

**TOWN OF MORAGA
TOWN COUNCIL REGULAR MEETING**

**October 13, 2010
MINUTES**

7:00 P.M. Regular Meeting

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

I. CALL TO ORDER

The regular meeting was called to order at 7:10 P.M. by **Mayor Chew**.

ROLL CALL

Councilmembers present: Mayor Ken Chew, Vice Mayor Karen Mendonca, and Councilmembers Howard Harpham, Michael Metcalf and Dave Trotter

Councilmembers absent: None

II. PLEDGE OF ALLEGIANCE

Councilmember Trotter led the Pledge of Allegiance.

III. SPECIAL ANNOUNCEMENTS

There were no special announcements.

IV. PROCLAMATIONS AND PRESENTATIONS

A. Proclamation Declaring October 2010 as National Disability Awareness Month

Ann Reed, Chair of the ADA [Americans with Disabilities Act] Advisory Committee and Jill Mercurio, a member of the ADA Advisory Committee, reported that the Town Council had established the Committee a year and a half ago to assist the Town in increasing the mobility experiences throughout public areas of the community.

Mayor Chew read into the record the proclamation declaring October 2010 as National Disability Awareness Month and presented the proclamation to Ms. Reid and Ms. Mercurio who accepted on behalf of ADA Advisory member Timothy McInerney who had recently passed away.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

The Council noted that the elevator currently being installed at 329 Rheem Boulevard would ensure accessibility to Town Hall for everyone.

B. Proclamation Honoring Timothy McInerney

Mayor Chew read into the record a proclamation honoring Timothy McInerney and acknowledged Mr. McInerney's family present in the audience.

PUBLIC COMMENTS OPENED

Tom McInerney, the older brother of Timothy McInerney, expressed the family's appreciation to the Town of Moraga and the Town Council for the proclamation and recognition of his brother who had loved growing up and being a member of the Moraga community. He identified all members of the McInerney family and friends who were present in the audience.

Jackie McInerney spoke about her son's work in the disabled community and noted his appreciation to the Town for its efforts to make the community more accessible. She expressed appreciation that his efforts had been recognized and would continue in the future.

Bob Murtaugh, President of the Lions Club of Moraga, commented on Mr. McInerney's work with the Lions Club. He reported that the Lions Club wanted to open a scholarship in Mr. McInerney's name, in cooperation with the McInerney family, at Campolindo High School. Both he and the McInerney family could provide more information on the scholarship after the meeting.

Public Works Director/Town Engineer Jill Mercurio advised that Town staff had worked with Mr. McInerney for many years and highly regarded his efforts. She stated that he had been a valuable member of the ADA Advisory Committee and would be missed by everyone.

PUBLIC COMMENTS CLOSED

V. DISCUSSION ITEMS

There were no Discussion Items.

VI. ADOPTION OF THE CONSENT AGENDA

A. Approval of Consent Items

Consent Agenda Item 2 was removed from the Consent Agenda.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Harpham/Trotter) to approve Consent Agenda items 1, 3, 4 and 5. Vote: 5-0.

- | | |
|--|----------------|
| 1) Accounts Payable Claims for 9/24/10 (\$79,239.77);
9/24/10 (\$250.95); 09/28/10 (\$37,765.00); 10/01/10 (\$4,250.00) | Approved |
| 2) <i>Approve Minutes from the Town Council Meeting
September 22, 2010</i> | <i>Removed</i> |
| 3) Adopt Resolution 78-2010 Awarding a Services Contract to | Approved |

Omni Janitorial Services, Inc., of Walnut Creek for the Custodial and Building Maintenance Services for the Town-owned buildings

- 4) Adopt a Motion Authorizing the Town Manager to Deem Identified Town-owned Vehicles as Surplus Approved
- 5) Proclamation Declaring October 2010 as Domestic Violence Awareness Month Approved

B. Consideration of Consent Items Removed for Discussion

- 1. Approve Minutes from the Town Meeting September 22, 2010

The following corrections were made to the third and fourth sentences of the paragraph under **Vice Mayor Mendonca's** comments on Page 11:

She [Vice Mayor Mendonca] supported the imposition of restrictions in the event of the development of one home in order to maximize the semi-rural environment and trail space while also minimizing the impacts of one large home. She sought further information to address how two homes on the lot would be in keeping with what the Town would encourage a private property owner to build on this same property.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Mendonca/Harpham) to approve the minutes of the September 22, 2010 meeting, as amended. Vote: 5-0.

VII. REPORTS

A. Mayor's and Councilmembers' Reports

Mayor Chew - Reported that he had attended the Candidates Forum on October 5; the Oktoberfest on October 10; and would visit the Wilder site development in the City of Orinda on October 15; that the next Audit and Finance Committee meeting was scheduled for October 25; the next Annual Town Gown meeting with Saint Mary's College was scheduled for October 26; and he would introduce the new Moraga Town Manager at the next Mayors' Conference.

Vice Mayor Mendonca - Reported that she had attended the Town Gown Conference in Riverside California last week; the Solid Waste Authority meeting on September 29; the first MYIC meeting with another meeting scheduled where the Election of Officers would take place; the Oktoberfest celebrations at the Hacienda on October 10; would participate in a site visit to the Wilder development in the City of Orinda on October 15; and reported that the Town Gown Subcommittee intended to meet quarterly.

Councilmember Harpham - No report.

Councilmember Metcalf - No report.

Councilmember Trotter - Reported that he had attended the Mayors' Conference on October 4 and that the Mayors' Conference Executive Committee would meet on October 22 with Assemblyman Mark DeSaulnier; had attended the Solid Waste Authority meeting; the Oktoberfest celebrations at the Hacienda on October 10; and the Audit and Finance Committee would meet on October 25.

B. Town Manager Update – No report.

VIII. COMMUNICATIONS

There were no Communications.

IX. ADOPTION OF MEETING AGENDA

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Trotter/Harpham) to adopt the Meeting Agenda, as shown. Vote: 5-0.

X. PUBLIC COMMENTS AND SUGGESTIONS

Bob Reynolds, Vice Chair of the Hacienda Foundation, principal sponsor of the Oktoberfest celebrations, expressed appreciation for the participation of the Town Council during the event which had been well attended. He commended all of the volunteer efforts for the celebration and encouraged anyone interested in volunteering for Moraga events to become involved.

