

**TOWN OF MORAGA  
DESIGN REVIEW BOARD MEETING  
MINUTES**

**April 22, 2013**

**I. CALL TO ORDER AND ROLL CALL**

A regular meeting of the Design Review Board (DRB) was called to order by Chair Helber at 7:00 P.M. in the Moraga Library Meeting Room, 1500 St. Mary's Road, Moraga, California.

Present: Boardmembers Escano-Thompson, Glover, Kirkpatrick, Zhu, Chair Helber  
Absent: None  
Staff: Shawna Brekke-Read, Planning Director  
Rebecca Atkinson, Temporary Planner

**B. Conflict of Interest**

There was no reported conflict of interest.

**C. Contact with Applicants**

Chair Helber reported that he and Boardmember Kirkpatrick had met with the applicants for 1392 Rimer Drive at the property, and with the neighbors across the street on the same day.

Boardmember Escano-Thompson reported that she had met with the applicant this date.

Boardmember Glover reported that he had also met with the applicant on Saturday, April 20.

**II. PUBLIC COMMENTS**

There were no comments from the public.

**III. ADOPTION OF THE CONSENT CALENDAR**

There was no Consent Calendar.

**IV. PLANNING COMMISSION LIAISON REPORT**

Planning Commissioner Marnane reported that the Planning Commission had held two meetings during the month of April.

Commissioner Marnane reported that on April 15 the Planning Commission had reviewed and approved a project for 1800 Donald Drive, and on April 17 the Commission had received comments from the public on the Bollinger Valley Environmental Impact Report (EIR).

Planning Director Shawna Brekke-Read added that the Planning Commission had also discussed amendments to the Zoning Ordinance related to the Rheem Planning Area although there had been a request by the public to slow that process given that there were four new members of the Commission and there was a need to ensure the Commission understood the intent of the amendments.

## V. ADOPTION OF MEETING AGENDA

On motion by Boardmember Zhu, seconded by Boardmember Glover and carried unanimously to adopt the meeting agenda, as shown.

## VI. DESIGN REVIEW

A. Design Review 13-01 - 1392 Rimer Drive: Construct a fireplace, pergola, and outdoor living/dining/cooking area within the side yard setback.

Temporary Planner Rebecca Atkinson presented the request to construct a fireplace, pergola, and outdoor living/dining/cooking area within the side yard setback of 1392 Rimer Drive, which required design review approval due to exterior lighting, mass and bulk, screening, and the like. DRB review was also required because of the creek located on the property and the different aspects of the creek including floodways, areas offered for drainage easements and environmental review where a California Environmental Quality Act (CEQA) determination would be required. The creek was located at the rear of the property and was a tributary to Moraga Creek, with portions of the property located within the floodway as identified on the map included in the staff report dated April 22, 2013.

The project included a number of elements: exterior lighting, landscaping, drainage, and pathways to various locations in the rear yard and the proposed outdoor living/dining/cooking area, fireplace, and pergola. Photographs of the project site had been included in the staff report. The Town had received two comment letters from neighbors and the applicant had provided submittals on various dates, as identified in the project chronology.

Ms. Atkinson advised that as recently as April 19, staff was waiting for confirmation information on the depth of the creek and top of bank, and while staff had recently received documents from the applicant and the applicant's engineer regarding some of this information staff was still reviewing those documents.

Ms. Brekke-Read noted that typically staff prepared a staff recommendation and Draft Action Memorandum and had attempted to do that for this project in working with the applicant to move the project forward. The project had been continued from the previous DRB meeting, and while staff had prepared a Draft Action Memorandum, an issue had come about with respect to CEQA. Noting that some projects on their face may be exempt from CEQA requirements, she explained in this case staff could not easily find the project to be exempt because of the creek, and since a portion of the improvements were in an area offered for dedication as a drainage easement. As a result, staff had been working closely with the applicant's engineer and the Town Engineer to identify top of bank to ensure the drainage easement was acceptable.

