that there was nothing socially responsible that would be sold by the Dollar Tree and there were enough such businesses in the Town. She asked that Kimco Realty be allowed the opportunity to obtain a nicer tenant for the shopping center.

Bill Snider, 711 Crossbrook Drive, Moraga, owner of Moraga Hardware and Lumber and Across the Way, liked the small town feel of Moraga but was saddened by the Rheem Valley Shopping Center. He supported competition but suggested it would be better to have a legitimate business in the subject location rather than have the space be empty. He spoke to the staff response to the economic concerns and pointed out that Moraga was overbuilt with retail. He suggested that the representative of Dollar Tree had misrepresented the Dollar Tree locations in the Bay Area during the August 23 Planning Commission hearing.

Mr. Snider stated that the Planning Commission should be concerned with what stores were coming into the community. He spoke to the prior tenants that had been located in what would become a larger combined space if the application was approved and urged that the Planning Commission set an example and not permit another 10,000 square foot retail store that could not be supported by the community. He spoke to his limited ability to give back to the community as a result of competition and the economy. He asked what Dollar Tree did for the communities in which it operated.

Margaret DePriester, Moraga, suggested that the Town needed more shops in the Rheem Valley Shopping Center given the current number of empty tenant spaces. The Town needed to fill the empty spaces and it also needed sales taxes. She suggested that Dollar Tree would provide that help to the Town.

Dale Walwark, Moraga, suggested that unless the Town wanted to end up in court it could not tell private property owners of shopping centers that one retail store could not be replaced with another retail store in the same space, particularly when that retail store was acceptable under the Town's rules. In this case, the Planning Commission had no choice but to approve the retail use. In his opinion, there was also no empirical evidence to support the assertion that home prices would be negatively affected by the retail use. While he did not particularly like the Rheem Valley Shopping Center, which he characterized as a strip mall, he suggested that the Town may require that the stores and signage look good. He expressed his hope that the issue would be settled at this time to allow the time to move on. He urged those who were emotional about the issue not to forget the issue but transfer their civic engagement to the larger issue of whether or not the Town could continue to be an incorporated municipality. Given that the Town Council was working to engage with the citizens on that issue, he urged everyone to respond to those outreach efforts.

Lynn B. Gallianos, 253 Scofield Drive, Moraga, commented that she had previously lived in the City of San Leandro which had four similar businesses and which businesses she suggested had negatively impacted that community. She suggested that Moraga would not benefit from a Dollar Tree store in terms of income, products and demographics.

Holly Lucas Alkali, 128 Devin Drive, Moraga, disagreed that the Planning Commission had no choice. She commented that many residents who had recently moved to Moraga and who had small children were in for the long haul. She explained that she and her neighbors had proposed a long-term strategy that everyone could participate in.

Ms. Lucas Alkali spoke to those efforts which included a list of neighbors' objections to the Dollar Tree; particularly the potential decline in property values, opposition to a low end retail store, the negative perception of the store which may also discourage potential homebuyers, and negative impacts to property values, the low value of Dollar Tree items with associated health hazards and lawsuits, concerns with limited tax dollars to Moraga, and concerns with how Kimco Realty had been handling its tenants in the current economy. She suggested that Dollar Tree would not contribute to the community as other local businesses did. She urged sustainable business practices in a positive direction.

Lynn Davis, 48 Corliss Drive, Moraga, questioned the intent of the Rheem Valley Shopping Center for another 10,000 square foot tenant space and questioned how the proposed use would be consistent with the findings that were required to approve a use permit. She suggested that the community had options to appeal any decision of the Planning Commission to the Town Council, which she fully intended to do if the use permit was approved. She commented that she had researched the Internet and had found numerous consumer product cases against Dollar Tree as related to recalls and fines on the sale of substandard merchandise over a number of years for a number reasons. She read into the record a number of the recalled items and presented the Commission with written information on her findings. She questioned the approval of the Dollar Tree use just to fill an empty storefront. She urged the Commission to conduct its own due diligence.

An unidentified resident of Moraga commented that she had patronized a similar store in England and suggested it would become a novelty which would wear off over a year or two. In the meantime, neighboring businesses would object to its presence and the store would bring in the wrong type of people. She suggested that Moraga was not large enough to support two separate shopping centers, which was probably why many storefronts were empty.

John Fry, 80 Goodfellow Drive, Moraga, expressed concern with the suggestion that the retail use would bring in the wrong people. He asked for a definition of the "wrong people" and asked if there was a law against anyone coming into Moraga.

PUBLIC COMMENTS CLOSED

Chairman Obsitnik referenced e-mail correspondence received from Moraga resident Susan Eddy who had asked whether or not Planning Commissioners lived in Moraga. He clarified that all Commissioners were residents of Moraga who had been appointed to the Commission by the Town Council.