Edy Schwartz, President of the Moraga Chamber of Commerce, commented on the improved relationship between Saint Mary's College and the Town of Moraga, particularly related to the Town Gown event. She encouraged the consideration of internships between the Town and Saint Mary's College students and the provision of a place for students to go when leaving the campus, a topic which the Chamber had been discussing with local businesses. She added that the Chamber's Business Department would be sending out a survey in January 2011, and that a Business Seminar sponsored by the Chamber and Mechanics Bank had been scheduled for Tuesday, October 19, 2010 at Saint Mary's College Soda Center at 5:30 p.m.

Barbara Simpson, Moraga, referenced comments made during a prior meeting of the Town Council as to whether or not the media had been invited to Town Council meetings. She noted that one newspaper did not constitute the media and there were other local publications and television stations that could become involved. Limiting the media to one outlet was a concern and she asked the Town Council to expand its definition of the media.

XI. PUBLIC HEARINGS

A. Public Hearing, Consideration of the Appeals of Dollar Tree Stores, Inc., and the Group of Concerned Moraga Citizens Represented by Hollie Lucas-Alcalay from the September 20, 2010 Planning Commission Decision Approving a Permitted Use Application in the Rheem Valley Shopping Center for the Dollar Tree, and Consideration of Adoption of Resolution No. ___-2010 Denying the Appeal of the Group of Concerned Moraga Citizens Represented by Hollie Lucas-Alcalay and Denying in Part and Granting in Part the Appeal of Dollar Tree Stores, from the

September 20, 2010 Planning Commission Decision Approving a Permitted Use Application in the Rheem Valley Shopping Center for the Dollar Tree.

Planning Director Lori Salamack presented the October 13, 2010 staff report and explained that the item was an appeal of the September 20, 2010 Planning Commission decision to approve a permitted use application by Dollar Tree to approve a retail store in the Rheem Valley Shopping Center. The matter had been considered by the Planning Commission on three separate occasions. Prior to adoption of a resolution at its last meeting, the Planning Commission had appointed a subcommittee to work on the findings and draft conditions of approval for the application due to perceived adverse characteristics of the use by the Planning Commission. The Commission's decision had been appealed the next day by Dollar Tree Stores Inc. and appealed the following week by a Group of Concerned Moraga Citizens (GCMC) represented by Hollie Lucas-Alcalay.

Ms. Salamack explained that she had been out of the office when the second appeal had been filed and the appellant GCMC had been informed that the appeal was not being accepted. Staff had later conferred with the Town Attorney and had been advised that the Town was required to accept the second appeal. When the first appeal had been filed, the matter was to be heard by the Town Council as a de novo hearing which meant that all issues would be open on appeal and the applicant had the burden of proof. She noted that regardless of the number of appeals filed, the Moraga Municipal Code (MMC) stated that requirement.

Ms. Salamack advised that appellants must pay for an appeal and the appeal fee had been established at half the application fee or a maximum of \$500. In this case, the Town Council had previously waived the application fee for new businesses wanting to locate in existing vacant space. Also in this case there had been no application fee and therefore no appeal fee. Once the first appeal had been filed there had been no need to file two appeals. She noted her understanding that the Town only accepted one appeal. She referred to the Town Council's passage of Ordinance No. 198 in 2003 which established procedures for the withdrawal of an appeal which became an issue with an application filed in 2001. She clarified that the Town Council had the right to call up any decision of the Planning Commission on appeal, although in the 2001 matter, the Council had been precluded from hearing the appeal by a court decision. As a result, the Council had adopted the new ordinance to specify the rules for the withdrawal of an appeal. She stated that, for the purpose of the subject hearing, all aspects of the application had been properly before the Council with no favor to one side over another.

Ms. Salamack reiterated that the Planning Commission had approved the permitted use application for the Dollar Tree subject to the standards specified in MMC Section 8.36.020(B) including eight findings which must be made by the Planning Commission to approve a permitted use subject to findings, which were not the same to be made for a conditional use permit. The GCMC appellant had included a supplemental document and reference to several General Plan policies that were not being followed. She emphasized that the application involved a permitted use, not a conditional use permit, and that findings of consistency with the General Plan were not the findings that must be made with respect to the application. The same held true with the finding related to property value.

Ms. Salamack explained that the Planning Commission had struggled with Finding 3, which would allow the Town to place conditions of approval on what was otherwise a permitted use. The Commission considered the adverse characteristics of the use and conditioned the approval. She noted that staff had proposed some modifications to the Planning Commission conditions of approval, in part after receipt of a letter from the applicant, Dollar Tree stores, in response to their comments on the conditions. The staff report had identified the Planning Commission's conditions, conditions proposed by the applicant, and those proposed by staff

including changes staff recommended to some of the Commission's conditions of approval, all of which could be detailed with the Council at an appropriate time.

Ms. Salamack understood, based on correspondence received, that Dollar Tree would likely speak to the conditions of approval which were of concern, specifically a condition relating to the maximum height of shelving. Since the staff report had been prepared, she had received communication from the Moraga-Orinda Fire District (MOFD) and from the Building Department regarding regulations for shelf height. The MOFD regulated storage and the height of shelving for storage and the Building Department regulated fixed but not movable shelves. Staff had included in the materials provided to the Town Council copies of an e-mail from the MOFD and the Building Department detailing the concerns with respect to shelving height.

Mayor Chew stated for the record that since there were two appellants, each would be given a total of ten minutes to make a presentation, including rebuttal.

PUBLIC HEARING OPENED

APPELLANTS:

Mike Di Geronimo, Miller Starr Regalia, Attorney representing the Dollar Tree, introduced Dollar Tree Regional Real Estate Manager Linda Duncan, Rosalind Hammond and Julian Guzman with Dollar Tree Operations. He took the opportunity to outline Dollar Tree stores corporate history with several existing stores located in the Bay Area in varying levels of demographics and incomes. He presented the Town Council with a packet of information about Dollar Tree stores and reported that 95 percent of Dollar Tree's merchandise was sold directly from the manufacturer, either a national or private label brand, similar to CVS/pharmacy and Safeway stores. He spoke to the information he had provided on the demographics between the Town of Moraga and existing Dollar Tree stores located in the cities of San Carlos and Granite Bay, which he described as comparable to the Town of Moraga. Photographs of those stores and the merchandise sold were also presented.

