

**TOWN OF MORAGA
PLANNING COMMISSION MEETING**

Moraga Library
1500 St. Mary's Road
Moraga, CA 94556

April 20, 2015

7:00 P.M.

MINUTES

1. CALL TO ORDER

Chairperson Marnane called the Regular Meeting of the Planning Commission to order at 7:01 P.M.

A. ROLL CALL

Present: Commissioner D'Arcy, Kovac, Kuckuk, Mallela*, Woehleke, Chairperson Marnane

*Commissioner Mallela arrived at 7:12 P.M.

Absent: Commissioner Carr

Staff: Ellen Clark, Planning Director
Ella Samonsky, Associate Planner

B. Conflict of Interest

There was no reported conflict of interest.

C. Contact with Applicant(s)

Chairperson Marnane reported that he had visited the property at 316 Calle la Montana and had met with the applicant regarding VAR 1-15, Public Hearing Item A.

2. PUBLIC COMMENTS

There were no comments from the public.

3. ADOPTION OF CONSENT AGENDA

There was no Consent Agenda.

4. ADOPTION OF MEETING AGENDA

On motion by Commissioner Kuckuk, seconded by Commissioner Woehleke to adopt the meeting agenda, as shown. The motion carried by the following vote:

Ayes: D'Arcy, Kovac, Woehleke, Kuckuk, Marnane

Noes: None
Abstain: None
Absent: Carr, Mallela

5. PUBLIC HEARING

A. Conduct a Public Hearing and Consider Variance (VAR 1-15) to Municipal Code Section 8.28.030 to Allow a 4 Foot-7 Inch Side Yard Setback for an Accessory Building

Associate Planner Ella Samonsky presented the staff report dated April 20, 2015 for consideration of a variance (VAR 1-15) to Moraga Municipal Code (MMC) Section 8.28.030 to allow a four-foot, seven-inch sideyard setback for an accessory building located at 316 Calle la Montana. She explained that based on site characteristics, neighborhood context, and requirements for new construction, staff had determined that the findings could not be made to approve a variance. She recommended that the Planning Commission adopt a resolution denying the variance to modify the required minimum 15-foot side yard setback to retroactively permit an accessory building at 316 Calle la Montana.

In response to Commissioner D'Arcy's question regarding legal consequences to neighbors who continued to build after notice of violation reached, Ms. Samonsky clarified that if the applicant wanted to keep the building as currently constructed, and if the variance was approved, Hillside Development and Design Review Permits would be required along with a Building Permit to legalize the construction. She described the submittal process for those applications and advised that the applicant would have to work with staff to ensure compliance or modifications that could allow staff to make the recommended findings.

Planning Director Ellen Clark stated residents perform work without first obtaining building permits; the County had experience sometimes with retroactive permits; and for the structure to be considered a legal structure all of the identified permits would be required. If the permits were not pursued, the accessory structure would be subject to abatement. In this case, staff had been made aware that the structure was under construction and a Notice of Violation had been issued. The applicant had decided to apply for permits.

Commissioner Woehleke identified a typographical error on Page 1 of the staff report for Table 1: Project Chronology and stated the date for the report of potential code violation-construction without permits should be revised to read August 25, 2014. He clarified with staff that a Hillside Development Permit would be required since the building had been placed on a slope greater than 20 percent, and since the accessory building had been located within the required setback Administrative Design Review would be required.

Commissioner Mallela also clarified with staff that the extensions to the deadline had been at staff's discretion to allow the applicant the opportunity to comply with the Town's requirements.

Rebecca Eirich, 316 Calle la Montana, Moraga, explained that her family had moved into the property in July 2014, had hired a licensed Landscape Architect to build a treehouse for their son, had spoken with their neighbors to inform them of the project before its construction, and had spoken with their landscape architect about permits. Their landscape architect had informed them that since the building did not involve plumbing and was not a habitable structure, it would not require building permits and have to comply with the County setback of 10 feet. She noted the accessory structure was 10 feet from the fence line of the neighbor's home. She stated at no time had they been told to stop construction but had been given notice to obtain permits from the Town and County. Someone from the County had come out to the property and had informed them that construction did not need to stop as long as they were in the permit process.