Once the top of bank had been established, staff would determine how far back the structure could be placed. She affirmed that the applicant had submitted recent information and staff had been in discussions with the applicant's engineer, although more information was needed to determine whether an exemption from CEQA could be made, and whether the structure was within the drainage easement to be able to determine the proper process.

Ms. Brekke-Read explained that in the past the Town had gone through an encroachment permit process for improvements within drainage easements on the creek although for two prior projects, both projects had required Town Council approval requiring indemnification clauses and specifying that no structures shall be placed in the drainage easement. Staff had also been discussing this issue with the Town Attorney given the lack of evidence Contra Costa County or the Town had accepted the public rights-of-way for the streets, which did not necessarily mean the drainage easement did not exist.

In response to the DRB, Ms. Brekke-Read identified the location of the drainage easement and the creek and noted that the center line of the creek had been shown on the map. She acknowledged that members of the Board who had visited the site had also received a letter from the applicant. She identified the top of bank of the creek as shown across the property and stated there remained a question as to the methodology used to identify top of bank, which would have to be resolved with the applicant's engineer, who appeared to have used an updated county code. She noted that the Town's code was less precise. While cross hatchings had shown where a hundred-year flood event would occur, the drainage easement remained an issue. She also identified the setback line from the top of bank based on the channel depth but asked the applicant to clarify that information.

Ms. Atkinson added that the Public Works Department would review not only the creek on the property but how the creek moved and operated along the entire course, noting that there was a large bend above the property upstream, to be able to determine stream bank stability.

Public Works staff would also review the history of erosion force on the creek along with requests from property owners to install drainage improvements, riprap, and the like to deal with storm events and erosion potential, and how the forces flowed on the property.

#### PUBLIC COMMENTS OPENED

John Banister, 1392 Rimer Drive, Moraga, asked staff whether there was agreement that the Moraga Subdivision Ordinance, as Town staff had recently provided to him, specifically Section 914-408, defined how a creek side setback had been considered for his project.

Ms. Brekke-Read acknowledged the information had been provided to the applicant, the information applied to his project, and it was the Town's Ordinance, although the Town Attorney had opined that if identifying an area outside of the established drainage easement it would need to be used to identify the setback line. Essentially there was no setback beyond the easement.

Mr. Banister entered into the record correspondence he had provided to all Boardmembers who had visited his property. He noted that staff had not included all e-mail communications in the staff report which he also provided for the record. He described his application as a simple, straightforward landscape improvement project to his rear yard, for an uninhabited structure. He thanked those Boardmembers who had visited his property, described a volume of information he had provided to the Planning Department, noted that his correspondence had raised concerns with the way the Planning Department had determined the setback, and explained that he had followed the criteria as posted on the Town's website, which had shown the methodology used for calculating the setback. Staff had not agreed there was no setback on the property under the ordinance he had followed, and had referred him to the Moraga Subdivision Ordinance.

Mr. Banister disagreed with the Town Council's interpretation of the Moraga Subdivision Ordinance, which stated that the top of channel depth was 21 feet or less, and there was no setback. Due to the change in position on the ordinance the Planning Department had applied to his project, he had retained the services of a structural engineer who had prepared plans pursuant to the ordinance the Planning Department had followed, and who had calculated the distance from the channel to the top of bank since there was no methodology to determine top of bank in the ordinance. The structural engineer had measured that distance identified as Section A at 15.2 feet, Section B at 15.3 feet, and Section C at 14.27 feet on the plans, all less than 21 feet. If the unimproved channel exceeded 21 feet, the setback was to be calculated based on the previous paragraph. With all depth less than 21 feet, there would be no structural setback.

