

**TOWN OF MORAGA
TOWN COUNCIL REGULAR MEETING**

**November 10, 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 Ken 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

Mayor Chew led the Pledge of Allegiance.

III. SPECIAL ANNOUNCEMENTS

Mayor Chew introduced new Town Manager Jill Keimach who had officially started employment with the Town on November 1, 2010.

IV. PROCLAMATIONS AND PRESENTATIONS

- A.** Proclamation Accepting the Commons Park Veterans Memorial Monument provided by Tony Knox

Parks and Recreation Director Jay Ingram introduced Tony Knox, a member of Boy Scout Troop 246, and cited a number of the Troop accomplishments and Mr. Knox's efforts to provide a Veterans Memorial Rock in the Commons Park along the walking path. He reported that a celebration would be held at the Commons Park on Thursday November 11, at 11:00 a.m. in honor of Veterans Day.

Tony Knox described the efforts to build the Veterans Memorial Rock at the Commons Park. He took the opportunity to thank everyone who had provided assistance and funding for the project.

Mayor Chew read into the record the proclamation accepting the Commons Park Veterans Memorial Monument provided by Tony Knox and presented the proclamation to Mr. Knox.

PUBLIC COMMENTS OPENED

John Haffner, a member of the Park and Recreation Commission, clarified that the project had been conceived and completed by Boy Scout Troop 246 as an Eagle Scout Project. He thanked the Council for the proclamation and commended everyone for their assistance on the project. He welcomed everyone to attend the ceremony scheduled for November 11 and announced that a Veterans Memorial Service would also be held at Campolindo High School at 3:00 p.m. on November 11 on the school grounds honoring two fallen soldiers.

PUBLIC COMMENTS CLOSED

V. PUBLIC COMMENTS AND SUGGESTIONS

Derek Zemrak, New Rheem Theatre, announced that the 13th Annual California Independent Film Festival (CAIFF) would be held from January 28 to February 3, 2011 at the New Rheem Theatre, and stated the event would bring economic benefits to the Town with national and international exposure, and looked forward to the continued support from the local community.

Edy Schwartz, President of the Moraga Chamber of Commerce, agreed that the CAIFF would produce many economic benefits to Moraga. She commended the new operators of the Rheem Theatre for investing in the community, noted the many events that were being held at the theatre, and stated that a meeting had been scheduled at Terzetto's on November 17 to discuss the community's efforts to make the theatre part of the local community.

VI. ADOPTION OF THE CONSENT AGENDA

A. Approval of Consent Items

Consent Agenda Items 4 and 6 were removed from the Consent Agenda.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Trotter/Mendonca) to approve Consent Agenda items 1, 2, 3 and 5. Vote: 5-0.
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| 1) Accounts Payable Claims for 10/22/2010 (\$103,562.27) | Approved |
| 2) Approve Minutes from the Town Council Meeting of October 13, 2010 | Approved |
| 3) Adopt Resolution 84-2010 Authorizing Staff to Enter into an Agreement with Synergy Enterprises, Inc. in an Amount Not to Exceed \$13,000 for the Removal of Asbestos at the Hacienda, CIP Project No. 10-305 | Approved |
| 4) <i>Adopt Resolution 86-2010 Authorizing Staff to Enter into an Agreement with Quality Striping, Inc. of San Mateo in an Amount Not to Exceed \$17,500 for Road Striping and Marking at Various Locations throughout Town</i> | <i>Removed</i> |
| 5) Adopt Resolution 85-2010 Authorizing Staff to Enter into an Agreement with Alcal-Arcade Contracting, Inc., in an Amount | Approved |

- 6) *Adoption of Resolution 87-2010 Ratifying Moraga-Orinda Fire District Ordinance 10-04, Adopting the 2010 California Fire Code and the 2009 International Fire Code, with Moraga-Orinda Fire District Amendments*

Removed

B. Approval of the Consent Items Removed for Discussion

1. Adopt Resolution 86-2010 Authorizing Staff to Enter into an Agreement with Quality Striping, Inc. of San Mateo in an Amount Not to Exceed \$17,500 for Road Striping and Marking at Various Locations throughout Town

Public Works Director/Town Engineer Jill Mercurio clarified that as part of the project striping for two basketball courts at the Commons Park would be paid through the General Fund Operating Budgets. The roadwork would be paid through Measure J funds. The staff report could be amended to clarify that issue.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Metcalf/Mendonca) to adopt Resolution 86-2010 Authorizing Staff to Enter into an Agreement with Quality Striping, Inc. of San Mateo in an Amount Not to Exceed \$17,500 for Road Striping and Marking at Various Locations throughout Town, with the staff report to be amended to clarify that the striping of the basketball courts at the Commons Park would be conducted through General Fund Operating Budget funds and the roadwork would be paid through Measure J funds. Vote: 5-0.