Ms. Eirich described the playhouse as soundly constructed, tucked back into the hillside, and hidden from view. If the playhouse was moved out 15 feet, it would be in the middle of the lot and it would become more visible. She had not met with, nor had seen, the neighbors in opposition to the playhouse.

Ken Hertel, Hertel Architects, 857 Birdhaven Court, Lafayette, advised that he had been retained by the Eirichs after the start of the project through its completion, and had been retained to look at a project to expand the home for their children. He commented on his effort to legalize the subject project through this process. Having obtained a survey of the property, he had discovered that the project was within the required setback. He understood the Landscape Architect was under the impression he was entitled to a 10-foot setback for the building from the property line based on prior County zoning, which had been established by the width of the frontage. He identified the fence line which sat 10 feet from the site of the structure, and identified the other property line where the fence line was right on the property line. He suggested that was the hardship the landscape architect had accidentally encountered, a result of reading the fence line as the property line, and asked the Commission to consider that hardship.

Mr. Hertel noted that if all regulated setbacks were ignored, the playhouse location was the best on the site given that it was concealed by the topography and trees while the staff recommended location would place the structure in greater view, impacting those neighbors in opposition more than the location of the existing structure. The openness of the structure viewed Mt. Diablo, the deck sat on the internal side of the property and there was no intention of invading the privacy of the neighbors. He disagreed with the staff report regarding the potential for neighbors to move the fence down the slope to the property line since little could be done with that property. He emphasized there was no intent to deceive, no intent on his client's part to do harm to the community, nor any desire to disrupt the neighbors.

Mr. Hertel added that the applicants had made an effort to meet with their neighbors, and the property had sat vacant in the community and had been a teenage neighborhood party house in the past. He explained that his clients had rescued the property and were adding value to the community. He suggested the physical reality

was that the structure should remain where it had been located without conforming to the Town's requirements to avoid a greater impact on the community.

PUBLIC HEARING OPENED

Tony Gottschalk, 50 Campolindo Court, Moraga, explained that his residence was located downhill and adjacent to the applicant's property. He reported that he had purchased his property in June 2014, and had been unaware of any plans to excavate any soil above his property. He had later learned of the structure and suggested it was an invasion of privacy. He emphasized the time and expense for a geotechnical report prepared on his hillside. Absent the proper permits and inspections, he was uncertain whether drainage from the structure would impact his rear yard. He requested screening with shrubbery and trees given that the structure was not concealed from his rear yard. While he appreciated that the applicants had discussed the structure with their neighbors, he noted that those residing on Campolindo Court had not been made aware of the project. He emphasized that the structure impacted his views, privacy, and could have potential impacts on drainage integrity and the geotechnical stability of his lot.

The unidentified property owner of 43 Campolindo Court, Moraga, identified his property as directly below the subject property at 316 Calle la Montana and stated he had lived on the property for 28 years. A large portion of his property was a large and steep hillside close to the crest of the hill meeting the adjoining property where the structure had been built. Having enjoyed all aspects of living in his home which offered great privacy and natural views of the hillsides and with no views of neighboring homes, he expressed dismay that the applicants had not sought the required permits prior to construction, which would have avoided the need for the hearing. He described the structure as looming over his home and many others on Campolindo Court and Campolindo Drive.

The unidentified property owner described the structure as a water tower type of construction with one story above a second story, 18 feet in height consisting of a semi-enclosed storage at the ground level, upper level above a flight of stairs where the peak of the roof was 18 feet above ground level, with a large indoor floor space, indoor/outdoor lights, large windows, sliding doors, and a seven-foot wide balcony with a protected glass railing. He suggested the structure could become a source of light and noise nuisance as opposed to a subdued accessory building. He characterized it as more of an adult, not a child's, playhouse and suggested the structure impacted the open, rural character of the area and the view of the hillsides, setting a precedent for other properties in the area, and impacting the quality of life, character of the surrounding area, property rights, and values. He asked that the Planning Commission deny the variance request, deny a request for a permit for the accessory building, and set a timeline and deadline for the removal of the accessory structure.