Mr. Banister advised that his structural engineer had also determined where an easement would fall based upon the ordinance staff determined applied to his project, which would be in the same location at the setback line outside of his structure. As a result, there was no drainage easement or setback line. He commented that he had exhaustively communicated with staff about the enforcement of a drainage easement and that it was the Town's burden to show there was an easement since the Town was attempting to enforce it against him to restrict what he could do to improve his property. He found that would affect his property ownership rights by claiming an easement when there was no evidence of an easement. There was a 1960 Subdivision Map showing a drainage easement and an expressed statement that it had been dedicated to Contra Costa County but had never been accepted. He emphasized that he had provided to staff a list of documents, assessor maps, legal descriptions, and title reports, all confirming the absence of an easement.

In response to staff concerns as to whether CEQA applied to his project, Mr. Banister requested clarification from the Planning Department on what he understood was the need to show a potential significant environmental impact would result from his project; he asked the Planning Director to identify the potential significant environmental impact. He presented a drawing prepared by his architect, which had shown the site plan, the hundred-year flood plain from his side of the creek, and the water flow with his home blocking any flooding from a hundred-year event.

Mr. Banister suggested that his project was exempt from CEQA, as staff had originally determined. He pointed out, as the Planning Director had stated, there was history that the Town had issued encroachment permits allowing development within the drainage easement, which he described as evidence his project would be exempt from CEQA. He went on to identify his civil drawings which were the most telling and which identified for CEQA evaluation purposes the setback line and the fact that his structure was outside the setback line, and which identified any purported easement line pursuant to the ordinance the Town stated would apply. Based on the evidence, he stated the Planning Director could make a determination the project was exempt from CEQA. He asked the DRB Chair to direct staff to make that determination to allow the focus on the sideyard setback.

Mr. Banister suggested that his project more than satisfied the required findings. He described the proposal, stated he had hired a licensed architect and structural engineer, Attachment E to the staff report included photographs of the fireplace and pergola for a beautiful project that would enhance his property value, and there were two locations where the structure intruded on the sideyard setback, as identified on the site plan. He described the natural red cedar structure with red cedar posts to be wrapped in iron pieces around structural steel posts for the fireplace, with a post that was 6 feet, 1 inch from the property line behind the fireplace and within the sideyard setback.

Mr. Banister also identified another post that was 7 feet 8 inches from the property line and explained that three to five percent of the fireplace/pergola structure was within the sideyard setback. The cook center/gas barbeque had not been detailed on the site.

Chair Helber clarified pursuant to the plans that a portion of the cooktop, a portion of the pergola structure, and a portion of the fireplace were within the sideyard setback.

Mr. Banister stated the site plans had been prepared by his structural engineer and were accurate. As to whether the DRB should use discretion to approve the project because of the sideyard setback, he noted that 90 percent or more of the project was outside of the setback. The one neighbor most impacted by the project had submitted correspondence in support of the project. The location would be screened by fencing and landscaping. He understood that a neighbor who lived across the street had submitted correspondence raising concerns with the application but noted trees had been planted on the back side of the property, which had been shown to those DRB members who had conducted a site visit to the property, additional landscaping would be planted adjacent to the pergola with trees offering additional screening so that the neighbor across the street could not see the project. He was open to planting more trees to obstruct views of that neighbor's property. In response to noise concerns from his rear yard, he pointed out his property abutted property lines along the creek and he too could hear noise from his neighbors. He suggested nothing could be done to mitigate typical neighborhood noise although he was open to suggestions.

Mr. Banister identified the three alternatives as contained in the April 22 staff report, and asked that the DRB approve the third alternative, the approval of the project at this time. He emphasized the time and effort involved for what was a simple backyard landscaping project, and urged the DRB to use its discretion to approve the project and direct staff to prepare a Draft Action Memorandum for execution by the Planning Director tomorrow, suggesting there was no reason to spend more time on this project.

While he understood that planning staff was overworked and had limited resources, and he commended the preparation of the staff report, he suggested that the Planning Director and staff should be working on more important projects.