Mr. Di Geronimo explained that the application was for a retail user applying to open a store in a retail shopping center that existed and which had been zoned for retail uses. Dollar Tree had a signed lease to sell merchandise as depicted in the photographs presented to the Town Council and would meet all of the Town's MMC requirements. He stated that there was no legal basis to deny a permitted use that met all of the requirements. Experienced with retail businesses, experienced as a Planning Commissioner in the City of San Ramon, and familiar with the process, he suggested that the Dollar Tree was a fine company and would add benefits to the community. Dollar Tree also donated to many charities, some which were identified for the Town Council. He added that Dollar Tree had worked with Town staff to prepare conditions of approval. He stated it would be unlawful to preclude a permitted use if for some reason members of the community did not like that use.

Mr. Di Geronimo spoke to the number of vacancies in the Rheem Valley Shopping Center and suggested that the property manager, Kimco Realty, was a good operator and it was their opinion that the shopping center needed more occupancy to create some vitality, to generate sales taxes, and to attract other retailers. In response to comments that had been made about the Pleasant Hill Dollar Tree store, he objected to the use of that site as a fair example of what could happen in Moraga since it was not a good example of how Dollar Tree operated its stores. He suggested that the San Carlos store and Granite Bay were fairer examples and comparable to Moraga. The Pleasant Hill location had been inherited, was a Dollar Tree clearance center, had a short lease, and that landlord had continual issues with the City of Pleasant Hill regarding the redevelopment of that center. He suggested that Kimco Realty could speak better to Dollar

Tree as a tenant in terms of how it maintained and operated its stores since it operated in other shopping centers owned by Kimco Realty.

Mr. Di Geronimo suggested that Dollar Tree would not generate significant amounts of traffic for a retailer beyond what already existed and would be compatible with the existing uses in the Rheem Valley Shopping Center. Dollar Tree would also sell merchandise similar to what was already being sold by other uses and would comply with all of the staff recommended conditions of approval, with the exception of two conditions including a condition regarding the shelving height which was too restrictive, and a proposed limitation of four-foot high shelving within the window area. He noted that Dollar Tree had a shelf to the right of the store with seasonal merchandise, which shelving must be taller in order to accommodate the larger seasonal merchandise.

Mr. Di Geronimo also spoke to conditions related to noise and stated that the use would be within an existing building. The use would not create any public economic problems but rather would increase the economic vitality of the shopping center and the Town. Conditions related to glare and electrical interference were also noted and had been addressed. Conditions related to the hours of operation would be acceptable to Dollar Tree. He emphasized that the use was a permitted use to be located in an existing shopping center in a space that had been vacant for two years. He asked the Town Council to rely on the expertise of the landlords that they were doing what was right for the shopping center.

In response to the Council, Mr. Di Geronimo clarified that Miller Starr Regalia had been retained to represent Dollar Tree as detailed in correspondence dated October 12, 2010, as contained in the staff report. He reiterated his concerns with some of the conditions and noted that Dollar Tree also had issues with some of the other conditions of approval but would accept them at this time. He urged due process and equal protection as he had outlined in his correspondence. He added that he had received all copies of communications from the MOFD related to the application and emphasized that the use would comply with any building code or Town code, as required by the lease, in effect at the time of application.

Hollie Lucas-Alcalay, Moraga, representing Group of Concerned Moraga Citizens (GCMC), stated that GCMC was pro business and wanted nothing more than a thriving retail community that would meet the Town's needs. She referenced the 2002 Moraga General Plan, which stated that if a proposed project was considered to be inconsistent with the General Plan the project must be modified, denied, or the General Plan amended. She commented that during the course of the proceedings the Planning Commission had struggled over its evaluation of the application based on the MMC and not the General Plan. She read into the record a quote from Planning Commission Vice Chair Driver which had been made during the Planning Commission deliberations. In her opinion, the Town had not lived up to its obligation in that the General Plan stipulated the development of a Specific Plan for the Rheem Valley Shopping Center by the Planning Department, although no such plan had been finalized which could have been helpful to the Planning Commission to utilize during its evaluation of the application. Such a plan had been successfully utilized by the City of Lafayette for its retail guidelines. Also, the General Plan expected that the action plan and implementation priorities would be reviewed annually to monitor achievements and priorities, which had not occurred. The 2002 Moraga General Plan was also to be reviewed annually and modified over time in response to changing conditions, needs, and priorities, with a report annually from the Planning Commission to the Town Council on the status of the implementation of the General Plan, with at least one public hearing to be held. GCMC understood that had not occurred for the past three years, possibly longer.

Mrs. Lucas-Alcalay referenced the MMC and commented that although the Planning Commission had stated it could not judge the application based on the General Plan, the General Plan had been cited as a source on numerous occasions in Planning Commission

decision making deliberations and cited as a source of findings, and should be adhered to as a guiding principle.

Lynn Davis, Moraga, representing GCMC, referenced Finding 3 of the MMC and questioned whether or not Dollar Tree could be made compatible with the neighboring anchor retail stores given that by its own admission and business model it was at the lowest end of the retail spectrum and was not a franchise but a bare bones warehouse outlet for millions of items with a one dollar price point. Dollar Tree's appeal had requested that Condition 14 related to keeping the aisles free and clear of merchandise be eliminated from the conditions. She reported that members of GCMC had personally inspected some of the Dollar Tree stores in the surrounding area and had found that all looked the same with piles of merchandise stocked to the ceilings and with merchandise along the floors. The Planning Commission had agreed that Dollar Tree's method of merchandising was not in keeping with Moraga's character, needs, or priorities and without mitigation would have a negative impact and would be incompatible with the surrounding uses. She noted that Dollar Tree would not change its business model of warehousing merchandise since it would adversely affect its brand. She suggested that Dollar Tree did not represent the type of retail described in the General Plan or the type of future business desired in the Moraga Center Specific Plan (MCSP).

Ms. Davis read into the record Guiding Principles 2-2 and 8, and Policy LU.3 of the Moraga General Plan as it related to the appeal of the proposed Dollar Tree application. She advised that over the past ten days an on-line petition had collected 200 plus signatures against the Dollar Tree store to add to the many e-mails and those who had spoken against the application.

