

**TOWN OF MORAGA
TOWN COUNCIL REGULAR MEETING**

**February 23, 2011
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 7:11 P.M. by **Mayor Karen Mendonca**.

ROLL CALL

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

Councilmembers absent: None

II. PLEDGE OF ALLEGIANCE

Mayor Mendonca led the Pledge of Allegiance.

III. SPECIAL ANNOUNCEMENTS

There were no special announcements.

IV. PROCLAMATIONS AND PRESENTATIONS

There were no proclamations or presentations.

V. PUBLIC COMMENTS AND SUGGESTIONS

There were no public comments or suggestions.

VI. ADOPTION OF THE CONSENT AGENDA

A. Approval of the Consent Items

No Consent Agenda items were removed from the agenda.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

ACTION: It was M/S (Chew/Harpham) to approve the Consent Agenda, as shown. Vote: 5-0.

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| 1) Accounts Payable Claims for 2/11/11 (\$180,877.31) | Approved |
| 2) Approve Appointments of Town Council Representatives to Commissions, Boards, and Committees | Approved |
| 3) Accept Hacienda Asbestos Remediation Performed by Synergy Enterprises of Hayward, CIP No. 10-305b | Approved |
| 4) Accept HVAC System Upgrades Installed by Stewart Heating and Air of Pittsburg, CIP No. 10-305a | Approved |
| 5) Rescind Resolution 90-2010 and Approve Resolution 4-2011 Authorizing Staff to Enter into a Revised Agreement with the Association of Bay Area Governments (ABAG) to Receive up to \$22,201 of Grant Funded Equipment and Installation of Trash Capture Devices in the Town's Storm-drain system | Approved |

B. Consideration of Consent Items Removed for Discussion

No Consent Agenda items were removed for discussion.

VII. ADOPTION OF MEETING AGENDA

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

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

VIII. REPORTS

A. Mayor's and Councilmembers' Reports

Mayor Mendonca - Thanked Councilmember Harpham for hosting the Park Foundation Life Member Reception, and commended the MYIC for its participation during the event; reported that many Councilmembers had attended the Business Person of the Year Awards on February 22 when Grant Stubblefield had been honored as the Business Person of the Year; the New Rheem Theatre's Friday Fright Night event would be held the third Friday of each month; and she and Councilmember Trotter would be attending the February 24 half-day board retreat at Central Contra Costa Solid Waste Authority.

Vice Mayor Metcalf - No report.

Councilmember Harpham - Reported that he had also attended the Park Foundation Life Member Reception.

Councilmember Chew - No report.

Councilmember Dave Trotter - No report.

- B. Town Manager Update – Town Manager Jill Keimach took the opportunity to introduce Tomas Brown with Burke, Williams and Sorensen who was present to address the Medical Marijuana Ordinance public hearing.

IX. DISCUSSION ITEMS

There were no discussion items.

X. PUBLIC HEARINGS

- A. Public Hearing, First Reading and Introduction of an Ordinance Adding Chapters 7.32 and 8.160 to, and Amending Section 1.24.050 of the Town of Moraga Municipal Code to Prohibit the Establishment and Operation of Medical Marijuana Dispensaries, to Prohibit Outdoor Cultivation of Marijuana, and to Provide for the Town's Costs, Fees, and Other Remedies in Lawsuits to Enforce City Laws

Planning Director Lori Salamack explained that the draft ordinance had been considered by the Planning Commission on February 7 and had recommended approval of the ordinance to the Town Council. The ordinance would prohibit outdoor cultivation and the operation of medical marijuana facilities in any land use district in the Town. While indoor cultivation was not prohibited, it remained a concern of the Planning Commission for the Council to determine whether or not there were ways to regulate indoor cultivation. The Planning Commission also expressed concern about not having criminal penalties. As drafted, the ordinance provided for non-criminal enforcement, such as nuisance abatement or injunctive relief, but would not make the cultivation of outdoor marijuana a crime.

In addition to adding chapters to the Moraga Municipal Code (MMC) and adding a new chapter to the zoning title, Chapter 8.160, there would be additions to the Town's enforcement options under Chapter 1 of the MMC. The Town may bring action as a civil matter if necessary to enforce the ordinance.

