



PLANNING COMMISSION MINUTES

City Council Chamber
200 Old Bernal Avenue, Pleasanton, CA 94566

APPROVED

Wednesday, September 10, 2008

CALL TO ORDER

At 7:00 p.m., Chair Blank informed the audience that the meeting would start in about five minutes to allow the Commissioners some time to review relevant documents that they had just received this evening.

The Planning Commission meeting of September 10, 2008, was called to order at 7:06 p.m. by Chair Blank.

1. ROLL CALL

Staff Members Present: Brian Dolan, Director of Planning and Community Development; Donna Decker, Principal Planner; Michael Roush, City Attorney; Wes Jost, Development Services Manager; Natalie Amos, Assistant Planner; and Maria L. Hoey, Recording Secretary

Commissioners Present: Commissioners Phil Blank, Anne Fox, Kathy Narum, Greg O'Connor, Arne Olson, and Jennifer Pearce

Commissioners Absent: None

2. APPROVAL OF MINUTES

(Note: Staff confirms any proposed changes by reviewing the recorded proceedings prior to finalizing the Minutes.)

a. July 23, 2008

Chair Blank indicated that the approval of the July 23, 2008 was still pending and inquired if any of the Commissioners had any corrections.

Commissioner Narum stated that she believed the reference to Lot 1 on the second line of page 8 should be to Lot 6. Ms. Decker confirmed that was correct.

Commissioner O'Connor referred to the first sentence of the fourth full paragraph on page 14 and stated that he believed he did not make the statement. Ms. Decker said staff would verify from the tape.

Commissioner Fox stated that she believed she had mentioned at some point during the meeting that the earlier City records show that the property was pre-zoned to Q (Quarry) and noted that she did not see this mentioned in the minutes. Ms. Decker replied that she would have staff verify this.

Commissioner Fox inquired if this item has been considered by the City Council. Ms. Decker replied that it did. She added that the City maintained the Q zoning for the site and did not process a rezoning to A or P District.

Commissioner Narum moved to approve the Minutes of July 23, 2008, as amended.

Commissioner Olson seconded the motion.

ROLL CALL VOTE:

AYES: Commissioners Blank, Fox, Narum, Olson, and Pearce.

NOES: None.

ABSTAIN: None.

RECUSED: None.

ABSENT: None.

The motion passed.

b. August 13, 2008

Commissioner Fox noted she was not present for the meeting of August 13, 2008 and would abstain from voting on the Minutes.

Chair Blank noted the word "knows" in the first sentence of the first paragraph following "The Public Hearing was Closed" on page 11 should read "known" and requested that the correction be made. He further requested that the phrase "at the beginning of the meeting" be added after "that he talked to Mr. Lemoine...."

Commissioner Narum advised that the second sentence of the last paragraph on page 15 be modified to read as follows: "She recommended keeping fencing as open as possible and would not like to see six-foot tall masonry or wood privacy fences."

Commissioner Narum referred to the discussion on Condition No. 22 in the fourth full paragraph on page 16 and stated that she believed the modification was to allow only one non-habitable accessory structure outside the building envelope.

Ms. Decker noted that there was a discussion on agricultural uses and that the Commission entertained notions of a vineyard, orchard, and crops as well as the grazing of animals and outbuildings outside the development area. She added that the Commission expressed the desire to have these uses come back to the Commission as conditional use permits. She stated that staff would go back and check the tape.

Commissioner Pearce stated that she believed the Commission talked about it but that the condition was actually about having a CUP for the non-habitable accessory structures. Commissioner Narum reiterated that her recollection was that it was for only one structure.

Ms. Decker noted that the discussion was for several agricultural uses outside the building envelope area, including the grazing of animals, a shed for animals and shading, an outbuilding to store seed, or vineyards and winemaking. She added that it was not limited in terms of conditioning to just a single outbuilding structure but was for any agricultural uses and outbuildings, which the Commission then requested to come back as a conditional use permit. She advised that staff would check and verify.

Commissioner Narum stated that her intent for the modification then as well as her vote was for one structure.

Chair Blank requested that the sentence of the first full paragraph on page 16 be modified to read as follows: "Chair Blank stated that when the project comes back for design review, he would like to see viewsapes similar to those presented for the Staples Ranch Environmental Impact Report (EIR) as they take away any issues of photo comparison."

Commissioner Pearce moved to approve the Minutes of August 13, 2008, as amended.

Commissioner Narum seconded the motion.

ROLL CALL VOTE:

AYES: Commissioners Blank, Narum, O'Connor, Olson, and Pearce.

NOES: None.

ABSTAIN: Commissioner Fox.

RECUSED: None.

ABSENT: None.

The motion passed.

3. **MEETING OPEN FOR ANY MEMBER OF THE AUDIENCE TO ADDRESS THE PLANNING COMMISSION ON ANY ITEM WHICH IS NOT ALREADY ON THE AGENDA.**

No members of the audience addressed the Commission.

4. **REVISIONS AND OMISSIONS TO THE AGENDA**

Ms. Decker advised that Item 6.b., PCUP-229, John Pfund, Tri-Valley Martial Arts Academy has been continued to September 24, 2008 and would be the first item on the agenda.

5. **CONSENT CALENDAR**

a. **PDR-793, Jeff and Megan Tarpley**

Application for design review approval to construct an approximately 4,087-square-foot, two-story custom home with an attached three-car garage on approximately 24,212-square-foot site located at 6035 Sycamore Terrace. Zoning for the property is PUD - LDR (Planned Unit Development - Low Density Residential) District.

Ms. Decker advised that before the Commission takes action on this item, the applicant had submitted plans, Exhibit A, that show a garage that is not consistent with the interior dimensions because of some built-in cabinets. She noted that the applicant was advised of this and that construction drawings staff has seen have been modified to reflect the removal of the cabinets to create the standard depths and widths required. She added that Exhibit A would be modified to reflect the appropriate dimensions for the garage areas.

Commissioner Pearce moved to approve PDR-793 as recommended by staff, subject to the conditions of approval listed in Exhibit B of the staff report. Commissioner Narum seconded the motion.

ROLL CALL VOTE:

AYES: Commissioners Blank, Fox, Narum, Olson, and Pearce.

NOES: None.

ABSTAIN: None.

RECUSED: None.

ABSENT: None.

Resolution No. PC-2008-44 approving PDR-793 was entered and adopted as motioned.

6. PUBLIC HEARINGS AND OTHER MATTERS

a. PAP-123, Greg and Lisa Johnston, Appellants (PDR-715, S.J., Applicant)

Appeal of the Zoning Administrator's approval of an application for design review for rear yard improvements at the existing residence located at 927 Montevino Drive. Zoning for the property is R-1-6,500 (Single-Family Residential) District.

Ms. Amos presented the staff report and described the background, scope, key components, and layout of the project, using a PowerPoint presentation.

Commissioner Fox stated that she appreciated the timeline of events. She indicated that she did not understand how the over-the-counter approval occurred without staff knowing that re-grading applications were required to go to City Council. Additionally, she inquired how staff, knowing that re-grading applications are required to go to Council, can make a determination that this case does not need to go to the City Council and could be approved through the Zoning Administrator process.

Mr. Dolan replied that staff made a mistake in approving the re-grading over the counter. He noted, however, that even if staff had checked the files of the original approval, staff would not have been able to locate this requirement, as it was not included in the original conditions of approval for the project. He added that staff has looked through numerous files for a reference to this requirement and found one in a resolution for a similar type of re-grading application for another property in the area.

With respect to why staff did not go to Council directly, Mr. Dolan stated that this condition was made a long time ago and that its origin was somewhat nebulous. He indicated that the former Planning Director was optimistic at the time that there was a resolution that could be reached between all parties, who agreed to allow the Zoning Administrator's review and approval. He noted that neighborhood disagreements are difficult for the Planning Commission and even harder for the City Council and that the preferred approach is for staff to attempt to resolve conflicts at the lowest level possible if staff has any basis for it at all,

Commissioner Fox inquired if the appellant was required to pay fees to proceed through the appeal process even if the application was originally supposed to go to the City Council. Ms. Amos said yes and explained that even if the applicant had filed to go to City Council, staff would still have rendered a decision for which the appellant would also have been required to file an appeal and undergo the process similar to any other appeal. She added that the cost of the appeal was \$6.25.

Commissioner Olson noted that he recalled reading in prior Minutes that there was a requirement placed on this project that the CC&R's include a restriction on re-grading and that it should be handled at the City Council level. He inquired if staff

checked the CC&R's to see if it applied to this area. Ms. Amos replied that the condition was added in the Tract Map conditions of approval as Condition No. 16, which is included as an attachment to the staff report. She noted that the CC&R's stated that re-grading would be reviewed by the City's Building and Safety Division.