2. Adoption of Resolution 87-2010 Ratifying the Moraga-Orinda Fire District (MOFD) Ordinance 10-04, Adopting the 2010 California Fire Code and the 2009 International Fire Code, with Moraga-Orinda Fire District Amendments

Town Attorney Michelle Kenyon clarified that, as long as the Town could make certain findings with regard to the ordinance, the Council could ratify the ordinance.

Mike Mentink, MOFD Fire Marshal, advised that MOFD Ordinance 10-04 and the MOFD Amendments had been noticed to the public in the local newspaper prior to the first reading. He reported that the required process had been followed with a second reading, public hearing, and formal adoption. When adopted, the ordinance had been printed in the newspaper, all pursuant to State law.

Mr. Mentink also noted that he had provided staff with a table which had explained the intent of the occupancy classifications and general descriptions. The table was not intended to be included in the ordinance since the ordinance was a companion document to the code. He asked that the resolution not be amended to include the table.

Ms. Kenyon recommended that the last clause of Resolution 87-2010 be amended to read:

NOW, THEREFORE, BE IT RESOLVED, that the Town Council does ratify Moraga-Orinda Fire District Ordinance No. 10-04 to be effective in the Town of Moraga.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Trotter/Metcalf) to adopt Resolution 87-2010 ratifying the Moraga-Orinda Fire District Ordinance 10-04, adopting the 2010 California Fire Code and the 2009 International Fire Code, with Moraga-Orinda Fire District Amendments, as amended. Vote: 5-0.

VII. ADOPTION OF MEETING AGENDA

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

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

VIII. REPORTS

A. Mayor's and Councilmembers' Reports

Mayor Chew – Reported that he had attended the Mayors' Conference on November 4 and had been invited to participate in the Interfaith Panel at the Lafayette-Orinda Presbyterian Church on November 7.

Vice Mayor Mendonca – Reported that she had attended the Central Contra Costa Solid Waste Authority rate-setting meeting in October and would be attending the November MYIC meeting; reported that Saint Mary's College had produced a six-month schedule for its 150th Anniversary; and reported that she planned to attend the Veterans Memorial on November 11 at Commons Park.

Councilmember Harpham – Reported that he had attended a recent Traffic Safety Advisory Committee (TSAC) meeting and had attended the November 1 Planning Commission meeting.

Councilmember Metcalf – No report.

Councilmember Trotter - No report.

B. Town Manager Update – Town Manager Jill Keimach reminded the Council that the State of the Town Address had been scheduled for November 17 at 6:00 p.m. at the Holy Trinity Serbian Church. She also reported that the Rancho Laguna II Appeal had been re-scheduled for the first meeting of January 2011.

IX. DISCUSSION ITEMS - None

X. PUBLIC HEARINGS

A. Public Hearing and Consideration of Adoption of Resolution 88-2010 Approving Grading and Hillside Development Permit 01-10 for Mr. and Mrs. Robert White (Owner/Applicant), 32 Buckingham Drive as Recommended for Approval by the Planning Commission (Continued from Council Meeting of October 27, 2010)

Senior Planner Richard Chamberlain presented the staff report dated November 10, 2010 for a Hillside Development Permit and Grading Permit to grade a hillside with an average slope greater than 25 percent with an excavation of approximately 50 cubic yards for a retaining wall and storage building set into the hillside. Moraga Municipal Code (MMC) Section 14.16.020 (Grading Ordinance) required the review by the Planning Commission with a recommendation to the Town Council for approval of the grading where average predevelopment slopes within the area of disturbance was 25 percent or greater. MMC Section 8.136.050-A required a Hillside Development Permit for any project which involved grading, clearing, construction upon or alteration of hillside land, defined as any slope of 20 percent or more.

Mr. Chamberlain reported that on January 9, 2006 the Design Review Board (DRB) had approved the grading and retaining walls at the east side of the rear yard. In May 2009 staff had become aware of additional grading and construction absent a permit on the west side of the property although 75 percent of the grading had been completed. The project was to be evaluated as if the project had not been started. The Planning Commission held three public hearings on the project on August 2, September 7, and September 20, 2010. After the September 7 meeting, the Commission appointed a subcommittee to draft findings and conditions for consideration by the Town Council. During the September 20 meeting, the Commission adopted a resolution which incorporated the subcommittee's recommendations for conditional approval of the grading.