Chairman Obsitnik acknowledged all of the comments on the pros and cons of the Dollar Tree use. He noted that the Commission was bound to evaluate applications based on the MMC and the criteria therein. He explained that during the August 23 meeting the Commission had focused on the eight required findings to approve the use permit and with the exception of Finding 3, *the potential adverse characteristics of the use will be mitigated to the extent necessary,* and Finding 6, *the use will not create an excessive public economic problem,* the application met that criteria. Town staff had been asked to identify potential conditions of approval which had been identified in the staff report and contained in the draft resolution.

Based on past experience with OSH, and the Town Attorney's response to any adverse economic impacts to the Town as a result of the approval of the retail use, and based on his own perspective, Chairman Obsitnik suggested that the approval of the Dollar Tree would not result in an excessive public economic problem in the short term. Based on the long term, the potential impacts on retail and on property values, particularly a result of a 50,000 square foot plus big box store, he suggested that property values could be impacted. In this case, based on his own research and based on the existing stores in the Rheem Valley Shopping Center, he suggested that the Dollar Tree could be perceived as a big box store with some adverse effects on property values in the future.

At this time, Chairman Obsitnik stated that he was leaning towards the approval of the application based on the criteria in the MMC.

Commissioner Wykle expressed his appreciation that Kimco had denied some of the other potential tenant uses that would not have been appropriate for the center. He remained concerned with Finding 6 and could not make that finding to approve the use permit. He too had researched the language in Finding 6 which he found to be unique to the Town of Moraga. Partnering that language with the language in the General Plan regarding new uses in commercial centers, he suggested that the Dollar Tree was not compatible with the MMC and the General Plan.

Commissioner Wykle reported that that he had patronized a Dollar Tree store in the City of Oakland on International Boulevard which had been well patronized but located in a depressed area, and which was not clean. In that case, the business fit the neighborhood, although if that type of neighborhood came to Moraga in his opinion it would create an excessive public economic problem. At this time, he could not find that the use would not create an excessive public economic problem.

Commissioner Richards stated that he had also reviewed Finding 6 and could not tie it together in terms of who would shop at a Dollar Tree store. He suggested that if the store was not supported it would go away as would any other unsuccessful business. Based on the MMC, he did not see how the use permit could not be supported.

Commissioner Driver apologized for not being present at the August 23 meeting. Based on the public testimony he recognized that the Dollar Tree store would be problematic. While he did not see any benefit of having such a store in the Town, based on the mandate of the Planning Commission and the application before the Commission, he expressed his hope that regardless of the outcome of the subject application a political solution or something in the MMC should be considered to address retail in the future. He acknowledged the community's concerns over the years with the existing retail, retail leakage and needed sales taxes in Moraga.

Commissioner Driver did not see a clear link between residential property values and the Rheem Valley Shopping Center tenant spaces vacant or otherwise. As to the burden of proof of the language contained in Finding 6, he saw that there was the possibility the Dollar Tree store may create negative economic consequences for the Town either through effects on other retailers in the Town and long-term sales taxes for the Town. He was uncertain that needed to be clarified before a decision was made on the application. He suggested that the remaining findings could be made to support the application and emphasized that land use decisions and not economic and retail decisions were required to be made.

Ms. Salamack spoke to the language contained in Finding 6 and explained based on that language the Commission must make a judgment that some economic problem could be acceptable to the Town, as long as it was not excessive. That would be along the lines of a new retail use where sales taxes were not paid. She noted that there were some businesses where sales taxes were not paid to the Town directly although there were employment opportunities and benefits to residents who may not have to go outside the community to find those services, which the finding spoke to.

Ms. Salamack stated that it was important for everyone to understand that Moraga was fairly diverse with 1,500 students in residence at Saint Mary's College whose shopping preferences were different from a typical Moraga family. Seniors also had different shopping habits and may find that the Dollar Tree store fits some of their shopping needs. She noted that not all residents shopped at the Town's one grocery store and she did not expect that the Dollar Tree would meet all needs of all residents.

Ms. Salamack added that the Planning Commission must make a judgment as to whether or not an excessive public economic problem would be created by the approval of the business.

Commissioner Socolich believed that a Dollar Tree store would revitalize the Rheem Center and the store would provide a number of jobs which could go to Saint Mary's College students or others. He found the larger problem to be the vacant storefronts and an unkempt shopping center which negatively impacted the community. For those reasons, he supported the use permit for the Dollar Tree.

Commissioner Levenfeld stated that during the August 23 Planning Commission meeting she had sought a legal opinion on the definition of the language "excessive public economic problem" as contained in Finding 6 and she was otherwise inclined to support of the application. Absent a legal definition, she was of the opinion that the Planning Commission could be in the midst of defining that language.

Commissioner Levenfeld commented that after having spoken with a number of residents, and while the use may not cause an excessive economic public problem today, she suggested it could become an issue in the future in terms of the potential impacts to residential property values. She suggested that the quality of products sold by Home Goods and TJ Maxx were different from those sold by the Dollar Tree. She also commented on the issue of a business being committed to the community where located in terms of giving back to a community which was another concern and potential economic impact as well as the potential economic impacts to surrounding retailers.