Mr. Roush noted that staff has also looked extensively to find the reference to the City Council directive and has not been able to find it. He stated that the CC&R's do not specifically state this but the grading must be reviewed by the Building Official in conjunction with the Planning Department. He indicated that his sense is that the former Planning Director, Mr. Jerry Iserson, was not aware of the condition and proceeded on the basis of looking at the Tract conditions, which does not indicate that the City Council would need to be involved in it. He stated that essentially, there is a re-grading application that the City is looking at and the issue is now in the Planning Commission's arena.

Chair Blank referred to the resolution and said that from in his experience, the "Whereas" clauses normally provide statements of conditions that are currently in existence. He noted that even though the resolution relates to the re-grade of Lot 48, the "Whereas" states fairly clearly the City Council directive that all re-grading applications for Tract 5835 must have City Council approval. He indicated that while staff may have a problem determining the correct date of the meeting and finding the original minutes where this was discussed, the resolution's intent is that the City Council, regardless of the CC&R's, would approve all re-grading in the neighborhood.

Mr. Roush agreed with Chair Blank but noted that the difficulty is that the Minutes of the April 18, 1989 meeting do not contain anything that would even touch on Tract 5835. He added that staff has looked at the Minutes for 1988, 1989, and 1990 to try and find the source and has drawn a blank.

Commissioner Narum referred to Condition No. 1 of Exhibit B of the staff report and said that it talks about the final landscaping, retaining wall, and grading conforming substantially to Exhibit A. She inquired whether or not what is actually there conforms substantially to Exhibit A. Ms. Amos said staff has not made a recent visit to the site to see what actual exists to date or what the actual grade is. She noted, however, that based on the cross-sections provided in attachments, they appear to be similar.

Commissioner Narum inquired if the berm referred to in Condition No. 4 of Exhibit B was actually one foot in height. Ms. Amos replied that staff has not visited the site recently and that it is unclear whether or not there is a berm.

Commissioner Fox inquired whether staff was comfortable with the directive that all re-grading applications for Tract 5835 must have City Council approval or if staff needed to further search the archives to find the actual requirement.

Mr. Dolan replied that staff would like the Commission to consider the application independent of that directive and see if the issue can be resolved. He noted that there is a possibility that the item will end up with the City Council regardless of what happens at the Commission level. He stated that staff brought the application before the Commission because staff's decision was appealed. He added that the Commission could take the position that it believes the application should have gone directly to City Council and that it does not want to consider the application. He indicated that staff could take this approach if this is what the Commission desires.

Chair Blank noted that even though the Council meeting minutes are not available, there is indirect evidence in the Planning Commission meeting minutes that reference this particular item, which includes a significant discussion on grading.

Commissioner Pearce indicated her appreciation for the research staff has thus performed. She inquired if it were possible or likely that the documents being sought are still out there. Ms. Amos replied that she looked at all the records from 1986 to 1992, both in the City Clerk's Office and in boxes from the archives and was unable to find anything on the matter.

Commissioner Fox inquired if staff looked at both the Design Review Board meeting and Planning Commission meeting files. Ms. Amos said yes.

Commissioner Pearce inquired if staff was simply looking for files relating to re-grading or for conditions of approval for the development which might be contained in other documents. Ms. Amos replied that she looked at landscaping and grading files as well as any type of conditions of approval.

In response to Chair Blank's inquiry if the search done was both electronic and manual, Ms. Amos replied that she did both.

Commissioner O'Connor expressed concern that staff has not been able to find this information and is not certain that what is at the site is in substantial conformance to Exhibit A. He inquired whether staff is leaving the determination of substantial conformance to the Commissioners who have visited the site.

Mr. Dolan replied that this was not the question that was before the Commission. He stated that the applicant went ahead and implemented his plan; he was then informed that the application was still an open issue and that no resolution had yet been reached. He noted that the applicant had a plan that was approved by the Zoning Administrator, but the decision was appealed; hence, the applicant does not have an approved plan at this time. He added that from this perspective, the application is a blank slate.

Commissioner O'Connor requested clarification that the substantial conformance of the work the applicant has started and completed is not at issue because there is no

approved plan. Mr. Dolan said yes. He added that it would be fortunate for the applicant if what is ultimately approved matches what he has installed.

Mr. Roush advised that the Commission should evaluate the application on its own merits, given the testimony and the documents the Commission has at hand, as if no project had been started or no work had taken place. He added that the Commission should determine whether or not it can support the application or some modification thereof or whatever the Commission feels is most appropriate without consideration to what has, in fact, occurred. He noted that while this would be difficult to do, this is the task the Commission is being asked to perform at this time.

Commissioner O'Connor stated that these types of applications have come before the Commission in the past, and the Commission has been fairly clear that it does not whole-heartedly support applicants who do work without permits or approved plans. He noted that based on the documents given the Commission, there have been two or three times that the City had informed the applicant to cease and desist; yet, when he visited the project two days ago, work was still going on. He expressed concern that work continues even after Code Enforcement has notified the applicant to cease and desist.

Mr. Dolan agreed with Commissioner O'Connor with respect to the landscaping and grading at the rear of the site. He noted that the pool was not an issue and is not part of this discussion.

Chair Blank noted that on January 25, 2008, Code Enforcement advised the Zoning Administrator that the owner was notified by phone to stop work until the necessary approvals were obtained. He inquired who spoke to the owner; Ms. Amos replied that it was Senior Code Enforcement Officer Walter Wickboldt.

Chair Blank noted that he did not find in the staff report any other indication that the applicant was instructed by either staff or anyone else to cease work, although it is implied elsewhere in the documents. He inquired if the applicant was notified on more than one occasion.

Ms. Amos replied that when the applicant came in to apply for his design review permit, he was asked to hold off work on the pool. She added that the former Planning Director then contacted the Johnstons and asked if it would be all right with them for the applicant to move forward with the pool while they try and resolve the design review issue, to which the Johnstons agreed. Ms. Amos continued that allowing him to move forward with the pool required excavating, removing the dirt, and stockpiling it. She stated that once that work was completed, staff conducted the Zoning Administrator hearings only for determining the type of planting as specified in the Tract conditions of approval and not for the landscaping itself; there was no restriction for the landscaping, and the applicant was allowed to plant in the rear yard area. She noted that at this point, the grading was completed where the stockpile from the pool was placed as the dirt had to be removed from the area. She

stated that he was then advised that work should stop until the design review issue was resolved.

Commissioner O'Connor confirmed that the date was January 25, 2008 and noted that Exhibit H of the staff report is a letter from staff dated August 8, 2008.

Commissioner Fox noted the materials given to the Commission: Exhibit D, City Council Resolution No. 88-29, dated January 19, 1988, which includes the Conditions of Approval for Tract 5835; and the Planning Commission meeting minutes of January 24, 1987 and August 15, 1989. She inquired if the Conditions were attached to the resolution or to the grading map and if there might possibly be an ordinance with the restriction on re-grading. Ms. Amos replied that staff also looked for ordinances or other avenues, given the age of the Tract itself. She noted, however, that this is a straight-zoned property and that it is not typical for development on this type of property to have an ordinance or conditions of approval on a tract map.

Mr. Roush explained that this was not a PUD zoning ordinance but simply an approval of a tentative map to which conditions were attached, as set forth in Exhibit D. He noted that it apparently had been denied at the Planning Commission level in November of 1987, was appealed to the City Council, and then approved on January 19, 1988.

In response to Commissioner Fox's inquiry if this Tract Map was tentative or final, Mr. Roush replied that a map is submitted as a tentative map and that once the conditions of approval were satisfied, the final map was recorded.

Commissioner Pearce stated that she knows from contract law that the City is not in the business of enforcing CC&R's which is a private contractual relationship between the parties. She inquired whether, in the event the City directs the development to include prohibitions in the CC&R's, this impacts the relationship of the City and its conditions to the CC&R's or if the intent is to shove off responsibility of those particular issues to the CC&R's in a private contractual relationship.

Mr. Roush said if there is a condition of approval that indicates that certain matters are to be contained in the CC&R's, then it would be the responsibility of the City to make sure those conditions are reflected accurately in the CC&R's. He noted that for whatever reason, Condition No. 16 did not include a strict prohibition against grading when it was translated into the CC&R's. He stated that it allowed some flexibility in that re-grading would be subject to the approval of the Building Official. He noted that there were some correspondence in the file which show that the CC&R's were reviewed at the City Attorney level and that, in fact, there were changes made to the provision in the CC&R's concerning this issue that did not absolutely prohibit the re-grading, but instead, gave it some flexibility.

Commissioner Pearce inquired why there would be a condition that directs the CC&R's to prohibit something but doesn't actually include the prohibition in the Conditions of Approval. Mr. Roush replied that theoretically, a person who purchases a piece of property is subject to the CC&R's that they might be more apt to be some kind of constructive notice of what is in the CC&R's rather than what would be in the Conditions of Approval. He noted that the idea would be that the purchasers would review those CC&R's and know that they are not allowed to do certain things.