Mr. Chamberlain advised that the project was categorically exempt from California Environmental Quality Act (CEQA) regulations. Public hearing notices had been mailed to all property owners within 300 feet of the subject property on October 15. No correspondence or testimony had been received during the Planning Commission meetings or prior to the Town Council meeting. Mr. Chamberlain identified the requirements of MMC Section 14.16.030 and a discussion of the required findings, as outlined in the November 10 staff report. He advised that staff had prepared a draft resolution for approval of the grading and retaining walls based on the recommended findings from the Planning Commission with the conditions of approval having been expanded to include recommendations from the Engineering Department.

PUBLIC HEARING OPENED

Robert White, Moraga, acknowledged his mistakes in pursuing the process but stated that the structure was sound and was not a concern to his neighbors.

Rudolph Mortensen, Moraga, identified his property as adjoining the White property. He saw no problem with the construction that had been done, but noted that the soil on the hillside was prone to sliding when moist. He asked the Town Council to consider the requirement of a signed written statement that any slide or damage to his property would not be at his expense. He acknowledged that he had not spoken with Mr. White about his request and was unaware of the issue until he had received notification of the public hearing.

Mr. White clarified that all of the excavation and use of heavy equipment had been completed and there would be no vibration. There would also be no construction until after April 15 when the soil would be dry. He added that the plans had called for a permanent roof with rebar and perma seal with a layer of sod for the storage building structure. He acknowledged his understanding that a roof on the structure would require the approval of a variance which was a concern given the time involved in obtaining such an approval from the Town.

PUBLIC HEARING CLOSED

In response to the Council, Mr. Chamberlain explained that the Town of Moraga utilized Contra Costa County's Public Works Department Code Enforcement Officer who had brought the project to the Town's attention. He described the County's violation process and noted that most property owners responded after a first notice of violation. He noted that the Town was also considering an ordinance in the future that would allow the Town more flexibility to address such violations.

Planning Director Lori Salamack added that staff was working on an Administrative Services Ordinance to be brought to the Town Council in the next year. She also described the penalties imposed for work done absent required permits.

Mr. White commented that his contractor had initially informed him that a permit was not needed since the other retaining walls had been permitted in 2006 and the most recent work was much less visible. He acknowledged that he had not done his due diligence in this case and that it was likely the work that had been approved in 2006 would not be approved today.

The Town Council discussed the item and made the following comments and or direction to staff:

- Agreed that the MMC findings could be made to approve a Grading and Hillside Development Permit;
- Revised the BE IT FURTHER RESOLVED clause as shown on Page 2 of the resolution, to read:

BE IT FURTHER RESOLVED, prior to the installation of a roof or deck above the "storage building," the applicant shall apply to the Town for approval of a variance to the 10-foot required side yard setback for a building.

- Revised Finding 3, as shown on Page 2 of 4 of Resolution 09-2010, Part 1 - Findings Based on MMC Section 14.16.030 to read:

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

ACTION: It was M/S (Trotter/Mendonca) to adopt Resolution 88-2010 Approving Grading and Hillside Development Permit 01-10 for Mr. and Mrs. Robert White (Owner/Applicant), 32 Buckingham Drive as Recommended for Approval by the Planning Commission, as modified. Vote: 5-0.

- B. Public Hearing, and Continued 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 Continued Consideration of Adoption of Resolution No. 89-2010 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, Inc. from the September 20, 2010 Planning Commission Decision Approving a Permitted Use Application in the Rheem

Planning Director Salamack reported that the staff report for the public hearing had been presented to the Town Council during the meeting of October 13, 2010. Subsequent to that meeting, staff had advised the appellants of the need to submit any materials to November 10 staff report to the Town by October 20 to allow it to be incorporated in time for the November 10 staff report. At that time staff had received no additional materials from either of the appellants. The Group of Concerned Moraga Citizens (GCMC) however, advised staff of the fact that they would also be appealing the application based on public health and safety concerns.

On November 9, 2010, the Town received a substantial packet of information from the GCMC which had been provided to the Town Council consistent with the Town Council rules governing the conduct of business by the Town Council calling for correspondence exceeding one page to be provided at least 24 hours in advance of the public hearing.