Commissioner Levenfeld did not like the empty spaces in the Rheem Valley Shopping Center although she suggested that one could not tell that the spaces were really empty since it was an antiquated shopping center. Based on all of the potential economic impacts, she was inclined at this time to deny the use permit request.

Commissioner Levenfeld was also disappointed that the applicant was not present. She found the applicant's absence to be telling in terms of being a potential new business in Moraga.

Commissioner Whitley noted that the Planning Commission was bound by the MMC and the criteria to be applied. He referenced Findings 3 and 6, and based on the Town Attorney's opinion on Finding 6; he was of the opinion that there was no question that the test to grant a use permit to the Dollar Tree would not violate Finding 6.

As to Finding 3, as written, Commissioner Whitley acknowledged the addition of new conditions which had been added to the draft resolution although he remained concerned that those conditions do not go far enough. He would like to have seen more robust conditions such as those imposed upon Tuesday Morning.

Commissioner Whitley recognized the concerns with the quality of the Dollar Tree stores, its merchandise and its maintenance. He suggested that it was important to take all into account and make the conditions more robust as to how the store would appear, be managed and what the tenant improvements would look like. He would like to see the applicant work with Planning staff on the types of conditions that would be acceptable to everyone. He understood that Dollar Tree was a large nationwide company with a range of stores in different jurisdictions, each containing different requirements and situated in different socio-economic conditions. He wanted the Planning Commission to be cognizant of the store it would like to see. At this time, he could not find that the use permit met Finding 3 absent more robust conditions.

Chairman Obsitnik suggested that if the use met the criteria the Planning Commission could not dictate what occurred on the inside of the store. He found the conditions to be a rehash of those already in the Design Review Board (DRB) approval process. If the Dollar Tree wanted a successful store in Moraga he suggested it would tailor the store to the needs of the community. As to the patrons of a Dollar Tree store, Dollar Tree's assessment was that patrons would come from the Lamorinda community.

Commissioner Socolich pointed out that the DRB would have authority over the exterior, not the interior, of the tenant space.

Chairman Obsitnik commented that eight conditions had been added to the resolution. He suggested that six to seven of the eight conditions were exterior related and would be covered by the DRB review process.

Based on her experience with retail, Commissioner Levenfeld stated that she had not seen any local jurisdiction control the interior of a tenant space. She added that her opposition to the store was not who would shop at the store but based on her previous comments.

Commissioner Socolich supported the additional conditions that had been added to the draft resolution, particularly Conditions 1 and 2 related to the quality of merchandise fixtures and interior finishes, and not blocking a significant portion of the front windows.

Commissioner Socolich understood that the store's success would be based on its ability to bring people in to shop. He suggested that the retail public would determine the success of the store.

Commissioner Driver remained opposed pending further changes to the additional conditions.

Commissioner Whitley sought changes to the conditions to regulate the interior and exterior of the tenant space in order for him to support the use permit.

Chairman Obsitnik would support the use permit with the removal of any conditions covering the exterior and those covered by the DRB.

Commissioner Socolich reiterated his support for the use permit application.

Commissioner Levenfeld remained opposed to the use permit application.

Commissioner Richards supported the application.

On the discussion, and after numerous straw polls where two Commissioners opposed the application outright, two Commissioners were in support, and the other three Commissioners were split on the conditions for approval, Ms. Salamack clarified that the Planning Commission must make a judgment on the application. She commented that it was unfortunate that the applicant was not present to weigh in on the decision given that the item had been scheduled to meet the applicant's construction schedule. The Planning Commission was not required to vote yes. Any decision of the Planning Commission was appealable to the Town Council. She was uncertain what additional conditions should be imposed at this point in time. She recommended that the Planning Commission take action on the application.

Commissioner Whitley preferred a continuance with the intent of forming proper conditions, as discussed.

On motion by Commissioner Richards, seconded by Commissioner Socolich to approve Resolution next in number to approve UP 10-10 for Dollar Tree at 542 Center Street subject to the findings and conditions as shown. The motion FAILED by the following vote:

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

Ms. Salamack identified the options available to the Commission to either state why Findings 3 or 6 could not be made to disapprove the resolution or to direct staff to return with a resolution reflecting the thinking of the Planning Commission.

Commissioner Whitley did not see that a majority could be found to disapprove the application given the split in the reasoning for disapproval. He asked staff how the application could not be denied where the majority of the Planning Commissioners were split on the reasoning for denial.

Ms. Salamack explained that the applicant was entitled to know the reasoning for approval/disapproval of an application which was the reason for the findings. Positive findings must be made on all standards for approval. Only one finding was needed for disapproval, such as, as an example, inadequate mitigation.

Chairman Obsitnik reiterated his rationale for supporting Finding 3 in that the conditions as outlined in the draft resolution were unnecessary and did not add anything to the resolution, nor was it the role of the Planning Commission or the Town of Moraga to govern the interior of the tenant space.