Ms. Salamack advised that during the February 7 Planning Commission meeting, there was public testimony from residents who were or had been neighbors of medical marijuana growing properties in Moraga, who had raised concerns with potential adverse impacts to their property, as well as testimony on public safety, nuisance aspects, and criminal activity with respect to the cultivation of medical marijuana. The Planning Commission was also concerned with public safety, such as potential fire hazards, and impacts to neighboring properties with respect to odors, such as in the summer months, and concern with indoor cultivation venting to the exterior which could have the same effect as being grown outside. That issue had not been addressed in the ordinance although the ordinance could be amended in the future if the Council had concerns with indoor cultivation.

Thomas Brown, Burke, Williams and Sorensen, explained that the draft ordinance was representative of current case decisions on such laws. Advocates of medical marijuana had advocated that since the State Act had created a limited immunity to criminal liability, local regulations, zoning, and health and safety regulations were preempted by State law to the extent they impose criminal penalties for violations. That issue has been argued vehemently but has not yet been decided by a court of appeal.

Mr. Brown stated that he has advised that clients with such ordinances may determine to eliminate criminal penalties to avoid a legal dispute to the extent possible, which was the reason the draft ordinance had been proposed as it had. He also explained that he had been directed by staff not to address indoor cultivation in the draft ordinance, but to address such issues in smaller steps. The Council may opt to do nothing or to do more on that issue. There was no legal reason prohibiting the Council from doing so.

Chief of Police Robert Priebe stated that his preference was not to address indoor cultivation. The ordinance was strictly limited to outdoor cultivation which had immediate concern. Outdoor cultivation was something that could be anticipated to be a problem in the future. If indoor cultivation were to become a problem the ordinance could be amended in the future.

Mr. Brown clarified that the ordinance could be drafted to address indoor cultivation and there were many examples of ordinances that had regulated indoor cultivation; however, the practical question was a problem from an enforcement standpoint.

Chief Priebe clarified the number of marijuana plants that could be allowed to be cultivated indoors. Anyone who grew marijuana for business purposes outside of the legal limits was still subject to criminal penalties and arrest for illegal cultivation. There would be no change to how the Police Department approached that illegal activity.

PUBLIC COMMENTS OPENED

Joan Webb, Moraga, supported the proposed Medical Marijuana Ordinance based on her personal experience with such issues since her neighbor had cultivated marijuana outdoors, the strong odors of which had impacted the enjoyment of her rear yard.

Richard Webb, Moraga, expressed his appreciation to the Town Council's consideration of a Medical Marijuana Ordinance. He expressed concern with the potential safety impacts, criminal activities, and negative impacts to property values.

Al Donner, Moraga, commented that he supported the direction to control and restrict the availability of marijuana in the community. He noted that it had been shown that marijuana dependency had increased in the State and anything that allowed greater access would provide greater opportunities for usage. Based on his personal experience, he supported the Town's efforts to restrict medical marijuana and hopefully save lives in the community.

PUBLIC COMMENTS CLOSED

Mr. Brown explained that the ordinance would not be enforceable criminally. Rather, it would be enforced primarily by a civil injunctive relief cause of action (lawsuit) that could be filed fairly quickly, providing the Town in most cases with fairly immediate temporary relief or a preliminary injunction. He commented that of the cities he had represented or whose ordinances he had reviewed, those jurisdictions typically had not specifically focused their ordinances to apply to a landlord or tenant. Nevertheless, Mr. Brown advised that both landlords and tenants fell within the sweep of persons who would be subject to the draft ordinance. The Town's draft ordinance already applied to both landlords and tenants; it also could be made more explicit if that was the Council direction.

Mr. Brown added that the State of California and U.S. Constitutions prevented the Police Department from entering a property without an entry or abatement warrant. The Town must have an ordinance in place to identify that violation and allow the Town to abate. As to whether or not the Town had the ability under nuisance abatement to issue an administrative civil warrant, he explained that the Town must go to court to receive such a warrant. The Town may

not summarily abate without going to court to obtain a warrant, even in most emergency situations, because even then some minimal due process is required. With a civil matter, some notice would be required to the property owner.

Mr. Brown stated that the Town had powerful tools that would enable the Town to be responsible to its citizens and act fairly quickly. It would be up to the Town Manager and staff to determine the priority and availability of resources. The ordinance provided those tools. He commented that some cities had also conferred on their citizens the ability to enforce local ordinances themselves through the creation of third party lawsuits.