Ms. Salamack advised that staff had reviewed the materials submitted by GCMC and noted that the concerns included the argument that the Town had erroneously processed the application and it should have been processed as a conditional rather than a permitted use since a portion of the sales would be from food and beverages. She noted that the MMC required retail food businesses and restaurants to obtain a conditional use permit as opposed to a permitted use. In this case, staff had asked the applicant at the time of submittal to identify the portion of the business attributed to food sales. The applicant had indicated in its application that food sales would be incidental to the business and occupy approximately 10 percent of the sales floor area. She identified the classifications for retail trade and food retailers where staff would have required a conditional use permit; however, staff had not required Dollar Tree or other applications where the sales of food and beverage would be a small component of the overall sales to obtain a conditional use permit which had been a past practice of the Town and was not new to the application.

Ms. Salamack noted, as an example, that Blockbuster, which had been in the same location as the proposed Dollar Tree in the Rheem Valley Shopping Center, had primary business sales of videos and games but also sold food items associated with the use. Dollar Tree had been classified as a General Merchandise Retailer, not a food retailer, on a standard industrial classification. When asked, Ms. Salamack clarified that CVS/pharmacy had a classification of Retail Business - Pharmacy and also sold food and beverage items that were incidental to the primary business purpose of Retail Pharmacy.

PUBLIC HEARING OPENED

APPELLANTS:

Hollie Lucas-Alcalay, Moraga, representing Group of Concerned Moraga Citizens (GCMC) reviewed the packet of materials provided by the appellants dated November 10, 2010. She asked that the Town Council deny the request by Dollar Tree for a permitted use application. She suggested that Dollar Tree had incorrectly filed for a permitted use application. The MMC stated that a restaurant or other retail business where food and beverages was sold or distributed was permitted on the issuance of a conditional use permit. She asked the Town Council to apply the MMC as written, to deny the application, and to require Dollar Tree to apply for a conditional use permit. She added that regardless of the land use classification, the Town Council should uphold the spirit of the General Plan and both case and State law had been provided to the Town Council in that regard. She read into the record Guiding Principle 12 and Policy LU-3 suggesting that if the application was evaluated under that General Plan criteria, the application would not be permitted.

Ms. Lucas-Alcalay also suggested that the pattern and practices of the Dollar Tree stores demonstrated a disregard of the health and safety of the consumer which could not be mitigated as required, and would therefore not comply with Finding 3. She spoke to the business practices and model for Dollar Trees stores to sell knock-off brands in order to achieve its price point, and the sale of dangerous products in violation of Federal regulations and State Health and Safety Codes as evidenced by samples of products that were provided to the Town Council. She suggested that the pattern and practice of Dollar Tree stores had created a hazardous work environment evidenced by OSHA fines with the business having been classified by OSHA as a repeat and continuous violator.

Ms. Lucas-Alcalay added that she had personally spoken with the Office of the Attorney General for the State of Vermont in which a Dollar Tree store manager had been asked by higher officials in the Dollar Tree chain to remove posted signage warning the public of the sale of some products that contained lead. She stated that based on the information the appellants had provided, the Town Council should be able to deny the application and direct the applicant to refile under the appropriate use permit classification. She suggested that the Town Council could not make Findings 3 and 6 for a permitted use permit, or Findings B, D, E and F for a conditional use permit. She urged the Town Council to deny the application and protect the community from the Dollar Tree.

PUBLIC COMMENTS:

Cliff Dochterman, Moraga, expressed concern basing a decision on fear and speculation with the government establishing a business community. He supported free enterprise established by the marketplace and the consumer with the risk taken by the enterprise. He urged the Town Council to approve the Dollar Tree store.

David Miller, Moraga, commented on the fact that Dollar Tree was a national chain that was not interested in local communities but in making money. He commended the volunteer efforts for economic development and urged efforts in working with Kimco Realty to obtain businesses desired by the community.

Chris Maher, Moraga, suggested that Moraga did not need retailers such as Dollar Tree. He urged the Town to make an effort to attract better businesses and urged the Town Council to focus on that rather than businesses such as Dollar Tree.

John Levy, Moraga, asked the Town Council to address why the indemnification clause had been removed from the resolution for the Dollar Tree store, particularly given current economic conditions.

Krista Knutson, Moraga, expressed her opposition to the Dollar Tree store. As a newer Town resident, she pointed out the lack of correlation between home prices and local businesses. She questioned the retail goal of Moraga in allowing a Dollar Tree to locate in the Town.