Commissioner Whitley reiterated his position that Finding 3 could not be met. To ensure that the potential adverse characteristics of the use could be mitigated to the extent possible, he suggested at a minimum that Condition 2 was more than appropriate and there were other ways related to the way the store was governed that could be of help. He questioned the application as being unmitigated without acceptable conditions. He suggested that the conditions in the draft resolution were inadequate and therefore based on the current application and mitigated factors the potential adverse characteristics of the use would not be mitigated with the current application and mitigations provided, leading to his denial of the application.

Ms. Salamack explained that the disapproval would be stronger if the potential adverse characteristics of the use including but not limited to; included at least one statement, to read "will not be mitigated to the extent necessary to make the use compatible with neighboring uses because sufficient conditions to mitigate the use do not exist" whereby such a finding would make that decision tonight. If the Planning Commission could not reach conditions to adequately mitigate the proposed application she stated that was something that could be determined. As a Board, the Planning Commission could identify the adverse conditions and could condition the application in such a way where the adverse conditions could be mitigated.

Chairman Obsitnik reiterated his opinion that the interior of the Dollar Tree could not be regulated. He reiterated that he could not support the additional conditions of approval including Condition 2 in that it could set a precedent for future applications.

Commissioner Richards agreed with the additional conditions being proposed, including Condition 2. If Moraga was going to have a Dollar Tree store he would like it to look nice.

On motion by Commissioner Levenfeld to deny the resolution based on the inability to make Finding 3, where the adverse characteristics of the use could not be mitigated to the extent necessary to make the use compatible with neighboring uses, and the Planning Commission was unable to mitigate the potential negative economic impact associated with the Dollar Tree store based on the presentation of the store or the potential economic issues that could be caused, and the impact to real estate or to other stores in the community. There was no second to the motion.

Commissioner Driver commented that the motion, as stated, was asking those Commissioners leaning towards a 'no' vote to go on record that they found a serious negative economic impact.

Commissioner Levenfeld suggested that an excessive public economic impact could be perceived as an adverse characteristic of the use. She suggested that because of the type of store, the use with a land use category of Community Commercial could be perceived as having an unmitigatable excessive public economic impact.

Commissioner Whitley sought specifications on the factors where the use would have a perceived negative economic impact in order to support that statement. He suggested that factors could be the presentation of the use, tenant improvements, or selection of merchandise.

Ms. Salamack recommended potential language for consideration that "the potential adverse characteristics of the use including potential negative economic impact with respect to the quality of shopping in the shopping center, including but not limited to the quality of merchandise and display, will not be mitigated to the extent necessary to make the use compatible with neighboring uses." She noted that such language notes that the nature of the use in terms of the merchandise and display was at a level different from the quality of the shopping experience currently in the shopping center, having an impact on the neighboring uses that could not mitigated based on the very nature of the use.

Commissioner Levenfeld sought clarification with other uses within the community not just the shopping center itself. She was not comfortable regulating only the uses in the shopping center at that level.

Ms. Salamack explained that she would review the MMC language. She read into the record Standard 3 of the MMC, whereby an adverse characteristic must be identified and can be mitigated to the extent necessary to make the use compatible with neighboring uses, which she took to mean "within the shopping center."

Commissioner Levenfeld withdrew her motion.

Commissioner Richards emphasized that the Planning Commission must make a decision. He asked those Commissioners who objected to certain elements of the application to deliver a reason for a denial of the application. He pointed out that Kimco was a part of the community and they needed to fill the empty tenant spaces and there must be a reason for the Planning Commission's denial of the application in order for Kimco to find something else to occupy the space.

Commissioner Driver commented that the problem was that those Commissioners opposing the application had five different reasons for doing so. He suggested that the application should be continued to allow additional public comment.

Ms. Salamack restated potential language for consideration. "The potential adverse characteristics of the use including a potential negative economic impact with respect to the quality of shopping on the shopping center due to the quality of merchandise and display in the proposed use that cannot be mitigated to the extent necessary to make the use compatible with neighboring uses." If the Commission was of the opinion the merchandise was of such inferior quality it would bring down the quality of the entire shopping center, which was a potentially adverse characteristic that could be attributed to the use.

Commissioner Whitley commented that with such language the applicant could propose mitigation.

Ms. Salamack clarified with the language the applicant would be asked to sell merchandise that could not be recalled, which was not possible.

Commissioner Driver reiterated the concerns with respect to economic negative impact on neighboring businesses. Having seen other Dollar Tree stores, he suggested that some mitigation could be done but not all.

Commissioner Richards questioned the Planning Commission telling a business what it could sell. He did not want to set a precedent where the Planning Commission would be telling retailers what could be sold.

Commissioner Levenfeld agreed that it was not the Planning Commission's role to regulate the merchandise sold by retailers.

Chairman Obsitnik offered as a discussion point consideration of the right conditions to allow the majority of the Commission to support the application.

Commissioner Whitley reiterated that he was not prepared to take such a vote.