Chair Blank noted that it would be similar to signing-off on deed restrictions. Mr. Roush stated that it is a constructive notice to the people buying the property as opposed to assuming the buyers are going to review a staff file that might prohibit the re-grading.

Commissioner Pearce clarified that given what Mr. Roush has said, the intent of the City to have a condition like this might not be to say that it is a private contractual matter but to indicate greater interest in the prohibition of a re-grading in order to provide the homeowners a greater, constructive notice of that condition. Mr. Roush stated that he would certainly read Condition No. 16 to indicate that the Council was concerned about not allowing re-grading on any lot within the project without exception. He added that the CC&R's provided more flexibility, but taking the language in Condition No. 16 literally, "prohibition" means, it cannot be done.

Commissioner Fox inquired if, as the approval of the CC&R's did not reflect the exact prohibitions against re-grading, the Commission should not then utilize Resolution No. 88-29 rather than the CC&R's, as Condition No. 16 is included in the resolution. Mr. Roush replied that it was appropriate to look at all of the documents and try to fashion a remedy that made sense. He noted that there are somewhat conflicting statements, and the documents are not totally clear; hence, some interpretation will need to be done in terms of what the Commission thinks the intent of this is all about, weigh that against the privacy interests and other issues before the Commission, and try to come to some fair and just decision. He admitted it was not an easy task.

Commissioner Fox inquired if staff had the documents from Peter McDonald. Ms. Amos replied that there are two sets of CC&R's found in laserfiche, one of which is the draft set and the other with some hand-written revisions.

Commissioner Olson noted that Condition No. 17 states that the on-site slope banks need to be cleaned and vegetated. He stated that when he visited the property two days ago and met with the appellants, he did not see the slope bank and believe it has been removed. He added that the yard comes out on a level plane to the wall which has been constructed, which sits right above the V-ditch. He indicated that he did not think Condition No. 17 has been met because the slope bank is gone.

Commissioner Fox concurred and stated that there was no longer any slope when she visited the site two weeks ago.

Chair Blank and Commissioners Pearce, O'Connor, Olson, and Narum disclosed that they also had visited the site individually and separately.

Ms. Decker stated that she would like to bring to the Commission's attention some information regarding Commissioner Olson's statement about the slope bank that is no longer there. She noted that other lots in the area, those adjacent to and farther upstream and downstream of the drainage easement, are not sloped any longer either. She explained that they have been graded, terraced, and filled, leaving the drainage easement and area clear as is required for access. She added that the lots adjacent to the subject site have been terraced as well, some with approvals and others without.

Commissioner O'Connor inquired if there were a total of 13 lots, and Ms. Decker replied that staff is unaware of any existing lots that still have the original slope banks. She noted that the slope bank no longer exists on both adjacent sides in the neighborhood; they have been terraced as well, up from the existing drainage easement area with retaining walls of two to three feet in height. She added that grading has taken place in the neighborhood, yards have been graded relating to pool excavations, and as reflected in the scope of this Tract map, material has been removed and off-hauled from existing sites.

Chair Blank noted that it would be difficult to make a comparison of the lots, but there are details about this particular property. He stated that one property could have been terraced one foot or two feet or 20 feet, whereas this one is graded four to six feet, and other properties may have been leveled off. He indicated that it would be difficult to determine the degree of the leveling short of going out and surveying the properties. Ms. Decker agreed and stated that the properties adjacent to this site were graded with retaining walls of two and three feet to retain the material that step down.

Commissioner Fox noted that based on Exhibit A of the staff report, it appears that there is just a small fill next to the retaining wall. She added that the massive amount of dirt excavated from the pool looks far more different than what appears on Exhibit A. She inquired how staff could tell that the four-foot high retaining wall is not actually put on two feet of fill in order to make the change six feet. She further asked if staff knew the existing grade as it should be to determine whether or not this was completely not representative of what actually happened.

Ms. Decker stated that the retaining wall has been constructed on the existing grade. She noted that there was a slope from the drainage easement, as shown on Exhibit A, and up the fence from the concrete edge of the drainage area; then there is the four-foot tall retaining wall. She indicated that the existing land slopes up and that this is actually close to the original grade. She stated that the applicant dug

down to the existing grade, and the fill material is from over-excavation of the pool. She noted that the material shown from the grading and excavation of the pool has actually been off-hauled, and the sliver that was actually placed within the four-foot tall retaining wall is not the amount of material seen in the photograph of the mound of the over-excavation. She noted that the pool is deep; the amount of material is greater than what is shown on the photograph and was actually placed behind the retaining wall. She reiterated that the wall was placed on original grade and was four feet high.

Commissioner Fox noted that application plans for re-grading are normally drawn by an engineer or a landscape architect, but the plans for this project are hand-written. She indicated that the Commission has seen plans prepared by engineers for pools as well as structures on unstable slopes along Foothill Road. She stated that she was surprised staff allowed the applicant to submit a hand-drawn diagram and not one prepared by an engineer.

Ms. Decker replied that this is not atypical and that the pool plan shown on Exhibit A is typical of a pool plan. She stated that the City has standard civil engineering design and drawings for various depths of pools and that staff has separate engineering drawings for free-form pools that are available through the Building and Safety Division. She noted that this is where the pool plan comes from, and the actual structural plan with standard details is then stamped.

With respect to plans prepared by an engineer, Ms. Decker stated that the Building Code does not require a building permit and/or structural engineering for retaining walls that are four feet tall or less; hence, there is no requirement for any engineering for this type of stacked wall. She noted that similar four-foot tall walls consisting of stacked concrete blocks have been constructed elsewhere, but this wall is mortar and a concrete masonry unit wall.

Ms. Decker noted that based on the drawings, the wall height varies from approximately two feet at the end next to the existing fence, goes up to four feet toward the corner of the drive isle with access to the drainage area, and then back to zero feet up the driveway. She stated that in effect, there is only a small portion of the retaining wall that is actually four feet in height; the rest of the wall varies from zero to four feet tall on both ends.

THE PUBLIC HEARING WAS OPENED.

Lisa Johnston, with her husband, Greg, Appellants, stated the importance of reviewing the history of this development to help explain their appeal. She noted that when the tract homes on Montevino Drive were first being developed, they attended many meetings of City planners and developers to discuss the homes, lot size, height of the lot, and most importantly, how to maintain the privacy and views of existing residents. She stated that when the development was finally approved, the impact lots, Lots 1-4 and 6-13, were required to place a heavy, dense, broadleaf

evergreen shrubs and trees along the entire western property line and were strictly prohibited from grading. She noted that Mr. and Mrs. Jeffrey owned one of those impact lots. She stated that the conditions are documented in Exhibit D, the Conditions of Approval for Tract 5835, with Conditions Nos. 5 and 15-18 indicating that the sloped yards shall be covered with trees and that re-grading is prohibited.

Ms. Johnston noted that a staff report from 1990 referencing a re-grading request of 19 inches reads: "The intent of the proposed conditions of approval that prohibited the re-grading of the lots in this subdivision and the restriction of building height from the 12 impact lots was to minimize any of the impact of the new development on the privacy and view shed of the homes in the older Vintage Heights subdivision.... Although the proposed re-grading is minor and could be completed without the need for City permits in most other neighborhoods throughout the City, staff feels that approval of this project would not be in conformance to the approved Tentative Map Condition prohibiting re-grading." She added that early in January 2008, the landscaped buffer which served as a privacy screen between their home and the home at 927 Montevino Drive and which was part of the Conditions of Approval was removed. She indicated that she notified the City that same day and informed staff of all of the conditions of these impact lots and that she was told that the project planner had made an error by processing the application and issuing the permits over the counter. She stated that after she spoke to Mr. Jeffrey, she decided to involve the City for help because there were too many unknowns.

Ms. Johnston stated that she was asked by then Planning Director, Jerry Iserson, to have this heard at the Zoning Administrator level instead of at the City Council level as conditioned by the approval. She noted that she and her husband agreed to this after being assured that it would carry the same weight of importance as if it were heard at the Council level. She indicated that they were asked if the pool could proceed as Mr. Jeffrey had contractors lined up and work was being delayed, and they had agreed in an effort to compromise in order to allow the Jeffreys to enjoy their yard, based upon their representation that they would re-install the landscaped buffer immediately and that no significant grading would occur.

Ms. Johnston continued that on April 8, 2008, the City received landscape and grading plans from Mr. Jeffrey, and upon reviewing the plans, they noticed that the plans did not accurately depict the nature of the slope bank that was in the southwest corner of the yard closest to them. She then showed pictures of what was submitted by Mr. Jeffrey, where the base of the wall is at the same grade level as the ditch and where the slope of the grade in the southwest corner as viewed from the Johnston home is more than just a four-foot area of fill. She also presented a picture of the final grade currently looks like. She noted that there is a significant difference between what was submitted as Exhibit A and what the final grade actually is, with the actual grade being 50 percent higher than what was submitted to the City.