An unidentified resident who resided on the Deerfield Drive side of the creek, expressed concern with any project that may impact the abutment of the creek, and emphasized the need for sufficient accounting for the highly-erosive creek. He noted the significant lowering of the creek bed, with many properties having fought the creek with rip rap and concrete, and found that proper remediation involved appropriate setbacks to allow the leveling of the creek and widening of the basin, which impacted the rear yards of the properties abutting the creek.

Linda Zoccoli, Deerfield Drive, Moraga stated that she was able to view several poles from her yard which she understood would include lights, raising concern with visual impacts. She asked the height of any lights on the poles, where they would be directed, and the level of brightness proposed.

#### PUBLIC COMMENTS CLOSED

Boardmember Glover stated that he had viewed the site and the poles referenced would be white PVC poles. He was uncertain of the color of the posts, and agreed that lighting could be an issue to the neighbors. He sought assurance that any proposed lights would not glare into the neighbors' properties, which should be a provision of any approval.

Mr. Banister explained that he has had lighting in his rear yard for the past 15 to 20 years, with up-lighting in trees around the perimeter of his yard which leveled out to the creek. He planned to have up-lighting as he had in the past and explained that no lights would be pointed towards the neighbors. Lights were proposed to be placed on the pergola to face down for safety purposes.

In response to the DRB as to the CEQA issue, Ms. Brekke-Read reiterated that staff would like to speak with the applicant's engineer and stated realistically it could take a week to obtain more information. She clarified that the setback line was something the Town had historically used and was a guideline in the Town's General Plan and Design Guidelines. The mechanism for recording that setback line had passed, although the guideline remained which was how staff identified structure setback lines. She understood the applicant's concerns with the calculation for top of bank but wanted to identify with the applicant how the approach had been determined. She acknowledged the application had been continued before and also acknowledged concerns delaying the project further.

Mr. Banister was uncertain why approval could not be made as soon as tomorrow.

Boardmember Zhu commented that the current proposal involved a significant number of permanent structures encroaching the sideyard setback and asked why that was required.

Mr. Banister emphasized there was a slew of discretion for the DRB to allow the construction of structures within the 10-foot sideyard setback, and his dealings with the Planning Department had led to the preparation of the construction documents, bids, contracts, and work starting. He had strong feelings about the fireplace and pergola design layout, had spent a great deal of time in advance planning for a conceptual plan, had met with the neighbors to ensure there were no objections, and had worked with the design professionals who had designed the project layout.

Mr. Banister referenced an application where the DRB had approved an application for a barbeque 11 inches from the property line and another application which involved a structure less than 3 feet from the property line for an open trellis structure, which the DRB had allowed, and as evidenced in published decisions. He also referenced a project on Buckingham Drive which had gone all the way to the Town Council. He reiterated the location of the fireplace and pergola had been proposed for a number of reasons as previously stated, and it made sense aesthetically, was convenient for the home, and was the only location within reason without requiring a more significant process which was why DRB Boardmembers had been invited to view the property.

Boardmember Zhu commented that while he liked the project and the proposed landscaping, he was not concerned with decisions the DRB had made in the past. As an architect, he strongly believed in the need to respect the setback line which he viewed as the law. He sought absolute reasons for the encroachment into the setback since in his opinion the improvements could be relocated elsewhere on the property.

Mr. Banister again identified the pergola location, as proposed, reiterated the reason for its placement given the location of the setbacks on his property, and while it had originally been located elsewhere on the property in working with his architect on the conceptual design it had been determined to be too far away, made no sense, and through discussions with planning staff over the past several months as to whether there was a setback and drainage easement, all had led to its current location.

Boardmember Zhu suggested there was an alternative location on the property for the pergola and suggested the fireplace could be rotated to provide the same arrangement.

Mr. Banister noted the fireplace had been situated on the property due to aesthetics. He again noted the easement/drainage line resulted in limited changes to the design, and if the fireplace was changed from the proposed location it would likely impact views from the Zoccoli residence.