Ms. Salamack recommended that the Planning Commission consider a subcommittee to work with staff in order to prepare a draft resolution to come back to the Commission at its next meeting for consideration.

Commissioner Socolich supported a subcommittee approach although he would like the representative from the Dollar Tree to be present as well in order to discuss what could and could not be done in the interior of the tenant space.

Ms. Salamack cautioned that would require the subcommittee meeting to be open to the public. She recommended a subcommittee of the Planning Commission working with staff to prepare a resolution that the applicant and the public would have the opportunity to review and discuss. She reiterated that any decision of the Planning Commission may be appealed to the Town Council. The subcommittee would consist of three or fewer Commissioners and should be appointed by the Planning Commission.

Chairman Obsitnik supported the staff recommendation. He recognized the length of the process and suggested it was sending a message to Kimco and Dollar Tree on the conflicting views of the Town.

Commissioners Socolich and Whitley volunteered to serve on the subcommittee.

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.

On motion by Commissioner Socolich, seconded by Commissioner Whitley and carried unanimously to continue UP 10-10 for Dollar Tree at 542 Center Street, to the Planning Commission meeting of September 20, 2010.

Chairman Obsitnik declared a recess at 9:57 P.M. The meeting reconvened at 10:07 P.M. with all Commissioners present.

B. Grading Permit and Hillside Development Permit (HDP) - 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 Moraga Municipal Code 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 Planning Commission meeting)

Ms. Salamack reported that the matter had been considered by the Planning Commission on August 2 at which time the applicant had not been present and the Planning Commission had questions of the applicant at that meeting. The applicant was currently present along with his soils engineer to answer any questions. The Commission was not being asked to make any decisions on the application other than to make a recommendation to the Town Council with respect to the grading permit since it had been proposed on a slope greater than 25 percent. The Moraga General Plan specifically called for grading in those conditions to be decided by the Town Council. The Hillside Development Permit would be considered along with the grading permit in accordance with the Moraga Municipal Code (MMC). The work that had occurred on the site occurred absent the necessary Town permits. Staff was present to address any concerns with respect to the MMC.

Staff Engineer John Sherbert advised that staff had several discussions with the applicant offering different suggestions to reduce the scale of the project in order to avoid the Planning Commission and Town Council process. The applicant had elected to follow the process and the original intent of the backyard improvement.

PUBLIC COMMENTS OPENED

Robert White, 32 Buckingham Drive, Moraga, apologized to the Planning Commission for not being present on August 2, as a result of a previously planned trip. He acknowledged that he was totally responsible and did not do what he should have although there had been some mitigated circumstances. He stated that he had submitted correspondence to the Public Works and Engineering Departments in February 2010 outlining the background of his project.

Mr. White commented that he had previously had discussions with Councilmember Trotter during this process and it had not been an arbitrary decision to continue to do the work. He suggested that there had been no option. The engineer and contractor, who had worked on his property for another larger project in 2005 and 2006, had informed him it would cost a great deal more money to tear the structures down and try to restore it and that the situation would be more expensive and more destabilizing than what currently existed.

Mr. White emphasized that the project at this time was a positive one although it had been handled incorrectly with bad judgment. However, he had paid the price in that he had not had the use of his rear yard for two years, and had paid exorbitant fines, permit fees and engineering costs over and above construction costs. He commented that he had reduced the number of original retaining walls on the property, the structure would be buried and totally unobtrusive, not visible from the street or his neighbors, and had been built in excess of any structural requirements for a retaining wall.

Mr. White reported that he had spoken with his northernmost neighbor whose property line nearly abutted within two feet of the interior of the fence which separated their lots and that neighbor had no concerns in that the fence had been paid totally by him and the property would be backfilled between the fence and the side of the structure. That area could also be a retaining wall if necessary.

Commissioner Socolich commented that one of the concerns of the Commission had been the installation of a new structure behind the home which had been located in such a manner requiring a certain amount of cut and high retaining wall. He asked whether or not any other alternatives had been considered which would have required less excavation such as a location on the side of the home.

Mr. White suggested that there were no other options in that any other location would have been closer to the property line and would have been conspicuous from the street. He noted that the property was on solid sandstone and bedrock, with four feet of concrete below where the face of the building would be concealed with concrete and the remainder would be buried.

There was no other location on the property that would have been accessible or not disruptive in terms of the entire facade. There was a continuum from the south to the north side of the property as one viewed away from the home all the way to the left, which was all walls and terraces and which had been approved and permitted in 2005 and 2006.

Mr. White recognized that work would not have been approved now because the rules had changed and he had been unaware of that change. He explained that the project had evolved in that the retaining wall that had been the lowest of the three existing retaining walls had been redwood material, had been closest to the home, and had been installed in response to a flood in 2004 where mud had collected against the home. That had not been addressed when the work had been done in 2005 and 2006. His engineer and contractor at that time had asked the Town staff about the wall and the Town staff had expressed no concern at that time.