Kathy Macchi spoke to Finding 6 and suggested that the Rheem Valley Shopping Center was in a state of crisis and its condition posed an excessive public economic problem that affected the entire community. She noted that Ms. Salamack had informed the Planning Commission that there was no legal definition for public economic problem and therefore the term was subject to judgment. While the Dollar Tree would be selling items that would generate sales taxes to the town, she stated that some of those items were already available for sale in existing Moraga stores resulting in fewer sales taxes to Moraga. As a result, she suggested that Dollar Tree would have a sales tax neutral effect on the Town, would not provide a friendly business environment, would not increase the sales taxes to the Town, would cannibalize existing businesses, and would not attract but detract desirable retailers to Moraga as opposed to the large percentage of retail sales captured by the cities of Lafayette and Orinda.

PUBLIC COMMENTS OPENED

Tom Wellbrook, Moraga, reported that he had unsuccessfully attempted to open a satellite clinic in the Rheem Valley Shopping Center since he had found the rents to be unreasonable given the current economic conditions, essentially driving potential retail business out of Moraga. He commented on his personal experience and the necessity of relocating his practice to another city as a result of negative issues related to discount retailers that had been located near his business. He referenced an article from a Canadian newspaper about Dollar Tree's refusal to stop selling crack pipes. He urged the Town Council to preserve the quality of the Town and find a loophole in the General Plan regulations that would prevent the store from opening in Moraga.

George Atashkarian, Moraga, questioned the fact that Dollar Tree desired to locate in Moraga in a small shopping center which was accessed by a two-lane road to sell merchandise already being sold by existing merchants. He reported that he had spoken with the landlord for the Rheem Valley Shopping Center and asked whether or not they had met with their tenants to possibly negotiate the rents. He had been informed that the landlord had, in fact, spoken with

its tenants and had offered lower rents for six months although the rents must be paid back in six months which he suggested did not make sense and was not a benefit to the tenants.

Douglas Jones, Moraga, did not support the Dollar Tree application and asked whether or not any other community had successfully prevented such businesses from locating in their communities and what protections were available to protect against such businesses. He suggested there was a general spiraling decline of retail in Moraga. In his opinion, Kimco Realty was driving out higher value retailers and filling the center with discount retailers.

Cecilia Murtagh, Moraga, noted that there was no Dollar Tree store in the City of San Ramon. She commented on the amount of overhead involved in opening a business for a store that would still sell items for one dollar and characterized the merchandise to be sold as junk.

Larry Tessler, Moraga, described his background in retail corporations, and clarified that he was the Vice Chair of the Moraga Chamber of Commerce. While not speaking for the Chamber, he suggested that the Rheem Valley Shopping Center needed at least one more major well-funded retailer and possibly three to four smaller chain affiliated retailers, where a recommendation for a small business to locate in the center would make economic sense. He suggested that there was no leverage to pick and choose retailers and products for the center. He questioned the discouragement of a reputable retail chain that may serve the needs of the community, particularly the underserved Saint Mary's College community. He asked the Town Council to approve the application.

Derek Lenzi, Moraga, pointed out that Orchard Supply Hardware (OSH) had been allowed to locate in Moraga largely based on the potential sales tax revenue to the Town. He commented on stories about the Town possibly going bankrupt, that the Moraga Police Department had been reduced in size, that the City of Orinda had accused Moraga of not carrying its burden relating to the MOFD, and the perception of the Dollar Tree store as a low-end store. He expressed frustration that the City of Lafayette had been able to attract finer businesses with greater sales taxes while Moraga had attracted a Dollar Tree store.

Connie Koplan, Moraga, stated that she had faxed information to the Town Council on the demographics of other Dollar Tree stores in the Bay Area. She suggested that the communities of Granite Bay and San Carlos had different demographics and were not comparables for the Town of Moraga. She identified the demographics for each of 16 cities in the East Bay where Dollar Tree stores were located and suggested that there was no comparison to the Town of Moraga.

Holly Erickson-King, Moraga, questioned the assertion that the General Plan was not relevant to a permitted use application and suggested that the use was inconsistent with the General Plan. She also questioned the assertion that property values were not relevant in that the Planning Commission had found that the type of operations conducted by Dollar Tree for essential merchandising would have a negative public economic impact on surrounding businesses and absent mitigation would cause an excessive public economic problem as a result of the decrease in quality of the Moraga business environment. In the absence of evidence, the Planning Commission had struck language asserting that Dollar Tree would decrease residential property values. She asserted that the public opposition to the Dollar Tree provided that evidence and that the establishment of a Dollar Tree store would drive down the perception of the Rheem Valley Shopping Center to a low-end bargain basement shopping center, which would likely be taken into consideration by potential homebuyers. She referenced a recent article in the Lamorinda Patch regarding the demographics of existing homebuyers, most opposed to the proposed Dollar Tree store. She commented that she had also spoken with a local realtor who had informed her that the Dollar Tree store was a sign of declining retail in Moraga, there was a need for significant investment in both centers, and a need for a revitalized

retail presence to attract new buyers. More people had been drawn to the City of Lafayette because of the vibrancy of that community which she suggested had been borne out by the statistical information from the National Association of Realtors regarding closed homes sales from August 2009-2010. In her opinion, approval of the Dollar Tree would drive down property values and impact Moraga's long-term future.

Scott Heidersbach, Moraga, commented that if he were to consider moving to the Lamorinda area and saw a Dollar Tree store he would not move to that area. He suggested that the business should fit with what the community desired. Given the community opposition, he asked the Town Council to reject the application.

Greg Kusinski, Moraga, understood that the intent of the General Plan was that decisions were to be guided to the best interests of the citizens. He questioned the potential approval of a project that was inconsistent with the General Plan or the guiding principles that had been set forth. He asked the Town Council to deny the Dollar Tree store application.

Stephanie Kusinski, Moraga, stated that she had chosen Moraga due to its schools, community values, charm, and small community character. The Town's General Plan was to be reviewed annually by the Planning Commission which had not occurred in the past three years or more. She acknowledged that empty storefronts were not desirable and that GCMC would be more than willing to work with Kimco Realty, the Town, and the Chamber of Commerce to bring long-term sustainable businesses to Moraga. She commented on the many efforts of the GCMC to identify the types of businesses and restaurants desired by the community. She asked that the future Economic Development Director help shape a retail ordinance, which would support a thriving and robust business environment. GCMC also looked forward to participating in a General Plan review and development of a Specific Plan for the Rheem Center.