Boardmember Zhu was not convinced the pergola and fireplace could not be relocated. He clarified he had opposed a past application where a fireplace was to be located right next to a fence. He did not want Moraga to become like Walnut Creek.

Mr. Banister referenced Attachment E to the staff report, photographs of the property, and emphasized the examples from his architect's website of the fireplace to be built along with examples of the types of posts for the pergola. He emphasized that he had written approval from the neighbor whose home abutted his property and who would be most impacted by the project.

In addition, Mr. Banister commented that Moraga was the only jurisdiction in Contra Costa County with 10-foot sideyard setbacks for uninhabited structures, and that the design plan had been based on the County standard of 5 feet.

As to the exhibit submitted by the structural engineer, Boardmember Kirkpatrick commented that he had no problem understanding where an easement had been perceived. He commented that in 1960 when the map had been prepared, the top of bank had been identified on the Federal Emergency Management Agency (FEMA) map based on the 2000 scale map. He had more faith in the recent survey by the applicant's structural engineer (Martin) than anything done by FEMA, with no structures in the finished condition of the plan. He also commented that the setbacks had been imposed for health and safety purposes to ensure emergency response and he did not see that a small encroachment represented health and safety issues. He also did not see there was a CEQA issue since the top of bank had been shown outside of the uninhabitable structure, and a small encroachment into the sideyard setback in this case was not an issue.

Mr. Banister identified, when asked, Lighting Plan L-4.1 as part of the submittal packet, with trees on the level area of the property including two madrone trees where up-lighting had been planned. The intent was to decorate the trees, not shine the lights down onto the neighbors. He reiterated that the trees were the same trees that had been illuminated for the past fifteen years or more.

Ms. Brekke-Read acknowledged there were a number of moveable lights that had been proposed. Staff had recommended toning down the number of lights and that they be shielded, as outlined in the April 22 staff report. While a Draft Action Memorandum had not been prepared, the staff report had identified conditions of approval staff would likely recommend the DRB impose.

Chair Helber understood the issues related to the project involved CEQA compliance, a structure that was over nine feet in height, and located within the sideyard setback. Had those issues been changed by the applicant, he affirmed with staff the project would not require DRB but administrative design review. He acknowledged receipt of the Martin exhibit, a letter from the applicant's structural engineer, which had been submitted to the Town on April 19. Based on the correspondence, he asked staff whether there was sufficient information to make a CEQA determination.

Ms. Brekke-Read reiterated that staff was uncertain a CEQA determination could be made based on the information at hand and the need to further discuss the matter with the applicant's engineer. Given the staff schedules and workloads and the conversations needed, she suggested that could be clarified in a week's time. Absent the CEQA determination, the DRB could not take action at this time.

Chair Helber liked the project design as an improvement to the rear yard, noted the other improvements had not required any permits, and all looked nice. While he had originally been concerned with the structure within the sideyard setback, the neighbor who would be most impacted by the encroachment had submitted a letter in support and he was less concerned with that encroachment. In response to concerns with respect to noise, he lived close to the area and suggested that was the nature of living

within the Camino Pablo Valley. He agreed there were legitimate concerns with the proposed lighting with the location of the up-lights, and while lovely, all faced outward to the property boundary which could be easily mitigated by slightly rotating the light location to the other side of the tree, which would still light the tree while not impacting the neighbors.

Chair Helber commented that he had also visited the neighboring property across the creek, affirmed the subject property had been visible through the trees, but suggested that once the structure had been built it would blend in more and he did not see it to be an obtrusive element. He would like to see the project move forward, suggested there was mitigation that could be considered for the up lights, but understood the CEQA determination would need to be resolved. He was confident staff could resolve that information with the applicant's engineer and it was possible once the CEQA determination had been made a special meeting of the DRB could be considered so that the applicant did not have to wait a month for the next meeting. Alternatively, the applicant had the option to pull the project outside of the sideyard setback by making adjustments which would not require DRB review. He agreed that the yard had been laid out in such a way so that the plan would offer a superior design, and waiting an additional week or two for the CEQA determination would be worth it.