Subsequent to that in 2008, Mr. White explained that the wall had begun to fail and in 2009 two stone walls began to sink. In order to take the wall down there would be enormous earth movement and it appeared as if the cut was larger than it was because after the removal of the walls at least half of the volume inside the structure had been removed and it was a matter of removing the top terrace. When the top terrace had been taken down and the lowest redwood supporting wall that had been failing, the contractor had told him the space was there to add to the property and that was the time to do such work which had been very appealing. He had asked about the required permits and the contractor had informed him that the other work had been permitted and was ten times larger than what had been proposed. He commented that he had later been traveling all of the time.

Mr. White commented that the contractor had later called him when the inspector had inspected the property and found it was not in compliance and the work would be shut down. As a result of the stop work order, a lien had been placed on his home.

Commissioner Driver affirmed with staff that there had not been any feedback from the surrounding neighbors regarding the application. He asked whether or not the slope stability of the neighbor's property or the hillside behind the subject residence had been reviewed since he understood in 2004 there had been an active slope. He also asked whether or not the Town had granted variances in the past for a building that was located two feet from the property line. He understood that the requirement was 15 feet from the property line.

Mr. Sherbert commented that the neighbor's property had not been reviewed. The structure was two feet eight inches from the property line. The requirement was that the structure be three feet from the property line.

Mr. White clarified that there was no active slope behind his property although there had been some problems with flooding and mud which he had to check on a regular basis. He clarified as well that the building was actually three feet from the property line since the fence was inside his property line. He added that four of the sides would be buried and the front would be exposed and faced with the same stone as the walls on the other sides.

Commissioner Socolich referenced the grading determination document as contained in the staff report regarding setback requirements, whereby the setback requirements were a minimum of three feet from the actual property line with a maximum of nine feet for a retaining wall.

Mr. White commented that it may be possible to have the wall closest to the property line made thicker.

Chairman Obsitnik commented that having read the meeting minutes from the August 2 meeting he understood that all of the requirements for both the hillside development and grading permits were being satisfied with the exception of the issue of the structure being three feet from the property line.

Commissioner Socolich pointed out that if the Commission was being asked to consider the project with nothing existing on the property, as they were supposed to do, the project would not have been approved due to the large amount of cut, proximity to the property line, and height of the retaining walls.

Mr. White noted that filling out the permits for hillside development and grading permits everything had to be adapted to a 150 square foot storage unit in the corner of the rear yard.

Commissioner Levenfeld explained that during the last Commission meeting it had been decided that when applications were submitted in a normal setting they were generally reviewed between the Planning Commission and the applicant so that determinations could be made as to why a project was being constructed as proposed and where conditions would have been imposed. That conversation had never occurred in this case. The Commission had continued the item to allow the applicant to be present to address the Commission.

Commissioner Socolich emphasized that the project was to be reviewed as if nothing had been done. In that case, the application would not have been approved. However, the work had already been done and the property owner had not been present during the August 2 meeting to answer questions on the reasoning behind the project.

Mr. White understood that his presence at the August 2 meeting had not been important and he would have canceled his trip plans if he had been aware of the importance. He reiterated that with the replacement of the three failed retaining walls, a space had been created. There was no other place to place the partial storage room given the proximity of his home on the lot and the proximity to his neighbor's properties. He added that the structure could not have been placed on the other elevated side of his property given that it would have been visible to the street. The building would be at the same level as the back door of his home. He found the building to be aesthetically pleasing. He reiterated that it would not be visible to anyone.

Commissioner Socolich pointed out that the property owner had gone through the process before with conducted improvements on the property without permits. He was dismayed that the property owner had done the same thing again, conducted improvements on the property absent the required permits.

Mr. White reiterated that the contractor who had done work previously on his property for a much larger project had obtained the required permits at that time and had also done the work on the current project. That contractor had advised him that permits were not needed for the current work. He acknowledged that the required permits had not been obtained and that it had been his mistake to take the contractor’s word.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

Commissioner Whitley understood the request of the Planning Commission to make a recommendation to the Town Council on the hillside development and grading permits although he noted that there had been testimony of a slide condition on the property which had not been included in any of the materials provided to the Commission. He asked staff whether or not the test to be applied to the hillside development and grading permits would be different in the event of an emergency or hazardous condition that was being remediated.

Ms. Salamack did not see the problem related to a slide which had occurred earlier but in this case there were three existing retaining walls on the property that were unattractive and the property owner desired to remove them and replace them with the new structure. In this case, She was unaware of an emergency situation that necessitated the work.

Commissioner Whitley questioned whether or not would the test would be different for the hillside development and grading permits if the Commission found that there was a slide occurring and the redwood retaining wall on the bottom was failing and the two high retaining walls were sliding down the hill.

Mr. Sherbert explained that for the grading permit the corrective action would be taken first before obtaining a grading permit although the Town's process would have to be followed after that. The same criteria would be applied in retrospect if there was an emergency correction. As to whether or not the slide would change the measurements, he suggested it would make it difficult to evaluate what existed first.