Jodi Weaver, Moraga, spoke to the character of the Moraga community and suggested that the Dollar Tree was in direct conflict with a healthy sustainable community. She referenced the products sold by Dollar Tree which could end up in local landfills. She urged the Town Council to oppose the Dollar Tree store.

Ann Means, Moraga, suggested that Kimco Realty could work harder to obtain a better tenant for the Rheem Valley Shopping Center. She objected to the store for all the reasons previously expressed by others.

Leah Saromi, Moraga, also opposed approval of the Dollar Tree store and was confident the Town Council would deny the application.

Holly Erickson-King, Moraga, suggested that the General Plan was relevant to a permitted use application, that the use was inconsistent with MMC Finding 6, and that the Planning Commission had found that the use 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. She noted that the Planning Commission had relied on Section 3 of the MMC to condition its approval on mitigation factors. The Dollar Tree would not only negatively impact the Town's ability to attract and retain desired businesses but would impact residential property values which had already been impacted by the current real estate market.

Ms. Erickson-King suggested that the Dollar Tree would offer the perception of the Rheem Valley Shopping Center as a discount center, commented on the public outcry opposed to the application, and urged the Town Council to follow the laws of the Town and not make a decision based on potential litigation, but reject the Dollar Tree permitted use application.

Jenny Clare, Moraga, stated that she had provided an e-mail to the Town Council. She commended the Town Council for its service to the Town but opposed the Dollar Tree permitted use application. She pointed out that retail businesses, such as Target and Walmart, were selling more food items than in the past and while the Town may have classified such uses differently in the past, things were different now. She urged the Town Council to deny the application.

George Atashkarian, Moraga, commented that many existing retailers carried general merchandise. He referred to an exodus of tenants and suggested that Kimco Realty did not care about the community. He questioned why Dollar Tree was coming to Moraga when it could have located elsewhere such as the cities of Lafayette or Walnut Creek.

Anne Obsitnik, Moraga, urged the Town Council to uphold the MMC. She otherwise suggested that the revenues for Dollar Tree Corporation had increased because of its sales of food items.

Sara Mooradian, Moraga, suggested that the Dollar Tree did not sell safe or quality products and had questionable employment and business practices. She read into the record General Plan Policy CD-6 and suggested that the Dollar Tree store did not comply with that policy.

Frank Comprelli, Moraga, commented on the significance of a conditional versus a permitted use permit application. He noted that CVS/pharmacy had 30 percent of its floor space dedicated to food and other food related products, and while a large business the sale of food related products was not incidental. The MMC was specific in its regulations and had stated that any establishment selling food or beverage items would require a conditional use permit. He pointed out that the Pleasant Hill Dollar Tree store location was an example where the sale of food related products was not incidental to the primary business. He wanted staff to revisit its classification of Dollar Tree as a General Merchandise Retailer, not a food retailer, particularly if it was an important part of the Council's decision.

Fred Schroeder, Moraga, spoke to his experience with respect to the sale of transit retail and food products, which had been experienced by every major retailer over the past few years since it involved a high margin and a higher profitability. He opposed the Dollar Tree and suggested that the issue was precedent setting in that Dollar Tree, a national firm, had the opportunity to take all of the existing former Blockbuster tenant space, if approved, and encourage the approval of other similar stores in the Rheem Valley Shopping Center.

Muriel Amsden, Moraga, suggested that the Rheem Valley Shopping Center had already become somewhat of a discount center. The approval of Dollar Tree stores would further that perception where potential upscale tenants would not likely locate adjacent to discount stores.

Jillian Elliott, Moraga, explained that she had moved to Moraga because of the quality of life and local schools. Based on her experience as a strategic planner, she questioned that the Dollar Tree would become a business that would be patronized by local residents and would be desired by potential new residents. She suggested that the Dollar Tree would not fit the quality store desired in the center. She commented on the fact that she would likely organize a boycott of the store if approved.

Paul Wolford, Moraga, pointed out the effort over the years to update the General Plan at great expense to the Town. He suggested that the Town Council was ignoring the General Plan.

Dustie Robeson, Moraga, encouraged the Town Council to be courageous leaders for the Town and not consider the fear of litigation. She opposed the Dollar Tree store.

David Sturgeon-Garcia, Moraga, commented that he was a trial attorney who had reviewed the MMC which clearly stated that if the business sold food or beverages a conditional use application must be filed. He questioned the staff's application and evaluation of the use under a different application. In this case, he suggested that case law was clear that the use must be evaluated under the conditional use permit application. He urged the Town Council to follow the law.