Ms. Johnston stated that they submitted a letter to the City dated April 15, 2008, explaining their concerns about Exhibit A and its inaccuracies. She noted that they attended Zoning Administrator hearings on April 16 and April 30, 2008, but no solution was reached. She stated that following the meeting on April 30th, she asked to meet with Donna Decker, Principal Planner, and noted that on May 2, 2008, she reiterated their concerns about the grading of the lot and how it negatively impacted their home and lives. She stated that Ms. Decker indicated that she would meet with Mr. Jeffrey to discuss these issues and that she would get back to them when new landscaping plans were submitted. Ms. Johnston noted that they did not hear back from anyone and that about June 26, 2008, work again began at 927 Montevino Drive. She indicated that she sent an email and spoke to Natalie Amos and asked if work had been approved that they were not made aware of. She stated that Ms. Amos replied that nothing had been approved and that Mr. Jeffrey was proceeding without City approval. Ms. Johnston noted that when they returned from vacation on July 6, 2008, the retaining wall was completely installed, and it was to the top of their fence line. She noted that the wall may be four feet tall but that from their home, the wall was a six feet tall. She added that they were unsure at what point the wall went from being permitted in error to being allowed as they never received an explanation.

Ms. Johnston stated that at the Zoning Administrator hearing on July 10, 2008, staff did approve a retaining wall and mild grading along the rear portion. She noted that the grading was not mild and that staff rendered a decision without having seen the completed wall or photos of it to ensure that it conformed to Exhibit A. She added that Mr. Jeffrey assured them that trees would be planted in a tiered effect to cover the entire rear portion of the property and would conform to the landscape plan he submitted; however, the landscaping has been completed, and there is no room for the tiered planting. She added that the southwest corner which is the area of they are most concerned with has very few plants. She stated that she believed the final landscaping and retaining wall do not conform substantially to Exhibit A, as provided in Condition No. 1. She continued that since Mr. Jeffrey has proceeded with his work throughout this appeal, there are still other conditions that are not satisfied, specifically Conditions 3, 4, and 10, and probably more.

Ms. Johnston stated that there are many inconsistencies and misrepresented details in the staff report and that she would be happy to explain all of them should time allow. She brought to the Commission's attention a statement at the bottom of page 5 that states that the resulting slopes and landscaping will be similar to other requests that were approved within this subdivision and lists 10 addresses on page 7 with grading changes approved within the development. She noted that only four of the lots are impact lots and that one of them, 949 Montevino Drive, was denied by the City a 19-inch grade increase because of the impact to the neighbors' privacy. She added that two others on Amoroso Court excavated dirt out to build pools.

Ms. Johnston stated that despite their appeal and the City's recommendation not to proceed, Mr. Jeffrey has completed the grading and is putting the finishing touches on his landscape plan. She noted their disappointment and amazement at how Mr. Jeffrey could proceed with the project even though it was under appeal. She added that they had done everything that had been asked of them throughout the entire process, but Mr. Jeffrey was granted approval of everything with no compromising. She stated that this would set a precedent with the development and that others will be able to do the same. She noted that Mr. Jeffrey was able to level his entire lot by re-grading it, install a pool, build a six-foot high retaining wall, ignoring the request by the Planning Division not to proceed with any work. She added that even though Mr. Jeffrey agreed to the changes made to the landscape plan at the July 10, 2008 hearing, he planted what he wanted anyway.

Ms. Johnston noted that in the beginning of this whole process, they had asked for two conditions: to not allow a significant grade change and to plant enough screening to provide immediate privacy. She added that when the discussions headed into the direction that the retaining wall was going to be allowed, they came up with ideas and suggested that a three-foot high berm be added to the southwest corner to act as a barrier for sound and privacy, and that due to the height and close proximity to their yard and master bedroom, they had also asked that the newly elevated area be conditioned as landscape only. She stated that they felt these were more than reasonable requests, considering the vast improvements he would be gaining from the redesign of his yard. She noted that Mr. Jeffrey has greatly increased the value of his home while decreasing theirs.

Ms. Johnston concluded that this long and exhausting process was mismanaged from the start and that they never want to address it again. She noted that 20 years ago, they fought long and hard for their privacy and view shed from these homes, and she requested the Commission to make a decision tonight that will prevent this will from ever happening again.

Commissioner Fox asked Ms. Johnston what additional mistakes were in the staff report besides the two she had mentioned. Ms. Johnston replied that the report reads: "The appellants oppose the amount of grading and replacement of the landscape screen." She stated that they do not oppose replacement of the landscape screen. She added that on page 4, there is reference to the new wall replacing the old wall and noted that the original wooden fence was installed at that place by the original owners to hide the V-ditch and that they then put the heavy broad-leaf plants in front of it. She noted that the purpose of Mr. Jeffrey's wall was to specifically level. Ms. Johnston also pointed out that on page 4, it also states that the Johnstons felt they could possibly agree to the grade change if the applicant planted the majority of the yard with mature dense landscaping. She noted that they would never agree to that change without conditions, and no mention is made of their suggestion of the three-foot high berm. She added that every time the wall is mentioned, it is referred to as four feet tall, but staff has not come out and seen it, noting that it was actually on top of two feet of grade, making it a six-foot tall wall.

In response to Commission Fox's inquiry regarding whether or not the existing plants serve as a noise barrier, Ms. Johnston replied that through the years, Mr. Jeffrey's yard was probably the least used of any yards in the City because it was not very pretty and that she does not blame Mr. Jeffrey for wanting to re-design it. She stated that it had a sloped lawn going all the way down to the fence line with large pretty bushes and that she knew whenever the previous owners were in their hot tub. She noted that the home had been sold at least three or four times since the Johnstons had lived in the area.

Steve Jeffrey, Applicant, stated that his contractor had applied for a pool permit for its present location in his backyard and was issued one a couple of weeks later by the Planning Division, together with a permit to install a four-foot tall retaining wall. He noted that, with respect to the retaining wall, there were a couple of issues in his yard: (1) the vegetation was so high with such a slope coming off that there was a major safety issue for him and his family; and (2) the bushes were so tall, and he was unable to use any type of ladder to maintain them. He explained that his intent was to install the four-foot tall wall closer to the property line as shown in Exhibit A, but there is a 15-foot easement from the property line towards his house for the drainage ditch at the back. He then referred to Exhibit A-2 showing the existing V-ditch that drains the run-off from his property. He indicated that he has had to maintain the slope along the ditch to prevent the water from going onto the neighbors' properties.

Mr. Jeffrey stated that the drawing he made was not quite exact because the actual V-ditch comes up in grade, but he had to move the wall closer because of the 15-foot easement from the property line. He added that because no structures are allowed on that 15-foot easement, there was very little, if any, fill he used from the pool. He then showed before and after photographs of the actual grade of his yard, noting that there is very little difference between the two. He added that the grade was as it was prior to the process of his removing everything, and where the four foot wall is, looking over to the Johnston's property, there was a little bit of fill in the corner to the left. He indicated that the "before" picture was taken from his deck, which is six feet higher than where the "after" photograph was taken. He noted that the actual grade of the property looks a lot higher from the photo taken today. He noted that the argument that the grade was changed is wrong because the grade is actually the same distance from his existing retaining wall towards the front of the house to the back of the property.

With respect to the hedge, Mr. Jeffrey stated that the CC&R's state that they need to be green, broadleaf evergreen trees. He stated that he has talked to the Johnstons several times about the intent of his design which included a total of 15 trees and a combination of bushes and trees. He added that he then installed 20 evergreen broad-leaf trees along that portion of his property and included what was originally proposed as 15-gallon trees with several 24-inch box trees, one of which he placed

right in front of the Johnstons' property along with the surrounding bushes. He then presented a photo of what the trees look like across the rear portion of the property.

Mr. Jeffrey stated that because he originally did not want the three-to-three-foot high berm on top of the wall, he spoke with Ms. Decker and agreed to install a one-foot high berm in the southwest corner, which is what is indicated in the staff report. He noted that he had spent a lot of time and money trying to come up with resolution with the Johnstons, but there is no end in sight and continues on and on. He stated that he feels he has been a good neighbor and understanding to his neighbors and their concerns; he has coordinated with them, discussed the design aspect of his actual backyard; and met their concerns; and he has fulfilled the requirements of the CC&R's and his design intent.

Mr. Jeffrey stated that he is completely opposed to any type of restriction on the use of his property because he feels he should be able to use his property as he sees fit and as set forth in the rules governing the City of Pleasanton. With respect to the statements that he moved forward without permission, he noted that after being told not to move forward at all with the pool, he was given permission by the previous project planner to move forward and that he did not receive any type of stop work order for the construction of the retaining wall. He indicated that the only caution he was specifically told was that if he did move forward and some resolution comes up that differs from what he had done, he would be responsible for removing them. He noted, in fact, that the pool has been completed and signed off by the Building and Safety Division, and the retaining wall was also inspected and signed off. He stated that engineering papers were also submitted and should be on file with the Building and Safety Division. He concluded that a City official has come out to his residence to document the fact that the wall was installed as the permit stated at the time it was issued.