Commissioner Whitley commented that if the remediation was done well before the permits were obtained and the work was very much like what was on the property now, he understood that emergency action could be taken to make repairs although the process would still have to be followed after the fact.

Mr. Sherbert explained that the Town code required contact with the Town Engineer regarding an emergency corrective action.

Ms. Salamack referenced Section 14.04.032 (c) of the MMC regarding emergency work where once the emergency situation had been stabilized Town Council approval was required for landslide repair or slope stabilization for a pre-developed average slope steeper than 25 percent, which was the situation now before the Planning Commission.

Commissioner Whitley suggested that the test requirements in this case had not been met for the hillside development or grading permits. He recognized the money and time spent on the project but was not convinced it was the right solution for a failing hillside. In this instance, he suggested that the work went beyond emergency stabilization of the hillside.

Commissioner Socolich recognized that the work may have gone beyond emergency stabilization of the hillside although it had stabilized the hill and the construction of the structure had provided permanent stability to the slope. He emphasized however that the project did not meet the intent of the regulations.

Commissioner Levenfeld noted that the Planning Commission had been informed it could not consider the fact that the work had already been done which had proven difficult to make a decision since the removal of the structure may destabilize the hillside.

Ms. Salamack advised that if the Planning Commission did not recommend Town Council approval of the exact work that had been done and the Council was in agreement there would be a revised design that would have to come back to the Town. She suggested that there should not be any benefit for doing work without obtaining permits since it created a strong incentive for work to be done absent Town approvals.

Mr. Sherbert clarified, when asked by Commissioner Levenfeld, that penalties had been levied against the applicant for the work done absent permits, which penalties were intended to cover staff time for the evaluation and inspection of the property, essentially equating to triple the permit fees.

Commissioner Socolich reiterated his concern that the applicant had done the work absent required permits, something that had been done in the past, and that a precedent could be set if the project was allowed. While the project may be a benefit to the rear of the property, he struggled with the past history of work done on the property absent permits with the same thing happening all over again, and with the applicant seeking Town approval after the fact.

Commissioner Richards understood that if the argument was made to recommend that the Town Council deny the hillside development and grading permits would mean that the Planning Commission would require the property owner to return the site to the smaller retaining walls and return the earth that had been excavated.

Ms. Salamack clarified that it could be that there was an alternative design for a retaining wall as opposed to a storage building that could ultimately be approved by the Planning Commission or the Town Council. She understood that the problem was not the slope stability of the hillside due to the composition of the material since the slope was stable.

Mr. Sherbert recalled a situation in 2009 where another homeowner had dug into the slope behind the residence to create more level space and the resolution had been to restore portions of the slope with the introduction of lower retaining walls to reduce the size of the flat area. In that case, Town staff had worked with the property owner and his engineer to reach a reasonable solution.

In this case, Mr. Sherbert suggested that there was accommodation that could be made to make use of the current structure but not create the size of the storage room as originally intended, to not be as close to the neighboring property resulting in such a large cut. However, that would not achieve the intent of the original design but something in between.

Commissioner Richards understood that the structure's original design had been engineered soundly.

Mr. Sherbert acknowledged that the current configuration of the existing wall appeared to be stable based on input from the soils engineer and that it had been designed to meet that test but had not been designed to meet the hillside development and grading permits. Further, there had not been a survey conducted to determine the actual location of the property line.

In response to Commissioner Driver who had not been in attendance at the August 2 Planning Commission meeting, Commissioner Socolich reiterated the background of the proposal, and the requirements of the hillside development and grading permits, which the project did not meet.

Ms. Salamack explained that since the grading permit was to be approved by the Town Council, in this case, both the hillside development and grading permits were to be approved by the Town Council with the factors to be considered for the approval of a hillside development permit, identified in Exhibit D to the staff report dated September 7, 2010. She reiterated that had the work not been done the application would have been required to go through the same process where the Planning Commission would have made a recommendation to the Town Council and the Commission could have imposed conditions. The Town Council would then consider the approval of the hillside development and grading permits.

Commissioner Driver asked whether or not the Planning Commission had considered imposing any conditions.

Commissioner Levenfeld commented that the Commission had discussed whether or not alternatives had been considered such as the relocation of the structure and reducing the height of the retaining walls.

Mr. White asked that his Soils Engineer be allowed to address the Commission to comment on the impacts of the removal of the building and the retaining walls as well as the associated costs with such removal.

Chairman Obsitnik suggested that a precedent could be set with hillside development absent the required permits where homeowners might consider similar work and circumvent the Town's processes.

Mr. White clarified that he never would have done the work had he been aware of the process. He acknowledged his error in not obtaining the required permits, noted the money he had spent on the project and the payment of fines thus far, the inability to use his yard for two years, and suggested that a precedent would only be set if a developer attempted to do such work across a hillside.

Chairman Obsitnik suggested that the options before the Commission were either to recommend that the Town Council disapprove the hillside development and grading permits, or recommend approval subject to conditions. In order to reach conditions, the Commission must discuss the specifics of each of the hillside development and grading permit factors.