Jennifer Heidersbach, Moraga, suggested that people had come to Moraga for the desirable services and schools offered in the community, and that people would shop if there were desirable shops to patronize. She opposed the Dollar Tree store application.

Vincent Cau, Moraga, commented on the fact that during prior testimony the San Carlos Dollar Tree store had been identified as comparable to Moraga. Having spoken with the former Mayor of the City of San Carlos, he had been told that if there was any way to keep Dollar Tree out of Moraga it should be done. He noted that individual had also provided him with copies of emergency ordinances that the City of San Carlos had tried to utilize to keep that Dollar Tree store as far away from its main street as possible. He referred to three communities in the state of New York of which he was familiar which had been negatively impacted by the presence of Dollar Tree stores. He looked forward to a real downtown for Moraga, something he had desired when he had purchased his home in Moraga.

Mayor Chew declared a recess at 9:20 P.M. The Town Council meeting reconvened at 9:30 P.M. with all Councilmembers present.

Cavan McCarthy, Moraga, suggested that an evaluation of the Kimco Realty's website illustrated how formulaic that company was for its shopping center portfolios. She emphasized that the community had done its best to shop Moraga first and citizens had pride in the Town. She questioned the absence of representation from Kimco Realty and Dollar Tree and suggested that if there was pride in what was proposed to be sold by Dollar Tree and a business desiring acceptance by the Town, representatives should have been present. She further suggested that the issue of a conditional use as opposed to a permitted use was a way out of permitting the Dollar Tree store. She was confident the Town Council would make the right decision for the Town.

Mary Elena Dochterman, Moraga, commented on the number of businesses that had been in Moraga in the past but were now gone. She too took pride in the community, although she supported the Dollar Tree store application. She commented that she had shopped at other

Dollar Tree stores and while messy it had bargains and she was very much in favor of the store. She expressed her hope that the Town Council would give the use careful consideration. She added that CVS/Pharmacy sold many items beyond pharmaceuticals and many were aware of the value of that store.

PUBLIC HEARING CLOSED

When asked by the Town Council, Town Attorney Kenyon acknowledged that the Council may impose a condition where food sales would be incidental to the business and occupy approximately 10 percent of the sales floor area. She explained that if food sales exceeded the 10 percent requirement, the applicant would be required to modify the permit given that the Dollar Tree application specifically delineated that it would not sell more than 10 percent of food or beverage items.

Ms. Salamack referenced Page 3 of the Dollar Tree application which had described the type of merchandise to be sold whereby no one category of the sale of general merchandise would be the principal products and the sale of pre-packaged food would be incidental to the applicant's business and would be sold in approximately 10 percent of the sales floor. As to whether or not the same condition had been applied to other stores, she noted that the Town had not regulated that issue in that way. As an example, Blockbuster Video had sold food and that use had been approved through a permitted use application on the basis that it was primarily a retail business where the sale of food products was incidental. She recognized that the MMC required a conditional use permit for restaurants and for other businesses where food and beverages were sold and distributed. Staff understood that there were food retailers, based on the standard industrial codes, and Dollar Tree store was not that type of retailer. She noted that TJ Maxx and Home Goods had been approved as permitted uses as general retailers and Tuesday Morning had been classified as a gift/novelty shop.

Ms. Salamack explained that a business such as Safeway, as an example, would involve a conditional use permit application since the retail trade was identified as category 44 and 45 of the Retail Business, Industrial Classifications Standards for Retail Trade, which had listed a number of food retailers, including supermarkets, convenience stores, meat markets, fish and seafood markets, fruit and vegetable markets, baked food stores, confectionary and nut stores, all other specialty food stores, beer, wine and liquor stores. Food and beverage retailers would require a conditional use permit as would restaurants if proposed to locate in Moraga. In this case, Dollar Tree stores had been categorized as All Other General Merchandise Stores. She acknowledged, when asked, that it was common practice for the Town and other jurisdictions to ask the applicant to fill out an application, describe the business, and impose conditions based upon that description.

Ms. Salamack stated that Blockbuster had been approved as a permitted use. She was not aware of a restriction such as that under consideration for Dollar Tree regarding the sale of food and beverage having been imposed on CVS/Pharmacy or any other application. She added that staff had not informed Dollar Tree that anything it had placed in its application would be a condition of approval although there was the expectation it would do what had been shown in its application. Staff had discussed with Dollar Tree the type of application for the business whereby the sale of food was a factor in determining the type of application.