Chief Priebe emphasized that it had not been the intent of the drafting of the Medical Marijuana Ordinance to deny anyone who had a legitimate medical marijuana use the ability to grow it themselves. The ordinance was intended to address outdoor cultivation and address the growing concerns with respect to safety and increased attraction regarding theft and associated problems. Not prohibiting indoor cultivation allowed people with legitimate medical needs to still provide for themselves if they so chose without intrusion from the Town, which in his opinion would create minimal or no impact to outside residents.

Mr. Brown explained that he advised his clients that they could prohibit or limit both indoor and outdoor cultivation through land use and health and safety authority. He suggested that the cases had supported that view. He added that there was no definition of 'compassion' under the Compassionate Use Act. Whether or not it would be "compassionate" to allow dispensaries but not allow cultivation would be something the Town Council would have to decide as a matter of policy. He suggested that the Town Council may, under its health and safety police power authority, on the one hand prohibit cultivation and, on the other, allow medical marijuana dispensaries.

Ms. Salamack stated that the item had been noticed as a public hearing and if the Council chose to continue it, the item should be continued to a date certain.

The Town Council discussed the proposed Medical Marijuana Ordinance and offered the following comments and or recommendations to staff:

- To Finding 1, capitalize the word 'controlled';
- To Finding 4, a word was missing and should be corrected;
- Consider report from the Chief of Police regarding the nuisance factors with medical marijuana dispensaries and outdoor cultivation, with a finding to be added to be tailored to Moraga's circumstances;
- To Finding 9, separate into three sentences;
- To Finding 10, reference to the court case *Gonzalez vs. Raich* to be in italics;
- That Chapter 7.32, which did not correspond to the actual text, state that the activities constitute a public nuisance;
- To Section 7.32.030, the prohibition of the cultivation of outdoor marijuana, to address those concerns raised by members of the public and include reference to owners of rental property, with staff to determine whether or not an accessory structure up to a property line of a shed, or secondary unit as an example, should be permissible in terms of not being outdoor;
- To Section 7.32.030, staff to review the Town's Party Ordinance to determine whether or not language in that ordinance should also be introduced;
- To Section 7.32.040, staff to clarify whether or not this section was needed since it was also included in Chapter 8.160.100, Medical Marijuana Distribution Facilities, and was redundant;

- A property owner, particularly absentee landlords, to be held responsible for acts of a renter or tenants, with the penalties imposed on the property owner and not just on the renter of the property;
- The definition of a 'building' to include a hothouse structure which would require additional language in the ordinance;
- Determine whether or not the ordinance was the most expedient civil process available to the Town where the Town would be equipped on a civil basis to act immediately;
- To Chapter 8.160.100, Medical Marijuana Distribution Facilities, the last sentence of paragraph B to be reinstated as part of Section 7.32.040 with reference to the Chapter as a whole; and
- Given the many corrections and concerns, the Town Council suggested that the item be returned, as discussed, for a new first reading.

The Town Manager requested consensus on the following issues:

- With a straw poll vote the Town Council voted 1-4 to prohibit indoor cultivation [no consensus reached on this issue];
- By consensus, the Council determined that the ordinance be drafted to prohibit outdoor cultivation in out buildings such as greenhouses and sheds in the primary residence;
- By consensus, the Council determined that the prohibition of outdoor cultivation include second units;
- By consensus, the Council determined that a property owner, particularly absentee landlords, be held responsible for acts of a renter or tenants with the penalties imposed on the property owner and not just on the renter of the property, with Police Chief discretion to make that decision;
- By consensus, the Council determined that the criminal penalties portion of the ordinance be held in abeyance pending resolution of current court cases, to then be returned to the Council for consideration.

ACTION: It was M/S (Trotter/Chew) to continue the Public Hearing, First Reading and Introduction of an Ordinance Adding Chapters 7.32 and 8.160 to, and Amending Section 1.24.050 of the Town of Moraga Municipal Code to Prohibit the Establishment and Operation of Medical Marijuana Dispensaries to Prohibit Outdoor Cultivation of Marijuana, and to Provide for the Town's Costs, Fees, to a date certain of March 23, 2011. Vote: 5-0.

By Council consensus, the Mayor rearranged the agenda to consider Item XI. A. Ordinances, Resolutions and Requests for Action. The Council would then return to Item X. B.