Mr. White explained, when asked, that any dust movement and noise was over and the remaining work was the roof of the structure, to be permasealed with facade on top, the retaining wall behind and above the structure, and a second concrete wall to stabilize the rear of the building.

Chairman Obsitnik asked whether or not two retaining walls could be created behind the structure to achieve the same objective rather than building all the way up.

Mr. White stated that the back wall behind the structure would only be three to four feet and would be going to the ground, sod on top of a concrete slab, or it could be made to be three feet and backfilled. The height of the back retaining wall was not an issue.

Commissioner Whitley understood that the Planning Commission could recommend Town Council denial or place conditions on the application. He did not see that conditions could be imposed by the Planning Commission at this time. He suggested that the question was whether or not the application, as presented, could be recommended for approval or disapproval. Placing conditions would be redesigning and reengineering what had been proposed which he was not prepared to do.

Commissioner Socolich recommended that any further construction be reviewed by the DRB, which body would review the height and width dimensions. In his opinion, the project should have started with the DRB.

Mr. White commented that it had been recommended that he skip the DRB process.

Commissioner Socolich realized that the project was before the Planning Commission due to the steepness of the slope of the property.

Commissioner Driver agreed that the Commission should not get too deep into the design. He saw no real compelling argument for an outright disapproval given the costs of undoing the work and the consequences to the hillside. He sought a way to move forward.

Commissioner Richards agreed with the comments and suggested that there was a penalty for breaking the rules. He suggested that a precedent would not be set in this case given the fines and delays that had been imposed.

Commissioner Driver recalled another project with similar conditions that had been disapproved by the Planning Commission given that project had impacted neighbors and the slope. He too did not see that a precedent would be set.

Commissioner Socolich asked whether or not the DRB should be involved in the structural components of the retaining walls given the excavation that had been conducted on the slope.

Ms. Salamack affirmed that the DRB could become involved with the design of the retaining walls which could be conditioned, although the DRB could not get into the design of the retaining walls until the Town Council approved the hillside development and grading permits.

Commissioner Socolich recommended a condition pending Town Council approval of the hillside development and grading permits that any follow-up design work construction be approved by the DRB.

Ms. Salamack affirmed that such a condition could be recommended to the Town Council.

As to whether or not the wall adjacent to the property line was holding back any soil, Mr. White explained that the retaining wall could be made thicker with aggregate or concrete in the space between the existing concrete retaining wall and the fence, which would comply with the Town's requirements. The wall was stable and the fence was large and would not go anywhere given that it had been placed away from the street.

Chairman Obsitnik stated that he too had heard no compelling reason to disapprove the application. He sought conditions of approval that could be included as part of the recommendation to the Town Council.

Commissioner Socolich recommended that any future construction design work go through the DRB approval process prior to construction once the Town Council approved the hillside development and grading permits.

Commissioner Driver sought more staff work on the draft resolution prior to Planning Commission recommendations to the Town Council. He was not comfortable wordsmithing the draft resolution given the number of blanks in the resolution.

Ms. Salamack explained that the reason for all of the blanks in the resolution was that the code called for a recommendation from the Planning Commission, not staff. The materials had been provided to the Planning Commission to make a recommendation.

Chairman Obsitnik recommended the creation of a subcommittee.

The Commission discussed the results of the engineering study and the Town's Design Guidelines as identified in Exhibit E to the staff report.

Mr. White pointed out that prior to the changes in the Town's Design Guidelines the three existing retaining walls, which had since been reduced to two retaining walls, had been in compliance with Town requirements.

On motion by Commissioner Wykle, seconded by Chairman Obsitnik, and carried unanimously to form a subcommittee to work on the draft resolution recommendation to the Town Council.

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

On motion by Commissioner Socolich, seconded by Commissioner Whitley, and carried unanimously to form a subcommittee to consist of Roger Wykle and Jim Obsitnik to work on the draft resolution recommendation to the Town Council for Grading Permit and HDP 01-10 for White at 32 Buckingham Drive.

On motion by Commissioner Socolich, seconded by Commissioner Driver and carried unanimously to continue Grading and HDP 01-10 for White at 32 Buckingham Drive to the Planning Commission meeting scheduled for September 20, 2010.

VIII. ROUTINE & OTHER MATTERS

A. None

IX. COMMUNICATIONS

A. None

X. REPORTS

A. Planning Commission

Commissioner Levenfeld reported that she would not be present for the September 20 Planning Commission meeting due to out-of-town business.

A. Staff

1. Update on Town Council Actions and Future Agenda Items.

Ms. Salamack reported that the Town Council was in the process of interviewing candidates for a new Town Manager this date. Staff anticipated that an appointment would be made soon.

XI. ADJOURNMENT

On motion by Commissioner Whitley, seconded by Commissioner Socolich to adjourn the Planning Commission meeting at approximately 11:24 P.M. to a regular meeting of the Planning Commission on Tuesday, September 20, 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