Ms. Kenyon pointed out that because Dollar Tree had included in its application that the sale of pre-packaged food would be incidental to the business and would be sold in approximately 10 percent of the sales floor, if Dollar Tree exceeded that percentage it would not be consistent with the permit as approved and a modification of the permit would be required or the application would have to be as stipulated. Such a violation would likely be complaint

generated. She noted that use permits were enforced whether by complaint, observations by staff, or uses not consistent with the granted approval.

As to the percentage that Dollar Tree had indicated, Ms. Salamack stated that if it had stated that 50 percent or more of the sales would be food sales that would be the primary business and she would have discussed that issue with the Town Attorney. She could not place a threshold on the percentage. In this case, Dollar Tree had stated that the food sales would be incidental to its business. She noted that it was important to know about the process in that Planning staff did not make decisions unilaterally. The Planning Commission had been noticed of the staff intent to take action with applications and applications could be called up for consideration by the Commission, which had occurred in this case, with Orchard Supply Hardware (OSH), and periodically with other applications.

Ms. Salamack advised that in discussions with Dollar Tree's Regional Manager Linda Duncan, she had been informed that Dollar Tree had different stores in different markets and in the lower income communities food was an important component of the store; however, it would not be an important component for the Moraga store.

Mr. Chamberlain clarified, when asked, that CVS/Pharmacy had inherited the use permit application from the former Longs Drugstores.

Ms. Kenyon further commented that the issue was narrow in that the use was a permitted use and the Council's ability to condition and deny would be restrictive. A conditional use would offer broader discretion. The use had been designated in the MMC as a permitted use with restrictions on the types of conditions that could be imposed and which staff had outlined. Those conditions could be modified by the Council, or the Council could add additional conditions, as discussed. Any additional conditions that would not be objective given the findings that needed to be made for a permitted use would be restrictive.

Ms. Salamack described the process for the permitted use application which was an application for the use to operate in a specific way.

Councilmember Trotter offered language for an additional condition as follows:

The sale of pre-packaged food will be incidental to the applicant's business and shall not exceed 10 percent of the total sales floor area.

Ms. Kenyon stated that if at any time the sales floor area exceeded 10 percent with food sales the application would be in violation of the permit. She was comfortable with the condition as proposed.

By consensus, the Town Council supported the new condition as proposed.

The Town Council discussed the public hearing/appeals for the Dollar Tree store and made the following comments:

Councilmember Trotter:

- Commented that based on his personal preferences he would like to deny the application although the Town Council must follow the laws;
- Agreed with the staff analysis;
- Noted the Town Council was bound by the MMC in terms of the application;
- Recommended that the Town Council consider during its 2011 Council Goal Setting Session opening a dialogue with Kimco Realty to make a Specific Plan for the Rheem Valley Shopping Center a reality;

- Commented that the Town of Moraga Police Department tracked criminal activities and police calls and he was uncertain that permitting a Dollar Tree store would create any negative impacts, although he would be interested in knowing what if any impacts there have been in the Rheem Valley Shopping Center on a timed basis of the trend towards a discount center. In the event of any measureable adverse impact in the future the case may be made for an excessive public problem for such a retail use;
- Suggested that the Town had the authority to approve the Dollar Tree store as a permitted use and impose appropriate conditions; and
- Disagreed with the elimination of an indemnification clause from the conditions of approval and as such would be voting against the application if the clause was not included which in his opinion would be prudent to impose on the application.

Councilmember Metcalf:

- Expressed concern with a Dollar Tree store since it would be a low sales tax generator and counter-productive to the efforts of the Town in term of revenue enhancement;
- Reported that he had visited the Pleasant Hill Dollar Tree store which he found to be unacceptable but had also visited other Dollar Tree stores in Massachusetts that were nice and he found that a Dollar Tree store would likely be whatever the store manager wanted it to be. He expressed his hope that the manager for the Moraga store would take pride in the community;
- Pointed out that the Town must comply with the MMC and that the application had appropriately been processed by staff with the Town Attorney offering assurance of the permitted use;
- Noted that the Town Council had previously made the decision to waive fees for new businesses coming to the Town and that the Town had spent a great deal of General Fund monies processing the application;
- Expressed concern with the potential for litigation in the event the application was not approved whereby funds would be taken from other Town services;
- Expressed confidence that the Moraga Police Department would offer appropriate enforcement;
- Recommended that the Dollar Tree store be invited to the community and be held to all conditions of approval; and
- Supported the elimination of the condition for an indemnification clause based on the advice of the Town Attorney that the Town was on firm ground, and he would like to see the Town stand by its decisions.