XI. ORDINANCES, RESOLUTIONS AND REQUESTS FOR ACTION

- A.** Authorize the Town Manager to Enter into Two Consultant Contracts, one with the Lew Edwards Group/Godbe Research and the other with Leptien, Cronin Cooper, Morris & Poore, Inc., for a Total Not-to-Exceed \$50,000 to Further the Sustainable Funding Efforts of the Revenue Enhancement Community Outreach to Neighborhoods (RECON) Subcommittee

Ms. Keimach reported that during the meeting of February 16, the Town Council had been given a presentation from the RECON Subcommittee which had outlined the state of the Town roads and storm drains. The presentation was the first step to the focus group questions which would be brought back to the community to better educate the community on the Town's infrastructure. The additional data, analysis, and cost estimates would be prepared as a next step. Also, the community would be engaged on what the community wanted, was willing to pay for, and invest

in the long and short term and how well the community wanted the streets and storm drains to perform. That information would be brought out to the community with comments solicited from the community and then returned to the Council with options for revenue measures. Staff had met with the RECON which had identified the steps to take and had identified the need for professional expertise on engineering analysis, cost estimates, assistance with community outreach, and engaging the community on the details and revenue measures best for the community. Proposals had been received from three consultants to fulfill that expertise. The three proposals would allow continued engagement with the community as to what the community wanted.

Staff and the RECON had recommended that the Town Council adopt two consultant contracts; one a subcontract, with all contracts to be less than \$15,000, with funding from the Infrastructure Operating Budget for 2010/11 of General Fund dollars to be used for infrastructure improvements.

Catherine Lew, President and CEO, Lew Edwards Group, introduced members of her team present in the audience. She spoke to the efforts of the RECON to engage the community, solicit viewpoints, and have a dialogue on the community's needs. She spoke to the background of her firm and experience with local jurisdictions. She advised that the objective was to build on the work already done by the RECON. The next 90 days would be critical with Bryan Godbe, Godbe Research to design a community survey which would elicit input from as many as 300 additional residents to assess the public's basic knowledge, areas where the community would like more information or explanation, and areas where they had enough information. She anticipated a return to the Council to debrief the Council on the results of the survey and a timeline for moving forward. The possible ending date was August 2012 for a mail-in ballot for the community to consider. There may also be the necessity of planning for a more traditional November 2012 election.

Bryan Godbe, Godbe Research, reiterated the work of the RECON which would be quantified and be used in a structure to help the Town to consider the feasibility of various tax measures. He described how the RECON work would be quantified, with the different kinds of tax measures and projects the Town may consider along with the desires of the voters to be prioritized and with the feasibility of all the options to be tested.

Ms. Lew explained that given the state of the national and State economy it was helpful to pause and identify areas where constituents already had information and would like more information, and craft a user friendly way to describe the needs which would enrich, simplify, and better focus the community dialogue over the coming months.

Randy Leptien, Leptien, Cronin, Cooper, Morris & Poore, Inc., (LCC), was pleased to join the other two consultants on the project. He commented on his work with the Town on the Street Lighting Assessment which would provide information on the creation of a database for a new district or revenue entity as the process unfolded. He advised that he would supply information and numerical quantities to be derived from the various tax structure options to both consultants and work closely with Town staff on the various cost estimates.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

In response to the Council, Mr. Leptien explained that he was familiar with the Town's street maintenance program, Street Saver, where it was possible to generate from the data in that program a correlation between payment condition indexes (PCI) and amount of funds.

Ms. Keimach explained that the \$24 million backlog that had been identified in the RECON presentation had been based on assumptions that staff had made based on what the community wanted or was willing to invest. That figure may change as more information was gathered from the community.

Mr. Leptien commented with respect to the storm drain issue, that the tax measure should include provisions for storm drain replacement and repair as well as provisions for Americans with Disabilities Act (ADA) requirements, which would add to the payment program.

Ms. Lew stated that the detailed proposal identified as Attachment A to the staff report had identified the scope of work, which she highlighted at this time, and pointed out that the contract amount now under consideration would only cover Phase One.

Mr. Godbe clarified that he had done work for the City of Lafayette over the past few years on potential tax measures which had ultimately not been pursued.