Anne Obsitnik, Moraga, referenced the governmental codes related to the General Plan and the preparation of a Specific Plan which must be based upon the General Plan. The MCSP also identified deviations to the MMC when the Specific Plan called for it. She too commented on the fact that the Planning Commission had not reviewed the General Plan on an annual basis. She commented that the cities of Lafayette and Orinda had regulations which included specific language for different districts in their downtowns which had served as protection for those communities. She asked the Town Council, as the representatives of the community, to realize that public opinion was more in opposition than in favor of the Dollar Tree. She suggested that there was a fear factor behind the Planning Commission's decision to go against the MMC and side with the General Plan. She suggested that the decisions made thus far on the application had not reflected the willingness to step outside the general code.

Ms. Obsitnik commented that based on her review of the minutes of Planning Commission meetings and agendas back to January 2007, there had been no notes as to any General Plan review occurring during that period of time. Specific Plans were to impact the MMC and she suggested that the MCSP was a precedent-setting document which stated that the MMC should be revised according to the Specific Plan's needs.

John Welter, representing Kimco Realty, clarified the leasing rates for the Rheem Valley Shopping Center which he acknowledged could be negotiated. He described the leasing aspects of the Rheem Center, reported on two new leases that had been signed for a café and yogurt shop, and advised that the center was 82 percent occupied. He reported that a potential produce store and a dessert restaurant had been placed on hold, and he expressed concern with the momentum slowing down. If the Dollar Tree, which he described as a major tenant although not defined as a major tenant under the MMC, was not permitted, the momentum in the center would stop. Having attended the last three Planning Commission meetings, he had expressed the desire to work with the community to seek out tenants the community wanted.

As to how the Town and businesses could help bring Saint Mary's College together with more retail in the Rheem Valley Shopping Center, he stated that the working class and students could be attracted to the center with more retail such as an alternative shopping retailer. He suggested that Dollar Tree would be consistent with the existing uses in the shopping center and he encouraged the Town Council to support the Dollar Tree application subject to the conditions set forth.

Cavan McCarthy, Moraga, suggested that the issue was not that the use was permitted subject to findings, but that the findings must be made. Having spoken with Mr. Welter, she had asked why retailers were leaving the Rheem Valley Shopping Center and why Dollar Tree was being proposed. She questioned why the Town and the Chamber of Commerce had not spoken to the opportunity to address the condition of the Rheem Center. Having visited the Pleasant Hill Dollar Tree store, she had been told that site was an anomaly although photographs she had taken of the site had shown boxes in the aisles and the like. She had also visited Dollar Tree stores in the cities of Berkeley and Oakland. She reported that she had conducted a cost comparison of items sold by Dollar Tree versus CVS/pharmacy, as an example, and suggested that the store would not be a bargain for seniors and would not be good for Moraga.

Dustie Robeson, Moraga, understood that Dollar Tree's profits had increased over the year with a positive future projected. She suggested that for those who lived on a fixed income there was access to specialty retail shops but having a more convenient location for reduced priced goods should not outweigh the costs to the community. She suggested that potential homebuyers would not choose Moraga if Dollar Tree were located in the community. She asked the Town Council to delay a decision on the matter given the active vocal interest. She urged Dollar Tree to consider opening for business in communities where they were welcome.

Barbara Simpson, Moraga, pointed out that the Town Council did not have control over what businesses opened in the Town. Many past businesses were no longer in existence in Moraga, and she commented on the past discussions and opposition to Starbucks and OSH. She stated that if residents did not like the products sold by Dollar Tree they would shop elsewhere. As to the comparisons of the costs of items sold by CVS/pharmacy versus Dollar Tree, she found CVS prices to be higher than the former Longs Drugstores. She added that she had asked the owner of Diablo Foods whether or not he would consider opening a store in Moraga and he had responded there was not enough business in Moraga. She too would prefer not to have to shop outside Moraga although desired stores were not in Moraga. As to concerns with respect to safety and health risks of items sold by Dollar Tree, she noted that the stores had no control over such items as reflected in the Consumer Product Safety Commission. She suggested that no one would willingly purchase poisonous products and that many items were also sold by competing businesses. She urged the Town Council to approve the Dollar Tree application.

Ms. Salamack clarified for the record that the Town Council received a report on the implementation of the status of the General Plan annually, as the General Plan called to be done, at the beginning of the budget season typically in March or April of every year, which was a publicly-noticed hearing where the public was welcome to participate.

Armand Vasquez, Vice President of Leasing, Kimco Realty, admired the pride of the Moraga community. He was aware that Dollar Tree sold numerous items that could be lower or higher in price than competing businesses. He clarified that the Pleasant Hill Dollar Tree store involved a project being reconsidered through redevelopment with no lease hold beyond two years. In that case, Dollar Tree was not interested in expending funds on a remodel. He cited the San Carlos and Granite Bay Dollar Tree locations as newer projects, photographs of which had been provided. He recognized that the Town Council had the community's interest at heart. Kimco Realty also had the community's interest at heart and was trying to shift its focus in a positive way and take the shopping center in the direction it needed to go.

Mr. Vasquez referenced earlier statements as to the rents being imposed by Kimco Realty and questioned the accuracy of those statements. He clarified that Kimco Realty now had a 49 percent interest equity in the shopping center and he described the decision making process based on budgets and projections. He emphasized that efforts were being made to reach out to the community as to the community's needs. He welcomed input from the Chamber of Commerce as to what types of tenants should be targeted. He suggested that Kimco Realty had more, not less, at stake with the shopping center. He clarified that Kimco Realty had bought out Prudential and there were three different investors in ownership of the remaining percentage. He emphasized that all efforts were being made to turn the shopping center around and Dollar Tree was hoped to be an impetus to attract a tenant for the tenant space adjacent to the Dollar Tree.

Mr. Vasquez affirmed that Kimco Realty would be willing to engage in a Rheem Valley Shopping Center Specific Plan process. He expressed his hope that the current passion from the community would be carried forward. He sought a tenant mix and merchandising plan for the Rheem Valley Shopping Center that would increase sales taxes to the Town and increase property values for both the Town and Kimco Realty.