Vice Mayor Mendonca:

- Reported that she had visited a Dollar Tree store located in the City of Healdsburg which she suggested was similar to Moraga, located in a shopping center similar to the Rheem Valley Shopping Center with neat outdoor displays, which was clean and with merchandise-free aisles, and had spoken with the staff and the store manager. In that case, she had been told that the stores were very much up to the manager of the store and it gave her hope that the Moraga store could be a store enjoyed by Moraga residents;
- Agreed that the application for the Dollar Tree store was a permitted use;
- Recognized that many of the types of tenants that were desired for the Rheem Valley Shopping Center did not want to come to Moraga;
- Emphasized the need for the Town of Moraga to be fair and equitable in the enforcement of its regulations for local businesses;
- Found the staff recommended conditions of approval to be fair and prudent including the additional condition as recommended by Councilmember Trotter;
- Believed in a fair market;

- Supported the staff recommendation; and
- Supported the elimination of the condition for an indemnification clause and was confident that the Town Council was acting in good faith based on advice from Legal Counsel, and agreed that the Town stand by its decision.

Councilmember Harpham:

- Noted that the Council was sworn to uphold the rules and regulations that governed it;
- Recognized the concerns with the potential for negative impacts to property values but emphasized that the rules and regulations could not be ignored;
- Agreed with the additional condition although the same condition had not been applied to other businesses and Dollar Tree was being treated differently than other businesses in the Town;
- Recognized that Moraga was a small and great Town although he expressed concern with the Town tearing itself apart with acrimony and the potential for litigation; and
- Supported the elimination of the condition for an indemnification clause.

Mayor Chew:

- Noted it was not the role of the Town Council to determine what businesses would come to Moraga;
- Emphasized the need to come together and do right by the Town;
- Suggested that the business would fail if people did not shop although the hope was the business would succeed which would benefit the Town; and
- Supported the elimination of the condition for an indemnification clause.

In response to the Mayor as to the staff recommendation to eliminate conditions related to the shelving, signage, and the indemnification of the Town, Ms. Salamack explained that the Design Review Board had approved a sign program for the application. As to the condition for the shelving, she noted that the condition had not been imposed on any other business and had been recommended by staff to be eliminated. The indemnification condition had been recommended for elimination by the former Town Manager and in consultation with the Town Attorney. The feeling was that the Town should be able to defend the MMC in that such conditions had not been placed on similar applications but were commonly placed on subdivision applications. There was also a concern with the Town's interests to stimulate business activity in the Rheem Valley Shopping Center and other potential businesses if such a condition were imposed.

ACTION: It was M/S (Metcalf//Mendonca) to adopt Resolution 89-2010, 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, Inc. from the September 20, 2010 Planning Commission Decision Approving a Permitted Use Application in the Rheem Valley Shopping Center for the Dollar Tree, subject to a new condition, to read:

The sale of pre-packaged food will be incidental to the applicant's business and shall not exceed 10 percent of the total sales floor area.

Vote: 4-1-0. Noes: Trotter

C. Public Hearing and Introduction of Ordinance No. ___-2010 Adopting by Reference Title 24: 2010 California Building Code Standard Code, Part 11,

known as CalGreen Establishing Mandatory Statewide Minimum Green Building Regulations

Given the lateness of the hour, the Town Council asked that the item be continued to a future meeting date.

Ms. Salamack recommended that the Town Council continue the item to the second meeting in January 2011 since it only applied to new residences and not to additions. The Town currently had Build-It-Green Program requirements.

ACTION: It was M/S (Trotter/Mendonca) to continue the Public Hearing and Introduction of Ordinance No. ___ -2010 Adopting by Reference Title 24: 2010 California Building Code Standards Code, Part 11, known as CalGreen Establishing Mandatory Statewide Minimum Green Building Regulations, to a regular Town Council meeting scheduled for January 26, 2011. Vote: 5-0.

- XI. ORDINANCES, RESOLUTIONS AND REQUESTS FOR ACTION - None
- XII. COUNCIL REQUESTS FOR FUTURE AGENDA ITEMS - None
- XIII. COMMUNICATIONS - None
- XIV. ADJOURNMENT

ACTION: It was M/S (Trotter/Harpham) to adjourn the meeting at 10:54 P.M. Vote: 5-0.

Respectfully submitted by:


Marty C. McInturf, Town Clerk

Approved by the Town Council:


Ken Chew, Mayor