Mikhail Federov, 48 Corte De Rosas, Moraga, stated the accessory structure was located on top of the hill, right on the property line, with windows viewing into his rear yard; he understood that no development was allowed on the hillsides. He noted that the main home had been obstructed by pine trees although during construction lower branches of those trees had been removed leaving the accessory structure and the

main home visible from his residence. He too expressed concern with the loss of property and privacy rights, and urged compliance with the required setbacks. He commented that the Campolindo area was a single-story neighborhood, the accessory structure was too close to the fence with inadequate space for screening, and approval of a variance would grant the property owner special privilege no other property owner in the immediate area enjoyed. He supported the removal of the building.

Joe Policcio, 7 El Camino Flores, Moraga, identified himself as a personal friend of the Eirichs. He commented that the Eirich property had an open fence which took full advantage of the distant views of open space areas above and not of downhill neighbor's yards. He suggested the structure had little impact to major views of Mt. Diablo and uphill where some portion of the accessory structure might be visible. He recognized that the Eirichs had failed to contact the downhill neighbors but implored everyone to come together and communicate to reach a logical solution that made sense. If that were to occur without creating a special precedent, he was confident that would be a good starting point and a logical first step to reach some sort of agreement. He acknowledged the concerns with impacts to property rights and the suggestions that the structure be removed but emphasized that the Eirichs were trying to remedy the mistake.

George Binczweski, 239 Calle la Montana, Moraga, identified himself as an long-time property owner. He referenced the fact the subject property had been derelict over the years with utilities shut off, and noted that he had done some weed maintenance on the property to conform to fire requirements. He had been elated that the property had been purchased and that the home looked as if it was part of the neighborhood again.

Bev Matthews, 308 Calle la Montana, Moraga, agreed with the previous speaker and the fact the property owner had become a wonderful addition to the neighborhood. She liked the fact the home had been rehabilitated and noted that the playhouse had not impacted her home since her fence was situated above the structure. She found that the pine trees had been a fire menace for years and was pleased that the property owner had trimmed them to provide safety to the neighborhood. She acknowledged that the Eirichs had checked with her and with her other neighbors about the project. She reiterated that she was thrilled that they had become part of the neighborhood.

An unidentified resident was pleased there would be a variance and an opportunity to look outside the rules. He understood the variance had to deal with a shared lot line; that the applicants had misunderstood the rules; the closest neighbor had no concerns, which was an important consideration; and the Eirichs may not have understood that anyone downslope would have affected views given the steepness of the hill. He suggested the focus should be on the potential impacts to the next door neighbor, not on the views, and that the applicants should be allowed to obtain permits in the future.

Erin Nyhan, 156 Calle la Montana, Moraga, appreciated that the applicants had made an attempt to comply with the requirements but had later learned that there had been some misinformation. She urged more communication to reach a solution, suggested that the issue was not views but the variance, and given the difficulties associated with

the history of the site was pleased with what the Eirichs had done to improve the property.

REBUTTAL:

Mr. Hertel described the high-quality structure as a small footprint building with a small roof area, with downspouts discharging into the level area of the site which dissipated pursuant to code. He pointed out there were similarly scaled accessory buildings downslope from the Eirich property. He identified those accessory buildings, one of which appeared to back up onto Campolindo Court, and suggested the application was not a unique element in the immediate neighborhood. He identified the window area of the accessory structure with one window facing out into the Campolindo Court neighborhood, and all main windows turned internal to the site. The view from Campolindo Drive was the only vantage point he could find where the project showed itself to the community. He suggested the elevation could be mitigated to help it visually sit on the hillside, including painting the building a darker color so that it would recede into the tree line. He suggested the exterior lights could be made Night Sky compliant to address the concerns of the neighbors, there could be consideration of fire resistant plant material, and while the contractor should not have placed the excavated material as he had, that material had been removed from the site. He added that the work had been done upslope into the cut side of the bank in stable sandstone.

Mr. Hertel added that the accessory structure was not, could not, and would not be a secondary dwelling unit. He did not see that the application represented a special privilege but was an anomalous condition he hoped the Planning Commission would help to make a legal project.