Commissioner Fox addressed Mr. Jeffrey and noted that the City of Pleasanton had informed him on January 25, 2008 to cease work. She asked him when he was told to continue work and by whom. Mr. Jeffrey replied that approximately two to three weeks after that, he was contacted by the project planner that he could continue to do work. Ms. Amos confirmed that Mr. Iserson had contacted all the parties, including the applicant, to let them know that an agreement had been reached and that Mr. Jeffrey could move forward with the pool permits.

In response to Commissioner Fox's inquiry regarding what the applicant was told about the rest of the backyard work, Ms. Amos replied that work in the backyard, including the retaining wall, was part of the approval that was given to him in December 2007.

Commissioner Fox asked Mr. Jeffrey if he had a copy of the CC&R's before he applied for his permits. Mr. Jeffrey replied that he did not and that he did not know they even existed.

Chair Blank inquired if he received a copy of the CC&R's when he purchased his home. Mr. Jeffrey replied that he was not aware of that.

Commissioner Fox asked Mr. Jeffrey if his contractor did not know about the CC&R's when he pulled the permits. Mr. Jeffrey replied that he had a licensed contractor but that his first knowledge of the CC&R's was when Mr. Wickboldt showed up at his home and told him there were issues with his work. He added that Mr. Wickboldt asked him to "hold tight" and they would try to resolve the problem. He stated that he asked Mr. Wickboldt for a copy of the CC&R's, which Mr. Wickboldt dropped off at his doorstep two days later.

In response to Commissioner Narum's question regarding the distance from the fence line to the wall, Mr. Jeffrey replied that the distance between the property line and the wall is 15 feet, which is the mandatory easement. Commissioner Narum stated that she thought the wall had been moved in from where the original fence had been, and Mr. Jeffrey replied that the original fence was probably a foot higher than the base of the retaining wall. Ms. Amos verified that a Building Inspector had measured the distance and indicated that the existing redwood fence then was about seven to eight feet from the property line; the applicant had moved the fence back to maintain the 15-foot easement required in that area.

Commissioner Narum inquired if the landscaping in the backyard was complete. Mr. Jeffrey replied that more landscaping was proposed, but he did not have additional money to spend at this time. He indicated that the intent is that in approximately one year, the plantings there will grow in. He stated that he had switched a lot of the vegetation from his original plan listed in Exhibit A to these different fast-growing varieties of shrubs and trees in order to meet the neighbors' needs as well as his own. He added that it is not his intent to just do what he wants and ignore his neighbors or staff.

Commissioner O'Connor requested confirmation from staff that Mr. Iserson's direction to Mr. Jeffrey in January 2008 that he could proceed included both the pool and the retaining wall. Ms. Amos confirmed that was correct. She added that the applicant went ahead with the pool and did not work on the retaining wall until later in the year. She reiterated that no permit is required for a four-foot tall retaining wall but that Mr. Jeffrey did receive one from the Building and Safety Division.

Commissioner O'Connor noted that one letter asking Mr. Jeffrey to stop work was dated August 8, 2008 and asked Mr. Jeffrey if he received that letter. Mr. Jeffrey confirmed that he did receive it but that he understood from his conversations with Ms. Amos and Mr. Dolan that this was not an order to stop work but a notice that if he did move forward, he would be responsible for possibly removing what had been installed should the final resolution be different from what he had installed.

Ms. Amos confirmed that whether the work involved installing landscaping or grading, the applicant, should he choose to move forward after receiving a work

order to cease, would be doing so at his own risk, knowing he may later have to change the work done.

Commissioner Fox referred to the timeline, noting that in January 2008, Mr. Iseron had indicated that the pool construction and excavation could move forward, and that soon thereafter, staff reviewed historical information and found that re-grading applications were required to go to City Council. She noted further that on page 2 of the staff report, it reads: "...Mr. Iseron made a determination to process the grading and landscape buffer at the Zoning Administrator level." She inquired how, given that staff found that the re-grading application required City Council approval, the Planning Director was authorized or able to actually allow this to proceed at a staff level.

Chair Blank directed that the Commission ask questions to the applicant first and then to staff later.

In response to Chair Blank's inquiry regarding who produced the Exhibit A and if he were an architect, Mr. Jeffrey replied that he prepared the Exhibit A and that he was not an architect. Chair Blank then suggested to Mr. Jeffrey that, if he did not get a copy of his CC&R's when he bought the property, he see an attorney or check the large packet of documents he received when he purchased his home and which should include the CC&R's.

Kathy Schoendienst, a neighbor of the Johnstons, indicated that she supported the appeal. She stated that she was present when the shrubbery was removed and confirmed that the Johnstons' privacy was substantially removed. She noted that the Johnstons notified Mr. Jeffrey from the very first day that there were restrictions on his property. She added that the Johnstons had contacted the City and made countless efforts to halt the project; they did everything they were asked to do and watched Mr. Jeffrey do whatever he wanted, compromising the value and privacy of the Johnstons' home. She stated that she did not understand how the process had gotten so out-of-hand and requested the Commission to uphold the restrictions on Mr. Jeffrey's property and have him take responsibility for his actions, and give back the Johnstons the privacy to which they are entitled.

Nelson Lam stated that he has lived adjacent to the Johnstons and directly behind the Jeffreys for about 5 years. He noted that one of the reasons he bought his home was because of its privacy and seclusion in the backyard, without realizing that there were homes behind him because of the extensive vegetation. He indicated that there are now at least two homes that have a direct line of sight to his backyard from their second floor. He stated that he renovated his home by extending out the master bedroom on the east side where two large windows and French doors are situated. He noted that he has lost privacy with the removal of the vegetation and that he did not want to wait five to seven years to get it back. He indicated that he was surprised that the work was allowed and that he and his neighbors now suffer the consequences of the City's mistake.

Lisa Johnson noted her confusion about when the retaining wall was permitted in error to be installed. She stated that when she and her husband returned from vacation on July 6, 2008, and saw the wall, she went to the City offices at 9:00 a.m. on July 7, 2008 and spoke to Ms. Amos, who seemed just as surprised that the wall had been built. She added that Ms. Amos indicated that she would let Ms. Decker know and that someone would go out to the site to issue a citation and fine the job because it was not to be done.

Ms. Johnston stated that she was also baffled at the July 10, 2008 Zoning Administrator hearing when Mr. Jeffrey and Ms. Decker were conversing that the wall that was built was fine and looks great, when she [Ms. Johnston] was under the impression that the wall was the reason for the hearing. She added that while Mr. Jeffrey stated that he tried to compromise at the meetings, her memory of the meetings is that he sat there and said nothing and that there was no compromise. She then asked what type of tree had been planted in the corner of his lot.

Steve Jeffrey reiterated that his intent from day one was to work with everyone and get through it because he did not want to be where they are today. He noted that he had no idea, owning three other houses in different cities, that he would ever be in this situation. He reiterated that he did not know the CC&R's even existed. He added that he has been to several meetings and has been working with the Planning Division to get this resolved, but it appears there is no resolution. He stated that he felt he has made a lot of progress with the Planning staff and that he has come a long way from where they were before.

Commissioner Olson asked Mr. Jeffrey the species of tree in the corner yard, and Mr. Jeffrey replied that it is Prunus Caroliniana or a Cherry Laurel tree, which grows about three feet a year.

Commissioner Olson inquired if the applicant would plant shrubs so that the lower area under the trees fills in. Mr. Jeffrey replied that the vegetation was taken out prior to knowing that the CC&R's even existed. He stated that he had a chipper come out and they were removed even before he learned about the rules. He indicated that he wished he could go back, but he could not, so he worked with Planning staff. He noted that he originally proposed 15-gallon trees, but when he went to the nurseries, he got the largest trees he could find, which were a 24-inch box trees.

THE PUBLIC HEARING WAS CLOSED.

Commissioner Fox stated that in the private sector, there are certain contracts for certain products wherein a Chief Executive Officer (CEO) or a Board of Directors say they want to review the contract before it's signed or before the product is sold to a certain customer. She noted that the Planning Commission also has things like this, such as for a particular housing development, it would like to have these particular

houses on these particular lots to come back to the Commission to be reviewed rather than through staff-level approval. She indicated that she finds it odd that, if there is a condition for a re-grading application to be heard by the City Council, the Planning Director has an application go through the Zoning Administrator process rather than through the process found in the original City Council's wishes. She compared the City Council to the CEO and stated that if the Council wanted to review something, such as the grading of certain lots, regardless if it was decided by a City Council of 20 years ago, that's what needs to be done.