Ms. Lew recognized that some decisions had already been made, input from the community continued to be refined, and quantifiable survey research would be used as a way to supplement the focus group work and interactive citizen input programs. She stated that they would work with staff to add links on the Town's website, use the Town's newsletter, and work with the RECON Subcommittee on informational presentations. The approach would vary depending on the unique culture and traditions of the community. She clarified that the contract under consideration would carry forward for the next 90 days or sooner, for Phase One. The contract amount would allow the consultants the ability to provide a blunt and unvarnished assessment of the Town's chances of success on a preferred approach. It was anticipated that 300 randomly selected constituents would be analyzed and cross analyzed on all of their perspectives. Having done due diligence on some of the work already done by the Town and the RECON, Ms. Lew explained that her team had been able to present a very fiscally prudent discounted rate to reflect that their services were adding value to work already achieved by the Town. She was unaware at this time, if they were looking at an August mail-in ballot or a November election, noting that the project duration would affect the Town's costs.

Mayor Mendonca re-opened the public comment period at this time.

Dick Olsen, Moraga, explained that he had served as the Chair of the Revenue Enhancement Committee (REC) and was a member of the RECON. He supported the proposed contracts and had high regard for all of the consultant groups. He suggested that the Town now needed professional expertise on the effort, not just help from volunteers such as the RECON. He asked the Council to approve the contracts.

The Town Council discussed the two consultant contracts and offered the following direction to staff:

- Staff to identify what assumptions had been built into the RECON presentation identification of a \$24 million backlog and what assumptions had been built into the City of Lafayette's road repair backlog as well; and
- The scope of work for Lew Edwards Group contract, Page 11 of Exhibit A, to be modified to clarify that Phase One would involve looking at a Community Facilities District (CFD) or a parcel tax.

ACTION: It was M/S (Trotter/Harpham) to authorize the Town Manager to Enter into Two Consultant Contracts, one with Lew Edwards Group/Godbe Research and the second for Leptien, Cronin, Cooper, Morris & Poore, Inc., for a Total Not-to-Exceed \$50,000 to Further the Sustainable Funding Efforts of the Revenue Enhancement Community Outreach to Neighborhoods (RECON), with an amendment to Page 11 of Exhibit A, Scope of Work, as discussed. Vote: 5-0.

The Town Council moved back to Agenda Item X. B at this time.

- B.** Public Hearing, First Reading and Introduction of an Ordinance Amending Chapter 3.04 Purchasing System and Chapter 3.06 Uniform Construction Cost Accounting Act Procedures of the Town of Moraga Municipal Code

Interim Administrative Services Director Emily Boyd explained that the item was a first introduction of an ordinance amending Chapter 3.04 Purchasing System and Chapter 3.06 Uniform Construction Cost Accounting Act Procedures of the Town of Moraga's Municipal Code. The Town Council had previously heard the first introduction on January 12, 2011 and had directed staff to add the words 'responsible' and 'responsive' when referring to bidders throughout the document. Staff had also been directed to clarify how emergencies were handled. She noted that the MMC had a code dealing with emergencies, Chapter 2.48.070(b), specifically stating that the Town had the ability to procure what it needed in the event of an emergency. References to emergencies had been deleted from Sections 3.04.070 and 3.06.070 since they had been covered in the other section of the code. She recommended that the Town Council hold a public hearing, waive the first reading, and introduce the ordinance amending Chapter 3.04 Purchasing System and Chapter 3.06 Uniform Construction Cost Accounting Act Procedures of the MMC.

PUBLIC COMMENTS OPENED

There were no comments from the public.

PUBLIC COMMENTS CLOSED

A typographical error was identified in Section 3.06.050(b) (2) that the Council asked staff to correct.

ACTION: It was M/S (Chew/Trotter) to waive the first reading, introduce an Ordinance Amending Chapter 3.04 Purchasing System and Chapter 3.06 Uniform Construction Cost Accounting Act Procedures of the Town of Moraga Municipal Code, as amended, and schedule a second reading of the ordinance for the March 9, 2011 Council meeting. Roll Call Vote: 5-0.

XII. COUNCIL REQUESTS FOR FUTURE AGENDA ITEMS

There were no Council requests for future agenda items.

XIII. COMMUNICATIONS

There were no communications.

XIV. ADJOURNMENT

ACTION: It was M/S (Harpham/Chew) to adjourn the meeting at 9:25 P.M. Vote: 5-0.

Respectfully submitted by:

Marty C. McInturf, Town Clerk

Approved by the Town Council:

Karen Mendonca, Mayor