PUBLIC HEARING CLOSED

Commissioner Woehleke found it unfortunate that the Planning Commission had to evaluate the project which had polarized the neighborhood. In this case for the reasons stated by staff, he supported the staff recommendation. He acknowledged that the applicants should have spoken with the Town from the beginning. Given that the size of the accessory structure was greater than 120 square feet, and the vertical height was a greater impact than a structure at grade, the only solution he could suggest was to move it, lower the height, eliminate the electricity, and comply with the 15-foot setback for the 2-DUA Zoning District.

Commissioner D'Arcy also found it unfortunate that despite good intentions the applicant must comply with the Building Code. While it appeared as if the applicants were good people and had good neighbors, she stated the inadequate setback was a big issue and the height of the structure made it fairly visible. She supported the staff recommendation to deny the variance and move the structure since it did not comply with the required setback.

Commissioner Kovac recognized that the applicant had no intention to impinge on other properties, and acknowledged the support from Bev Matthews spoke to the applicants' character and intent. He added that the three findings required to approve a variance

had not been met. He commented that the Town had not provided bad advice but that the Landscape Architect, a professional, had given bad advice and the applicant had to resolve that issue. He suggested the Town had no legal responsibility in this case.

Commissioner Kuckuk was familiar with the history of the property. She appreciated that the Eirichs had purchased and improved the property and she hoped they would not give up making improvements. She commended the architect for a compelling presentation and expressed her hope he would be creative as to how to proceed from here. She noted that the application before the Planning Commission was only the variance and not the merits of the building. She found that the project did not meet two of the required findings to approve a variance, and supported the staff recommendation to deny the variance request. She again encouraged the architect to be creative to allow the applicant to move forward, and urged the applicants to meet with Town staff.

Commissioner Mallela also agreed with the staff recommendation to deny the variance request, recognized the structure was intended to allow the family to enjoy their home, acknowledged the unfortunate situation, and expressed his hope that the architect could provide assistance to find a way so the updated structure would comply with the Town's requirements.

If the Planning Commission took action to deny the variance, Ms. Clark advised there was an appeal process that could be followed. If the Planning Commission decision was upheld, the options would be to demolish the building or relocate it out of the required setback in conformance with the current zoning regulations. Other options included a redesign such as converting the structure into a deck without the playhouse on the top which could be approved as an accessory structure. As designed, the structure would have to be outside the required setbacks. If the variance was denied, a Notice of Violation would be issued to the property owner allowing the applicant a timeframe for correction as described.

Chairperson Marnane commented that he had visited the property, found it to be a very substantial building, with electricity, and if the structure were plumbed for water it would be large enough to be a nice guest home since it was insulated. He also found that there was no way to approve a variance. At this time he supported the denial of the variance.

Ms. Clark advised that if there was a motion for denial of the variance, it should be denied without prejudice.

On motion by Commissioner Kuckuk, seconded by Commissioner Woehleke to adopt Resolution next in number to deny, without prejudice, VAR 1-15, a Variance to Municipal Code Section 8.28.030, modifying the minimum side yard setback to retroactively permit an accessory building at 316 Calle la Montana. The motion carried by the following vote:

Ayes:	D'Arcy, Kovac, Kuckuk, Mallela, Woehleke, Marnane
Noes:	None
Abstain:	None

Absent: Carr

Chairperson Marnane identified the 10-day appeal process of a decision of the Planning Commission in writing

Chairperson Marnane declared a recess at 8:13 P.M. The Planning Commission meeting reconvened at 8:15 P.M. with Commissioners D'Arcy, Kovac, Kuckuk, Mallela, Woehleke, and Chairperson Marnane present.

6. **ROUTINE AND OTHER MATTERS**

A. **Consider Planning Commission Resolution __-2015 Approving Guidelines for Visual Representation of Proposed Development Projects**

Ms. Clark presented the staff report dated April 20, 2015; reported that the item had previously been considered by the Planning Commission on November 17, 2014, February 2, and March 16, 2015; and stated a revised redline strikeout version of the guidelines had been provided in response to the Commission's past discussions and direction.