Maggie Baker, Moraga, encouraged more business diversity. Since Saint Mary's College had been referenced as a key target audience for the Dollar Tree store, she urged more input from the college. She had contacted students groups and did not agree with the assumption that they were the target audience. She expressed concern for the potential other tenants that might be attracted with a Dollar Tree store in the Rheem Valley Shopping Center.

Fred Schroeder, Moraga, a member of the Revenue Enhancement Committee (REC), reported that the REC had conducted research on the Town's shopping centers. He had also considered transferring his business currently located in the City of Lafayette to Moraga although he had determined after contacting Kimco Realty that the potential lease rates were too high. Given that Kimco Realty now had a 49 percent interest in the shopping center, he speculated that they may have removed the smaller tenants to bring in larger box retailers. He opposed the Rheem Valley Shopping Center becoming a destination for discount retailers. He asked that the Council defer its decision pending the hiring of an Economic Development Director.

Mr. Wellbrook rebutted statements made by representatives from Kimco Realty and the suggestion that his comments regarding the rents imposed were inaccurate. He understood that many tenants had left the Rheem Center as a result of the rents.

Karen Chin, Moraga, asked the Town Council to find ways to consider all of the comments and to consider the overall retail climate in Moraga and realize that concerns of the newer residents and families of Moraga mattered since they would drive local retail and schools. She expressed concern that the Dollar Tree may impact existing businesses and future businesses that may consider moving to Moraga.

The following individuals did not speak but offered the following written comments:

Laura Beckner, Moraga, *"The City Council is elected to do what the people want. I thought that was how it works. A Dollar Tree store here is not only the beginning of cancer in Moraga shopping areas but also alarming in that Dollar Stores is attracted to Moraga! City Council should address this problem as well as do whatever it takes to prevent this bad blot on our town of Moraga."*

Marylou Lucke, Moraga, *"We don't need or want the Dollar Store."*

Mayor Chew allowed each appellant three minutes to address the Town Council for rebuttal.

REBUTTAL:

Mr. Di Geronimo suggested it was appropriate and right for the community to participate in the hearing, although it was important to recognize the Town had regulations that had been adopted and followed by the Dollar Tree. He understood that the public was upset with the absence of a specific plan or regulation in place that would prohibit the type of use being proposed. He suggested that the proof that the use was compatible had been evidenced by the fact that the Dollar Tree would sell merchandise that was already available. In his opinion there was no incompatibility, the use was allowed, and there was nothing in the code that precluded the use. He reported that there were a couple of Dollar Tree stores under consideration for the City of San Ramon and suggested that it was guaranteed that those stores would be approved in that community if a lease was signed. He reiterated that they had an application with a lease signed with the landlord and the Town Council owed it to the applicant to follow its own laws and regulations and to approve the application. He suggested that the Town Attorney would advise that the General Plan was not relevant and that the use must be consistent with the MMC and not the General Plan since there was no specific plan for the property.

Mr. Di Geronimo stated that if Dollar Tree's application was approved, Dollar Tree would work hard to prove residents wrong and show that they were a good retailer. He added that Dollar Tree changed its product mix to fit the needs of the community and suggested that if the market did not work Dollar Tree would go out of business. In response to a Council request for assurance, on the record, if the application for Dollar Tree was approved that no illegal item would be sold, he clarified that the reference to crack pipes involved a Canadian Dollar Tree store. He guaranteed that Dollar Tree would not sell anything illegal. As to a request that Dollar Tree personnel would contact the Moraga Police Department in the event or knowledge of any criminal or illegal activity, he presented his business card to the Council.

Ms. Lucas-Alcalay reiterated that GCMC had been informed that it could not appeal the decision of the Planning Commission the day after the Planning Commission meeting when the application had been approved and when GCMC had been informed that there could be only one appellant. As a final effort and after review of the MMC, GCMC had decided to submit an appeal almost two weeks after Dollar Tree had submitted its appeal. She suggested that it was unfair that citizens who were opposed to something did not have a voice. She clarified that only after staff had later contacted her and informed her that GCMC could have its appeal after Town Attorney review, GCMC had less than 24 hours to submit the appeal and only six days before the appeal hearing before the Town Council. She suggested that GCMC did not have a level playing field to address the appeal as had Dollar Tree. GCMC's appeal had also cited Findings 3 and 6, specific areas of the code, and reasons why the Dollar Tree store application would cause an excessive public economic problem and why the proposed use would not be compatible with its neighbors. She again asked for more time to allow GCMC to prepare its appeal.

Ms. Davis added that members of the GCMC had also appeared before the Town Council on September 22 after the September 20 Planning Commission decision to address their concerns and had been informed at that time that they were not allowed to file an appeal. She otherwise asked who would pay for the GCMC appeal emphasizing that members were working families.

Mayor Chew declared a recess at 9:50 p.m. The Town Council meeting reconvened at 10:00 p.m. with all Councilmembers present.

Town Attorney Michelle Kenyon stated that if there were three Councilmembers who were in agreement that the GCMC appellant needed more time it would be wise to continue the matter

to give GCMC that time. If that additional time was not allowed, in her opinion it was not a due process violation, but if the appellant was seeking more time and had raised an issue the Council was of the opinion was a reasonable concern, unless some other party, such as the applicant or appellant would be prejudiced by that delay, it made sense to provide for a continuance.

Responding to whether or not a continuance would be acceptable, Mr. Di Geronimo explained that the Dollar Tree store had been budgeted for this year and a lease signed in anticipation of the store opening in 2010. If the public hearing was continued, he stated that could be prejudicial and may well jeopardize the deal. He was uncertain what issue the GCMC appellant would raise other than appraisals on the potential impact on home values. He added that this was the first time he had heard the claim that a Dollar Tree store would affect home values. In his opinion, there was no empirical evidence to support such a claim which was pure speculation and not relevant. He recognized that the decision was up to the Town Council. If the public hearing was continued for 30 days it would push the store into the next quarter possibly jeopardizing the application.