Mr. Roush stated that he cannot speak entirely for why Mr. Iserson did what he did and that his assumption would be that Mr. Iserson looked at the intent of the condition, which seems to be an issue of the privacy concerns of those downhill residents. He added that he thinks, as Mr. Dolan had earlier indicated, that in an effort to try and resolve the issue at the lowest possible level without having to take it to the City Council or the Planning Commission, Mr. Iserson made a judgment call that he would try to work with Mr. Jeffrey and the Johnstons and other affected neighbors at a staff level or Zoning Administrator level to try and resolve the issue without elevating it further than that. He indicated that regardless of whether it was a good or bad idea, it was a judgment call on Mr. Iserson's part, and there seemed to be acceptance at least at some point from all affected neighbors that this would be an appropriate way to proceed; unfortunately it did not turn out the way Mr. Iserson hoped it would. He stated that without speaking for Mr. Iserson or justifying what he did, Mr. Roush felt it was well intentioned but did not work out in this particular case.

Commissioner Fox inquired if the City Council was informed through a memo or some other way that a lot was being re-graded in error and there was a former City Council action to have these reviewed by the City Council. Mr. Roush replied that he did not believe this has happened.

Chair Blank stated that he felt it was reasonable to try and get all the parties together to try and resolve the issue. He noted that between the end of January and the first Zoning Administrator hearing of April 16, 2008, it appears that permission was given for the pool and that at least one party thought there was permission given for the wall. He inquired if there were minutes or notes produced from those actions or record of discussions that took place during the three to four months when things were happening. Ms. Amos replied that there is no record or meeting minutes during that time period because what took place were internal conversations with staff; no official public hearings were held.

Chair Blank asked Ms. Amos if she was under the impression that the wall was approved in January 2008. Ms. Decker explained that the City had a change in project planners for this application. She noted that Ms. Amos is not the original project planner. With respect to whether or not there were notes and/or minutes and whether or not these decisions were memorialized, she explained that the Director's instruction to staff regarding various decisions made are not always memorialized via email or written notes. She stated that the Director has the authority to make

these decisions, which staff then carry out. She added that on any given day, there are numerous decisions that the Director makes that are not memorialized by notes, and there are no effective minutes of everyday activities taken by staff.

In response to Chair Blank's inquiry regarding when the original project planner left the project, Ms. Decker replied that she left the City in March 2008 and that Ms. Amos took over at the end of March or the beginning of April.

Chair Blank inquired if a search had been done of Mr. Iserson's emails to see if there is any correspondence which might provide some information. Ms. Decker said no and added that staff typically tries to clean up their emails before they leave.

Chair Blank questioned if there was any retention period for emails on City business. Ms. Decker replied that the City does not have a policy as far as retention of emails for correspondence and that staff is currently discussing this matter.

Commissioner O'Connor noted that staff first thought the wall should not go forward and then later indicated that it was fine. He added that the Commission also heard tonight that a wall four-foot tall or less does not require permitting. He asked staff if this was something staff did not realize in the past. Ms. Decker replied that the process under question was the grading of the site and the removal of the required screening along that particular boundary. She stated that the screening was previously within the 15-foot drainage easement area adjacent to the existing four-foot tall redwood fence along that boundary. She noted that the approval for both the swimming pool and the retaining wall were given by Planning staff in terms of the site being a straight-zoned parcel rather than a PUD. She added that staff at the counter would not have readily found the conditions of approval associated with a tract map. She stated that what instituted the question of grading is the pool, and staff had received the call in terms of the grading that was happening. She noted that four-foot tall retaining walls are being built all the time within the City. With respect to the question of whether, based on the topography the Commission has seen, this is or is not a four-foot tall retaining wall, she stated that on that corner there are six courses of eight-inch high concrete masonry unit blocks, which equal 48 inches. She added that there is a two-inch concrete cap, which makes the height slightly over four feet tall. Ms. Decker noted that Mr. Jeffrey did, in fact, get a permit but did not need to.

In response to the question of whether or not this was a surprise to Ms. Amos, Ms. Decker replied that Ms. Amos did not have the history of this project and was not aware of how it actually evolved from being permitted over the counter when she took over the project in March 2008. She noted that pools are permitted over the counter without design review, and the setbacks as well as the retaining wall and backyard landscaping are checked in terms of the straight-zoning.

With respect to the question regarding any of the other landscaping and irrigation on site, Ms. Decker explained that this particular dispute is about grading and excess

material as a result of the swimming pool as well as the removal of the landscape screening along that boundary.

Commissioner O'Connor noted that he had a picture that shows seven eight-inch bricks with a two-inch cap, which makes the wall look like it is ten inches higher than four feet or almost five feet. He stated that when the red flag went up and the neighbors were saying that there were conditions of approval regarding grading, the fact that a wall went up and if it were four feet tall, the City would not be able to stop it from being put up anywhere on the grade. He noted, however, that the issue at that point was there should not have been any grading and backfilling to the wall.

Ms. Decker stated this was correct, and the condition was interpreted that no grading without review would occur. She explained that the excavation of the pool itself causes grading of that site, which needed review. She reiterated that these types of conditions were embedded in a tract map and not a PUD which is more readily available to planners at the counter.

Commissioner O'Connor noted that it was in January 2008 when everyone became aware that this site is a PUD and that there are conditions. He stated that the wall was not in yet, but that the wall was not really the issue as the wall can be built up to four feet high on any place on the property; the issue is that no grading should have been done and there should have been no backfilling into that wall without review. Ms. Decker confirm Commissioner O'Connor' statement and added that this, as well as the excavation for the pool, should have been reviewed.

Commissioner O'Connor stated that he thought the pool was approved in January 2008. Ms. Decker advised that the retaining wall was approved on December 6, 2007, and the pool was approved on December 12, 2007. She added that when it came to staff's attention that there was grading occurring and that there was a condition of approval restricting that, Mr. Iserson began discussions with Mr. Jeffrey, the Johnstons and the Lams to determine what course of action would benefit all of the parties.

Chair Blank stated that based upon what is before the Commission, it seemed clear to him that if the Commission upholds the Zoning Administrator's decision, things would remain the way they are. He inquired if conditions would be created should the Commission vacate the Zoning Administrator's decision.

Ms. Decker replied that if the appeal is upheld, the Commission would be overturning the Zoning Administrator's approval and thereby requiring that the property be returned to its former stated, which would mean removing all grading, the retaining wall, all of the irrigation, and all of the plants that have been planted as well as the screening trees that have been planted for the neighbors, and consideration of the pool.

Ms. Decker continued that if the Commission denied the appeal and upheld the Zoning Administrator's decision, the Commission would be approving the grading, the pool, and the retaining wall. She added that the Commission may also modify the conditions of approval of the Zoning Administrator's approval if it so desired.

Chair Blank inquired if there is a *prima facie* evidence that the pool has been agreed to in its current state by both the appellants and the applicant. Mr. Dolan replied that was correct.

Commissioner Pearce inquired if, should the Commission uphold the Zoning Administrator's decision and deny the appeal, the Commission could go back and modify the Conditions of Approval as it sees fit. Ms. Decker replied that was correct.

Chair Blank inquired if the Commission could also modify the conditions should it overturn the Zoning Administrator's decision. Mr. Roush replied that the Commission would be modifying the Zoning Administrator's decision and allowing something to go forward as the Commission would craft it, as opposed to approving it, which would be status quo. He added that the Commission could also deny it, which would mean that the backyard would have to be returned back to what it was before the grading occurred, replanting trees, and so forth.

Commissioner Fox inquired if the Commission could uphold the appeal, put recommended conditions on it such as retaining the pool, and then forward the matter to the City Council. Mr. Roush replied that if the Commission's decision were not acceptable to the appellant, it would most likely be appealed to the City Council. He added that hopefully, the Commission will craft a decision that everyone will be happy with, and it will not have to go to the City Council.

Commissioner Fox inquired if, since the original approval indicated that the re-grading of the particular tract requires City Council approval, the Commission would not want this go to the City Council and follow the original wishes of the Council. She stated that she believed that if the Council wanted to review all re-grading, plans, it should do so even if the parties are in agreement.

Mr. Roush stated that it is within the Commission's discretion to recommend that this matter go on to the City Council for approval, consistent with the elusive condition for which staff has not been able to find the specifics but is referenced in a resolution.

Chair Blank called for a 10-minute break at 9:05 p.m. and thereafter reconvened the regular meeting at 9:15 p.m.

Chair Blank stated that the Commissioners have not discussed the matter amongst themselves and asked for discussion on the matter.