Commissioner D'Arcy recommended a revision to Attachment B, Revised Draft Town of Moraga Guidelines for Visual Representation of Proposed Development Projects, in the first sentence of Section 2 Visual Simulations, 3 Story Poles, a) When Required, to read:

Story poles shall be required when other visual representation tools are not adequate to demonstrate the potential visual impacts of a proposed project.

Ms. Clark suggested the term "shall" in that there could be cases when other visual representations were not sufficient where story poles would also not be feasible. As an example, she cited large elevation changes in a project when computer modeling was not adequate and when story poles may also not work well. She suggested the policy had been very clear that it was desirable to have some kind of visual representation. Using the term "shall" meant there were no exceptions.

Commissioner Woehleke supported the language proposed by staff.

Commissioner D'Arcy remained concerned with the need for stronger language in that section.

Chairperson Marnane referenced the prior Commission discussions on the same issue, whereby it was possible to have no visual representation other than public announcements.

Ms. Clark affirmed that had been the case in the past, when computer modeling had not been available and the Town had not always required renderings. She reiterated that the use of the term "shall" was a mandate making it something an applicant had to

provide. Based on prior discussions, that had not been the desire of the Commission. She acknowledged further recommended language modifications to the same section by Commissioner Kovac based on a concern that the first two sentences were duplicative of the second sentence in the same section.

The Commission discussed the language in Section 2 Visual Simulations, 3 Story Poles, a) When Required, and while not unanimous, there was support to leave the section as written by staff, and as reflected in the redline strikeout revisions.

Commissioner Woehleke identified typographical errors in the Resolution including the name of the Chair as shown on Page 2, to be revised to read *Chairperson Marnane*; and to the second paragraph on Page 1 to be part of the Resolution itself and not just in the guidelines.

Ms. Clark suggested the Commission's action could be appended to include a statement in an additional NOW, THEREFORE BE IT RESOLVED to reflect that such guidelines shall be reviewed a year after adoption by the Planning Commission, with the second sentence of the second paragraph under discussion to also include the same clause.

Commissioner Woehleke also referenced the format of Section 3 Story Poles, which should be revised to correct a typographical error in the numbering of the sections; and clarified with staff the reference to Attachment A in the last sentence on Page 4 referenced a document that had been provided in a previous draft.

Commissioner Kovac understood that the intent of the policy had been to invite transparency and asked whether that could be worked into the guidelines. He also clarified with staff that Section 2 d) Story Pole Plan, as shown on Page 4 meant that story poles were erected on-site and "to scale" at a 1:1 scale or "full" scale.

PUBLIC COMMENTS OPENED

Dave Bruzzone, Moraga, acknowledged the progress on the topic since the first meetings but emphasized that the Town's initiation of the policy had started in the last couple of years, there had been no push in the past for story poles and/or visual simulations, submitted plans typically included a great deal of information, and standard plans provided a lot of information where one could discern the potential impacts. He was pleased the discussion related to guidelines and not to mandatory requirements, which would slow the process and inflame those in the community who did not understand what they were looking at. He found that story poles often exacerbated the concerns of the community and did not offer a better understanding. He cited the policy used by the City of Lafayette, which was also not mandatory.

PUBLIC COMMENTS CLOSED

Commissioner Mallela understood there had been a number of iterations in the process and suggested the best thing to do was to adopt the regulations and see how they worked.

Commissioner Kovac found the current version to be an improvement over the prior iteration, although he continued to recommend specific language changes to Section 2 Visual Simulations, 3 Story Poles, a) When Required, and requested that the language for “scale” under d) Story Pole Plan should be better clarified.

Commissioner Kuckuk commented that she had seen the guidelines on four occasions and was supportive of those guidelines with minor modifications, as discussed. She found the guidelines to be a great way to provide the visual representation needed on a project to ensure that the visual ramifications were understood.

Commissioner Woehleke commended staff and the Planning Commission on the creation of guidelines to provide options to staff as projects developed, recognized there would be occasions when story poles were the best option, understood the risks, and commented that based on his past experience on the Design Review Board (DRB) in 1989/1990, he was familiar with the use of story poles which was not a new concept.