Linda Duncan, Regional Real Estate Manager for Dollar Tree stores, clarified that Dollar Tree stores were budgeted by year and quarter with the Moraga Dollar Tree store planned to open in 2010. As with every retailer, Dollar Tree stores had a retail blackout starting August 30 where nothing was done between that time and November 1. She also noted the time involved in obtaining a permit from the Town, the fact that it took 90 days for a build-out and two weeks to stock. Even if a decision was made by the Town Council this date, the application was already out four months not including the blackout period.

Ms. Kenyon suggested that by granting a continuance the Town would not be exposed to legal liability from the applicant, Dollar Tree.

Ms. Duncan further clarified that even if the application were approved, Dollar Tree would not open in time for Christmas 2010 but could be open by January 30, 2011. A continuance to the first meeting in November would shift the opening to the second quarter in mid-May based on fiscal quarters, provided she was allowed to open, since Dollar Tree budgeted by quarters and they could be pushed out by another store application within the corporation.

Mr. Segrest reiterated the background of the appeal discussion with GCMC and the fact that although GCMC had been initially told it could not file an appeal, which had later been corrected by staff, GCMC had been informed by staff that the appeal would be a de novo hearing where everything would be on the table and their arguments considered as would any arguments by the applicant, Dollar Tree.

Ms. Salamack referenced the meeting minutes from the September 22, 2010 Town Council meeting, at which time members of GCMC had spoken during public comment, and she had reported that the application had been approved by the Planning Commission and the Planning Commission's decision had been appealed by the applicant, Dollar Tree. She suggested that as early as September 22, 2010, GCMC in a public meeting had been advised of its opportunity to be present and participate in an appeal hearing. She also had a conversation with one of the appellants from GCMC regarding reference to a MMC code section which was not the correct section leading to the argument that the Town had not followed its proper process in regards to the appeal. GCMC had referenced MMC Section 8.12.220, the appeal of a decision not otherwise provided for and which was not the relevant code section in this case. The correct MMC section was identified as Section 8.12.200, appeal of decisions. She suggested that GCMC had been under the misunderstanding by reading the wrong code section as to what the process would be for the appeal. She had addressed that issue with GCMC.

Ms. Salamack added that the matter had also been considered three times by the Planning Commission and this was the fourth public hearing on the matter with consistent testimony throughout the four public hearings. She urged the Council to review the findings that needed to be made and that the Council consider whether or not it needed additional time to make that decision. She emphasized that staff had worked in good faith with the appellant group.

Ms. Lucas-Alcalay reiterated that she had been informed that only one appeal could be filed, and that information had been provided the day after the Planning Commission meeting. She had been advised of the de novo hearing process, but had been informed that the only recourse was to participate in the three-minute public discussion which had led to a decision of GCMC not to appeal. When members of GCMC had later read the appeal process, she decided to appeal and wanted it on the record why GCMC could not file an appeal. She otherwise acknowledged in speaking with staff that she had learned that the wrong MMC section had been cited although that was not in the context of her efforts in speaking with staff for a legal definition as to why a second appeal could not be made. When she had filed an appeal, with her name and address, she understood she was to receive a statement in writing as to whether or not the appeal would be denied or accepted and only after later contacting staff to learn of the status of the appeal, staff had informed her that the appeal had been approved and that staff had been unable to contact her in writing since staff did not have any contact information.

Mr. Di Geronimo stated that after contacting Corporate Offices for Dollar Tree, he had been assured that if the public hearing were continued Dollar Tree would do whatever was possible to keep the application pending.

Ms. Salamack corrected the appellants that the appeal from GCMC had been filed on Thursday, September 30, 2010, the end of the appeal period. That following Monday she had conferred with the Town Attorney to determine the status of the document accepted by Planning staff and advised at that time to offer to the appellant an opportunity to provide grounds for the appeal to be incorporated into the staff report since GCMC's statement of appeal had stated that it would be amending its appeal statement to provide those grounds. She had not asked for anything that GCMC had not already anticipated providing to the Town.

Ms. Davis reiterated that members of GCMC had attended the September 20 Planning Commission meeting and attended the September 22 Town Council meeting and learned at that time from staff that only one appeal would be heard. She had later researched the MMC and GCMC had then decided to file an appeal and had asked the Town for a written denial of the appeal, which had not been provided.

Dale Walwark, Moraga, stated that he had been involved in those discussions, and clarified his comments made during the September 22 Town Council meeting where he had verified with staff the appeal process and applicable appeal fees. The GCMC appellant had not been told it could not file an appeal, but that an appeal did not have to be filed because an appeal had already been filed and the hearing would be a de novo hearing. He questioned the suggestion that staff had been unfair in this matter.

Councilmember Harpham stated that if the rights of the appellant had been damaged, it was accidental. If they were given extra time, he urged the appellants to prepare a reasoned and logical argument based on the law.

The Town Council discussed the public hearing/appeals for the Dollar Tree store and by consensus supported a continuance of the public hearing to a regular meeting of the Town Council scheduled for November 10, 2010, in order for the appellant GCMC to have adequate time to prepare for the appeal hearing and cure any suggestion of due process issues with the

appeal procedures and based on advice from the Town Attorney that there would be no legal liability on the part of the Town if the item were continued.

ACTION: It was M/S (Trotter/Mendonca) to continue Public Hearing, Consideration of the Appeals of Dollar Tree Stores, Inc., and the Group of Concerned Moraga Citizens Represented by Hollie Lucas-Alcalay from the September 20, 2010 Planning Commission Decision Approving a Permitted Use Application in the Rheem Valley Shopping Center for the Dollar Tree, and Consideration of Adoption of Resolution No. ___-2010 Denying the Appeal of the Group of Concerned Moraga Citizens Represented by Hollie Lucas-Alcalay and Denying in Part and Granting in Part the Appeal of Dollar Tree Stores, from the September 20, 2010 Planning Commission Decision Approving a Permitted Use Application in the Rheem Valley Shopping Center for the Dollar Tree, to the November 10, 2010 regularly scheduled Town Council meeting. Vote: 5-0.