Commissioner O'Connor stated that he believes he has heard the issues from both sides and knows what the people would want but that he is trying to come up with a

compromise that he thinks would work that would keep this from elevating any higher. He indicated that he sees this as a noise and a privacy issue. He noted that a neighbor had mentioned not wanting to wait five to seven years for the landscaping to grow in and fill in. He further noted that foliage does not keep out a lot of noise and that usually it is retaining walls or berms or something more solid. He stated that staff had discussed a one-foot high berm going in as opposed to the three- or three-foot high berm that the appellants had wanted. He indicated that when he visited the site, he did not notice a one-foot high berm but that he thinks some kind of berm is needed. He stated that he believed it would be easy to remove some of the new vegetation, get a berm in there, and replant the vegetation without doing too much work. He noted that part of the problem would be that between the wall and the bender board, there is now a limited amount of room because the bender board has gone in as well as the sprinklers and grass which have been done in the last few days. He indicated that he thinks the berm should be a minimum of three feet which would help get some of the vegetation higher now rather than five years later. He stated that the only way to do this would be to encroach into the lawn area, but he noted that the applicant is aware that he would have to remove whatever he has installed should the decision be otherwise. He added that he did not know whether or not the appellants are looking for a tree that would grow to be 40 or 50 feet but that they did like what was there before, which was not really tall but filled in all the way down to the level of their fencing and provided privacy. He noted that the type of trees should be looked into.

Commissioner Narum noted that these type of neighbor disputes are tough. She stated that she was thinking along the same lines as Commissioner O'Connor and that she is hearing noise and privacy issues. She noted that the reality is that this will not happen tomorrow in terms of the vegetation and the screening, and, therefore, the issue is how to make this the most effective the quickest. She indicated that she was inclined toward say some kind of berm with plants on top and around to get the height up and the vegetation more quickly. She added that she was disturbed by the picture in the corner with all of the wide open space that is not really going to fill in. She noted that a Pittosporum would grow fast but would not totally fill in the corner, which is the portion most impacted. She stated that she believes a lot of these issues could be solved if we a screen could be provided more quickly.

Commissioner Olson stated that he was inclined to go with Commissioner Fox's earlier question of finding for the appellant and then placing conditions. He indicated that as a matter of principle, he felt strongly that the Commission should find for the appellant based upon everything that has happened. He stated that he agreed with Commissioner O'Connor that a berm is needed and noted that he did not see one at the site. He also agreed with Commissioner Narum that it is critical to fill in the corner. He also agreed with both Commissioners that it is both a noise and a privacy issue and while he is not inclined to put restrictions on the applicant's property, he thinks some conditions should be put in place that would prevent the

use of that corner of the property right up to that wall, which in his opinion is greater than four feet high.

Chair Blank indicated that he was in agreement with Commissioner Olson. He stated that he did not think this was handled properly and that finding for the applicant is the right, moral decision. He stated that he was at the site this morning and did not see a berm, that he was not happy with the vegetation removal as shown in the before and after picture, and that the testimony about not knowing about CC&R's was hard to believe. He noted that he would understand if this was the applicant's first home, but he had mentioned that he had purchased three homes in the past. He stated that ignorance of CC&R's is not an excuse for not being able to follow them. He agreed that there should be a berm and that there should be a restriction for the corner on Mr. Jeffrey's lot to prohibit above-ground structures and that if Mr. Jeffrey does not want to accept that restriction, the grade should be lowered, with the cost of lowering that grade borne by Mr. Jeffrey because he did not put the grade in in accordance with the laws of the City of Pleasanton.

Commissioner Pearce stated that like Commissioner Narum, she struggles with neighborhood disputes. She added that generally when she sees unpermitted work, she views the application as not having had the work done. She noted, however, that in this instance, she viewed the pool as being permitted and the retaining wall permitted only up to four feet high. She expressed concern about Condition No. 16 of the January 19, 1988 Conditions of Approval wherein there was very strong language prohibiting re-grading, and that based upon her conversation with the City Attorney that when this was written, the Council tried to put in the strongest language possible that the homeowner was sure to see in his CC&R's that prevented re-grading or strongly admonished against it. She noted that in general, ignorance of the law is no defense. She stated that she would like to make the parties whole but that her initial inclination is to allow the wall up to four feet high and return the grading on the western edge of the property to the pre-December 2007 grade. She added that she thinks there are other ways to achieve the privacy and view shed that the Commission would have considered had this come to them without the work already being done. She agreed with Chair Blank's suggestion that the berm be placed so as to afford sufficient privacy, that the landscaping issue be dense and addressed specifically, and that a sufficient portion of the lot near both back neighbors' homes be severely restricted, with the alternative that the grading be returned to the pre-December 2007 grading and only a four-foot tall retaining wall be retained.

Commissioner Fox stated that she agrees with Commissioners Pearce and Olson and that the Commission should uphold the appeal because she believes that what the appellants have to go through was not right. She noted that this is the sixth permit issued in error that the Commission has received in about three years. She agreed that the grading at the wall should be returned back to its original state and that the wall be only at four feet in height. She stated that the applicant should be required to do a professional landscaping plan that includes grades, prepared by an

engineer to ascertain that it complies with the first grading plan that was approved. She indicated that she believes the backyard towards the property boundary should be restricted so that there are no accessory structures, no sports courts, no gazebos, no fire pits, and no play structures. She added that the landscaping should be increased and that a condition be added that that this be reviewed by the City Council as well. She compared this application to that of the nursing facility at 300 Neal Street where there was an issue of planning integrity. She noted that the intent of the resolution should be looked into and that it is not right to say the Council does not need to see this because 15 or 20 years have since passed.

Mr. Dolan indicated that there are certain practical limitations to some of the things that have been discussed that he would like to comment on. He stated that in terms of a restriction, the Commission should be very specific geographically with respect to what this restriction should be in terms of the distance from the fence or retaining wall because this can be controversial. Mr. Dolan noted that he was not certain that it will be practical to be able to determine precisely what the grade originally was because as has been mentioned, he was not sure whether or not the retaining wall was over four feet tall. He noted that where the wall is located is definitely farther up the slope than where the fence was located because of the setback requirement from the fence. He added that it would be difficult to determine the grade on which the wall is located, and the applicant's claim that the wall is located on the former existing grade would be difficult to disprove.

Commissioner Fox inquired if the City has an original map of the subdivision. She stated that she felt the Commission would not get down to the quarter-inch. Chair Blank indicated that the Commission does not have any professionally prepared diagrams, but a hand-drawn diagram by someone who is not an architect or a soils engineer. He added that a professional engineer could look at the site and say that it would be impossible to determine or it would not make a difference due to erosion or other things; or the engineer could also spend 10 seconds on it and identify how to determine the grade and get within three to four inches.

Mr. Dolan stated that he believes the language of the motion needs to acknowledge that kind of difficulty. He questioned that if there is consideration for the Jeffreys to maintain the wall but not backfill it, it would be a retaining wall with nothing to retain. Chair Blank noted that this would be a choice to be made. Commissioner O'Connor pointed out there was also a four-foot tall fence that did not hold any dirt either.

Commissioner Pearce stated that given that the Commission does not have any real documents, the Commission could take a stab at how far back it thinks the restriction should be on a structure, or the Commission could have the Director of Planning and Community Development to go to the site and determine the appropriate distance, say 25-foot setback from the property line which would be 10 feet back from the wall. Mr. Dolan stated that if the Commission picked a number, it should be appropriate to replicate where the grade originally tapered off, which is unknown. Commissioner Olson stated that if a three-foot high berm is required, this will equate to a certain

amount of base and a certain width of base, which would pull the current lawn back from where it is now and dictate a certain width distance from the wall.

Chair Blank suggested specifying that it be a 10-foot setback from the three-foot high berm. Commissioner O'Connor stated that it should be measured from the property line or from the wall. He added that the Commission should keep in mind that before the grading was done, this backyard was virtually unusable as it sloped all the way to the bottom where the V-ditch is located. He stated that he would look at where the wall is currently located, step back from there, and then look at 25 feet from where the wall is. He noted that this restriction is for an above-ground structure; it is not for usability and or for coming out and playing on the lawn, but for going up higher.

Commissioner Fox inquired what the setbacks for accessory structures are for straight-zoned sites. Ms. Amos replied that it is five feet from the rear property line and three from the side property line for Class I accessory structures.

Commissioner Narum noted that the bigger issue is to re-create the privacy. Commissioner Fox noted that a large accessory structure also creates a visual impact.

Commissioner O'Connor indicated that the wall has only been pushed back about seven feet from where the fence used to be, and where the fence used to be, the ground was four feet farther down. He noted that it would be a guess to determine how far back was usable ground before it was backfilled.

Chair Blank stated that he liked the idea of 25 feet and that while he realizes it might not be a scientific methodology, it is something that is enforceable, measurable, and achievable. He noted that this is part of the price everyone has to pay when a project is handled this way by the City, the applicant, and everybody involved. He indicated that the Commission is simply attempting to do the best it can to make sure the appellants regain their privacy. He noted that the documentation from the Planning Commission meeting from 1987 looked like a lot of people went to a lot of effort to make sure that one thing above all will not happen, that the property will not be re-graded without City Council approval, and that is exactly what happened. He stated that the Commission must now do the best it can to make sure the intent is restored. He noted that the grade could be returned to what it originally was, which is going to be very expensive and maybe impractical.