Boardmember Glover suggested that the lighting plan could be modified to include language regarding spillage, reflection, and directionality to solve the lighting issues.

In response to Boardmember Escano-Thompson, Ms. Brekke-Read noted the moveable light fixtures were not dark sky compliant and the step lights were shielded down with specifications yet to be made. The down lights were adjustable. She recommended that the item be continued to a date certain which would not require re-notification to the public. Given the desire to address the CEQA determination in a week's time, given requirements for staff report preparation, and the availability of staff and the DRB, she commented that a meeting would have to be held in the morning or afternoon if scheduled in the next week.

Boardmember Glover reiterated that he had no concerns with the sideyard setback but he did have issues with the lights, with staff having identified a way to resolve that issue, and he was not convinced CEQA was an issue while recognizing the need to have that conversation with the applicant's engineer.

Boardmember Zhu found the encroachment into the sideyard setback to be significant and wanted to see another design approach that would respect the setback line, and the neighbors.

Boardmember Escano-Thompson suggested the sideyard setback was not an issue. She was happy to approve the project.

Boardmember Kirkpatrick acknowledged the concerns with the two neighbors as related to the creek and potential erosion, suggested the setbacks prescribed by the county provided adequate safety, noted that the homes were above the flood plain, and suggested additional planting on the slope may attenuate the noise and light impacts. He did not see that health and safety would be impaired by the encroachment into the

sideyard setback, and other than the height of the chimney, the structure would not be visible.

Chair Helber reiterated the project was of good design and should move forward. He recommended a condition of approval or note added by the applicant to mitigate the potential concerns with the lighting, that additional planting would help mitigate any light spillage along the creek area, and suggested the design would justify a decision of the DRB based on the information it had now to move forward pending clarification of CEQA exemption.

On motion by Chair Helber, seconded by Boardmember Glover and carried unanimously to continue Design Review 13-01 for 1391 Rimer Drive to a date certain of May 2, 2013 at 9:00 A.M. at 329 Rheem Boulevard, Town of Moraga Offices, to allow staff to gather information to make a CEQA determination, prepare a Draft Action Memorandum, and discuss with the applicant potential mitigation measures.

## **VII. ROUTINE & OTHER MATTERS**

There were no routine and other matters.

## **VIII. REPORTS**

### **A. Design Review Board**

There were no Design Review Board reports.

### **B. Staff**

Ms. Brekke-Read reported that a second Senior Planner had been hired, with the Town Council having recently authorized the hiring of another Senior Planner rather than fill the Assistant/Associate Planner position.

The Planning Commission had also reviewed the Annual General Plan Implementation Report in anticipation of the upcoming budget discussions with the Town Council along with a report from staff on the projects the Planning Department was engaged for the coming year which would be forwarded to the DRB. In addition, the Town Council had been provided with an update on the Livable Moraga Road Project where the scope of work and meeting schedules were being finalized and where a Technical Advisory Committee was under consideration.

Ms. Brekke-Read added that staff was in the process of cleaning up the Administrative Design Review process, acknowledged there was frustration in the community and with applicants as to the Town's design review process, and stated if that issue surfaced amongst friends, relatives, and neighbors, staff would be willing to discuss the Town's design review process.

Chair Helber expressed his appreciation to staff for all of its hard work.

Ms. Brekke-Read further reported that future DRB meetings would involve full agendas and there would be an effort to consolidate similar applications.

**IX. ADJOURNMENT**

On motion by Boardmember Kirkpatrick, seconded by Boardmember Glover, to adjourn the meeting at 8:42 P.M. to a Special Meeting of the DRB on Thursday, May 2, 2013 at 9:00 A.M. in the Moraga Town Offices, at 329 Rheem Boulevard, Moraga, CA 94556.

A Certified Correct Minutes Copy



Secretary of the Planning Commission

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