XII. ORDINANCES, RESOLUTIONS AND REQUESTS FOR ACTION

- A.** Adopt Resolution 79-2010 Authorizing the Town Manager to Execute a Project Operating Agreement with East Bay Regional Communications System Authority

Police Chief Robert Priebe explained that experiences with both the Oakland Hills Fire and the San Bruno Pipeline Explosion confirmed it was critical that first responders be able to communicate with one another in emergency situations. In 2007, the East Bay Regional Communications System Authority (EBRCSA) was created as a Joint Powers Authority incorporating agencies from both Alameda and Contra Costa Counties. The Town of Moraga adopted a resolution in 2007 to join EBRCSA which was expected to be completed in 2013. The Town must officially commit to be a part of EBRCSA and agree to funding sources. He reported that the estimated cost to complete the new interoperable radio system was almost \$70 million. Some Citizen's Option for Public Safety (COPS) grant funds and other sources of funds have been used to develop the system. EBRCSA had worked with both Alameda and Contra Costa Counties on financing strategies that would incorporate a combination of grants and debt financing to fund the remaining costs to complete the system. Both counties were also taking advantage of American Recovery and Reinvestment Act (ARRA) bonds.

In lieu of EBRCSA independently undertaking the financing, both counties had agreed to increase their size of debt issuance to include the needed EBRCSA funds based on the distribution of system users. EBRCSA would then issue the bonds to the counties. The cost to each member agency to build the radio system would be allocated based on the total subscriber units (radios). Monthly per radio charges will be based on total annual debt service payment plus operations and maintenance costs. The monthly user fees had been estimated at \$40 to \$45 per radio, with the debt service payment to commence in 2013/14 once the entire system was operational and consist of a 15-year bond running through 2028. As more users joined during the intervening two years the rate would be adjusted to match the total user count.

Chief Priebe advised that agencies may choose to fund their share of the system cost up front in lieu of participating in the monthly financing, which would require payment for system maintenance fees only. In order for the Town to capitalize on the opportunity to partner with Alameda and Contra Costa Counties, the EBRCSA would need each member agency to adopt a resolution to approve the Project Operating Agreement. The adoption of the resolution would financially commit the Town of Moraga to participate based on the number of radios that it planned to operate on the system. The Town of Moraga planned to utilize 50 radios in the system for Police and Public Works with a current estimated cost of \$71,000 to be paid from the Traffic Safety Fund. Once the system fee obligation was met, the Town would have to pay a monthly maintenance fee for each radio currently estimated at \$26 per month which would have to be budgeted for beginning Fiscal Year 2013-14.

Chief Priebe noted that the cost of purchasing the radio units for the system would be separate, between \$3,000 and \$5,000 per radio. In the event the Council did not elect to enter into the agreement with the EBRCSA, staff would have to consider alternative options although there were few alternatives that could be considered since there were limited agencies the Town may contract with if the Town Council decided not to join EBRCSA. He asked that the Town Council adopt the resolution authorizing the Town Manager to Execute a Project Operating Agreement with the EBRCSA.

In response to the Council, Chief Priebe advised that the estimated cost of \$71,000 would be due by the end of this year. The Traffic Safety Fund included monies that had been used to purchase police equipment and it was appropriate to pay the \$71,000 from that fund. The new radio equipment would replace the existing radio system to be used by Police and Public Works. The units could be purchased over time since the Town had until 2013 to have a fully operational system. The intent was to have the Police Department fully operational first and phase in the Public Works Department. He further clarified the financing details being proposed and his intent to potentially petition the committee overseeing the use of COPS funds to determine whether or not such funds could be used for the purchase of more radios if the other funding sources were not viable. The intent was that the radios be purchased in bulk to ensure the best purchase price possible in cooperation with other agencies. He clarified that the lifespan of the current radios was seven to ten years although the lifespan of the newer radios was unknown. The maintenance fee had been intended to build up a fund to continue the system and replace parts as needed.

The Town's monthly maintenance fee for each radio, currently estimated at \$26 a month, would be constant and might actually be reduced with the participation of other agencies. All 19 cities in Contra Costa County were participating. The cost of the current radio system had been incorporated in the Town's contract with the Contra Costa County Sheriff's Department, estimated at \$100,000 a year, which would increase in the future. The County would continue to be paid for dispatch services in addition to payments to the EBRCSA.

Chief Priebe understood that the language in the agreement had been vetted by the Town Attorney's office and that there could be modification to Page 25 related to the user payments in that the radio count had increased since the agreement had been prepared and a final user payment would be better known at the end of the year.

Mr. Segrest clarified that the amended mid-year budget would include the \$71,000.

PUBLIC COMMENTS OPENED

Barbara Simpson, Moraga, understood that the Town Council had no choice but to support the item. She urged the Town Council to support the local Police and Fire Departments and approve the item.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Trotter/Mendonca) to adopt Resolution 79-2010, Authorizing the Town Manager to Execute a Project Operating Agreement with the East Bay Regional Communications System Authority and to pay the system financing costs up front. Vote: 5-0.

ACTION: It was M/S (Trotter/Mendonca) to extend the Town Council meeting to 11:10 P.M. Vote: 5-0.

B. Adopt Resolution 80-2010 in Support of Measure O to Fund Local Transportation Improvements in Contra Costa County

Mr. Segrest reported that if approved Measure O would involve an increase of \$10 to Vehicle License Fees (VLF) providing approximately \$108,000 annually to the Town of Moraga local transportation improvements, would increase the Town's return-to-source funding from Measure J by approximately 40 percent, and would provide critical funding to help address the deterioration of neighborhood streets. He stated he was uncertain of the number of cities in the County that had expressed support for the measure. He asked that the Town Council adopt the resolution supporting Measure O.

As a member of the Contra Costa Transportation Authority (CCTA), **Councilmember Metcalf** understood that the City of Clayton had passed a resolution in support and that such resolutions would be considered by other cities in the County this month.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Metcalf/Mendonca) to adopt Resolution No. 80-2010 in Support of Measure O to Fund Local Transportation Improvements in Contra Costa County. Vote: 5-0.

XIII. COUNCIL REQUESTS FOR FUTURE AGENDA ITEMS

Mayor Chew requested that Town Council meetings be videotaped and web-streamed possibly part time by a Saint Mary's College student. He asked that the issue be considered as a future agenda item although he understood it had not been one of the top priorities listed during the Town Council Goal Setting Session.

XIV. ADJOURNMENT

ACTION: It was M/S (Trotter/Mendonca) to adjourn the meeting at 11:09 P.M. Vote: 5-0.

Respectfully submitted by:

Marty C. McInturf, Town Clerk

Approved by the Town Council:

Ken Chew, Mayor