Commissioner Pearce inquired how this could be done if the original grading is unknown and what would be proposed to be done in theory?

Mr. Dolan stated that it will be very difficult to construct the complex condition the Commission is discussing as a group. He noted that no one wants this to drag out longer and asked the Commission to give staff some time to make some proposals in order to correct it. He added that alternatively, the Commission could consider

something where the applicant could make a proposal, and if the appellants agree to it, the Commission could authorize him to approve it; and if the parties do not reach an agreement, staff will return to the Commission with alternatives.

Commissioner Fox stated that she likes the first alternative, but not the second one because she still believes what the City Council years ago indicated that it wanted to see re-grading requests.

Chair Blank stated that if the Commission tables this to the next meeting, and staff gets both parties to agree between now and the next meeting, the Commission can then send this to the City Council, explain what was said in 1988, and indicate that the two parties are 100 percent in agreement. He stated that he would be astonished if the City Council said it would not let the agreed-upon proposal move forward. He added that if, on the other hand, there is no agreement reached, then the Commission can have more detail from staff in terms of what that setback should be for the above-ground restriction, and the Commission can then move forward from there.

Commissioner Fox requested that the item be addressed at the next meeting as the appellants have gone through a lot and that she would not want to have them spend the next 20 hours in meetings. Chair Blank stated that this is something he felt could be done by the next meeting. Mr. Dolan stated that realistically, between now and the next meeting, staff could ask Mr. Jeffrey to make a proposal and present it to the Johnstons, and if the Johnston do not accept the proposal, staff would then go on to the Commission to consider options along the lines of what has been discussed, and it would not be a long, drawn out mediation. Chair Blank confirmed with Mr. Dolan that the setback recommendation could also be included through a short memo to supplement the current staff report.

Commissioner Pearce requested Mr. Dolan to measure the height of the wall, and Mr. Dolan replied that could be done if Mr. Jeffrey allows staff to do it.

Commissioner Fox reiterated that it should not be allowed to go for not more than two weeks. Mr. Dolan agreed and noted that it would take months if it does end up going to Council.

Commissioner Pearce moved to table PAP-123 (PDR-715) to the Planning Commission meeting of September 24, 2008.
Commissioner Fox seconded the motion.

ROLL CALL VOTE:

AYES: Commissioners Blank, Fox, Narum, Olson, and Pearce.
NOES: None.
ABSTAIN: None.
RECUSED: None.
ABSENT: None.

The motion passed, and the item was tabled for the September 24, 2008 meeting.

b. PCUP-229, John Pfund, Tri-Valley Martial Arts Academy

Application for a conditional use permit to allow the operation of the following at 1262 Quarry Lane, Suite A, in the Valley Business Park: (1) a martial arts/childcare facility, Monday through Friday, from 11:30 a.m. to 6:15 p.m.; (2) full-time childcare program camps during school breaks and holidays; and (3) evening martial arts classes, Monday through Friday, from 6:45 p.m. to 9:00 p.m. Zoning for the property is PUD-I (Planned Unit Development – Industrial) District.

This item has been continued to the September 24, 2008 meeting.

7. MATTERS INITIATED BY COMMISSION MEMBERS

a. Discussion of the types of projects to be placed on the Consent Calendar.

No discussion was held or action taken.

Waiting Period for Over-the-Counter Approvals

Commissioner Fox inquired whether the Commission could agendaize a discussion on a two- to three-day waiting period for permits that come to the counter in order for them to be vetted. She noted that she would like to see some process in place because an over-the-counter approval that ends up in error takes hundreds of hours of staff time. She stated that with permit streamlining, there have been some situations where applications are approved in error, which is not good.

Chair Blank stated that rather than formally agendaizing an item for the Commission to discuss processes that take place in the Planning Division, he suggested having Mr. Dolan return in one month with recommendations that might help ameliorate this situation. He indicated that he is not comfortable with holding a public hearing regarding internal departmental mechanics which is the Director's responsibility.

Commissioner Narum stated that the time to address this issue might be at the discussion on the permit streamlining process. She noted that there should be a

24-hour cooling-off period for over-the-counter approvals, particularly when they involve children.

Commissioner Fox noted that things are sometimes streamlined so quickly that it appears applications are being rubber-stamped. He stated that whenever these things occur, they have involved the inability to immediately access a record or condition that should be on a computer system somewhere. He added that the Commission has seen numerous walls that have been constructed that do not comply with the egress requirements as well as issues regarding a three- to four-story senior care facility which seem to go back to what types of Planning records are available to both the public and the Planners on duty. She noted that there have been a number of mistaken approvals lately and that the focus on streamlining should consider slowing down the pace to avoid mistakes.

Commissioner Narum agreed that there should be safeguards put in place so these kinds of errors no longer happen.

Commissioner Fox noted that the Commission's approval of tutoring and other schools to be a permitted use has resulted in ramifications that might make the Commission wish to re-think its decision and make it a conditional use again. She added that the Commission also needs to look at the context of some of the zoning decisions it has made for permitted uses that do not require a conditional use permit, such that applicants are coming in as tutoring facilities when they are actually day care facilities. She indicated that the Commission needs to re-evaluate and determine whether or not the Commission made the right decision, re-visit them, and revert them to conditional uses.

Chair Blank noted that this is a completely different issue than permits at the counter and suggested separating the issues.

Commissioner Fox stated that she felt they were related because some of these permitted uses are getting a rubber-stamp at the counter.

Chair Blank noted that these are not errors made by staff and they are following exactly what the Commission has asked them to do.

Commissioner Pearce stated that the Commissioners agree that this needs to be discussed. She added that she thinks the Commission is talking about which process is most important. She asked Mr. Dolan what his recommendation is with respect to streamlining.

Mr. Dolan acknowledged that there have been mistakes and that staff is not happy with them either. He added that staff wants to do whatever it can to eliminate mistakes. He indicated that he likes Chair Blank's approach that he suggest some ideas on how staff can address this issue. He noted that some of them relate to a technology question, which cannot be fixed overnight, and others have to do with

volume and complexity. He stated that smart, dedicated people could make the same mistakes in some of these cases and that is part of the City's challenge to find out how to minimize this. He indicated that he would be happy to share his thoughts on what it is he thinks staff could do, but the item could be agendaized as well if the Commission so desires.

Chair Blank noted that he would prefer to hear from Mr. Dolan first.

Commissioner Fox stated that she found out that when the old records were converted from microfiche to laserfiche, some of the documents became completely unreadable, making some laserfiche actually unsearchable because they are unreadable. She noted that this has caused all sorts of problems in terms of not being able to find records from even just ten years ago.

Mr. Dolan stated that there has been a whole package of permit streamlining, with a group in town making recommendations to the City Manager. He noted that staff is still reviewing these recommendations and would be vetted through this Commission, particularly when they involve ordinance changes. He stated that it would be within the Commission's purview to provide a feedback to slow down and not speed up.

Chair Blank stated that he did not believe it was a question of slowing down or speeding up but figuring out what process needs to be put in place to make sure that there is no recidivism. Mr. Dolan agreed and noted that permit streamlining is all about speed and that there are multiple interests that the City is trying to satisfy and balance.

Commissioner Fox stated that said she feels that there are things that involve kids and putting a certain number kids in buildings that we're not sure are up to fire or building code standards. She added that if some things were done in error, they should be reversed. She noted that paramount is the safety of the kids and the people in this community.

House on Peters Avenue and Angela Street

Commissioner Narum stated that she is very happy that the house at the corner of Peters Avenue and Angela Street has primer on it and thanked staff for following through.

Automatic Residential Fire Sprinklers

Chair Blank advised that the first public hearing on the sprinkler ordinance is scheduled for September 24th and thanked staff for bringing that forward.

8. MATTERS FOR COMMISSION'S REVIEW/ACTION

a. Future Planning Calendar

Ms. Decker announced that the special meeting planned for October 2 to review the General Plan has been canceled. She advised that there is a notation in the staff report on the Actions of the Zoning Administrator that Commissioner Fox has appealed PDR-725, Comerica Bank. She added that PDRW-6, T-Mobile, was appealed by Chair Blank. She indicated that both of these items will come before the Commission at its September 24th meeting.

Actions of the City Council

No discussion was held or action taken.

Actions of the Zoning Administrator

No discussion was held or action taken.

9. COMMUNICATIONS

No discussion was held or action taken.

10. REFERRALS

No discussion was held or action taken.

11. MATTERS FOR COMMISSION'S INFORMATION

a. Brief report on conferences, seminars, and meetings attended by Commission Members

12. ADJOURNMENT

Chair Blank adjourned the Planning Commission meeting at 9:54 p.m.

Respectfully,

DONNA DECKER
Secretary