Commissioner D’Arcy noted that she had missed the first two discussions of the guidelines but thanked staff for making the changes. She sought assurance that the guidelines could be tightened, and agreed that story poles and visual representations were useful to communicate information to the public.

Commissioner Kovac offered a motion to amend the last sentence of the fifth paragraph of Section 2 d) Story Pole Plan on Page 4 to specify a 1:1 scale.

Ms. Clark recommended the phrase “full scale” as opposed to “to scale” and recommended that change be made to the first sentence of the first paragraph of Section 3 Story Poles on Page 3, to read: *Story poles are full scale models constructed of wood and plastic netting or tape to show the height, profile, and massing of proposed buildings.*

Commissioner Kovac also asked that the first two sentences of Section 2, Visual Simulations, 3 Story Poles, a) When Required, be modified but was uncertain of the specific language change.

Ms. Clark noted that both sentences said different things and both were important based on the Planning Commission’s previous direction. She described the intent of both sentences and stated that the second sentence provided discretion to staff.

On the discussion, with the exception of Commissioner Kovac, Commissioners did not support any revision to Section 2 Visual Simulations, 3. Story Poles, a) When Required.

On motion by Commissioner Kuckuk, seconded by Commissioner Woehleke to adopt Resolution next in number to Approve Guidelines for Visual Representation of Proposed Development Projects, subject to the following revisions:

- The name of the Chair as shown on Page 2 of the Resolution to be revised to read *Chairperson Marnane*;

- Page 2 revised to reference Exhibit B, not Attachment A;
- A new NOW, THEREFORE BE IT RESOLVED clause to be added to read: *Town staff will review the guidelines with the Planning Commission one year after approval to determine if any modifications to the guidelines are needed;*
- Page 3, Section 3 Story Poles, to read: *Story poles are full scale models constructed of wood and plastic netting or tape to show the height, profile, and massing of proposed buildings;* and
- The lettering in Section 3 to be corrected.

The motion carried by the following vote:

Ayes:	D'Arcy, Kovac, Kuckuk, Mallela, Woehleke, Marnane
Noes:	None
Abstain:	None
Absent:	Carr

B. Consider Appointment of Two Planning Commission Representatives to Moraga Center Specific Plan Implementation Project Steering Committee

Chairperson Marnane recommended the appointment of Commissioners Kovac and D'Arcy to the Moraga Center Specific Plan (MCSP) Implementation Project Steering Committee. The Commission concurred.

7. REPORTS

A. Planning Commission

Commissioner Woehleke reported that he and staff had brief communications regarding the Brown Act, and would meet again on April 21, 2015 to discuss lessons learned, all in an effort to streamline the planning process as part of upcoming Planning Commission training.

Chairperson Marnane commended the professionalism of Kelly Clancy, Planning Assistant, who he had the pleasure to observe at work with the public.

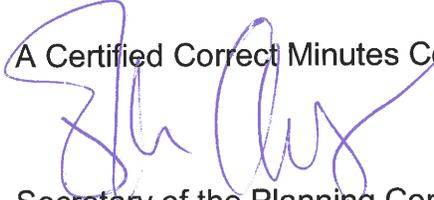
B. Staff

Ms. Clark reminded Commissioners of the Planning Commission training session to be held on April 28, 2015 from 6:00 to 9:00 P.M. at Saint Mary's College (SMC), which would be professionally facilitated. She also clarified for the benefit of new Planning Commissioners that the policy contained in the MMC which allowed Planning Director/Zoning Administrator approval of certain projects also allowed those projects to be called up for Planning Commission review.

8. ADJOURNMENT

On motion by Commissioner Kuckuk, seconded by Commissioner Kovac and carried unanimously to adjourn the Planning Commission meeting at approximately 8:55 P.M.

A Certified Correct Minutes Copy

A handwritten signature in blue ink, appearing to be "John Cox", written over the text "A Certified Correct Minutes Copy".

Secretary of the Planning Commission