



TOWN OF TIBURON
Tiburon Town Hall
1505 Tiburon Boulevard
Tiburon, CA 94920

Action and Approved Minutes - Regular Meeting
Tiburon Planning Commission
September 10, 2008 – 7:30 PM

ACTION MINUTES TIBURON PLANNING COMMISSION

CALL TO ORDER AND ROLL CALL **7:35 PM**

Chairman O'Donnell, Vice Chairman Kunzweiler, Commissioner Corcoran, Commissioner Fraser, Commissioner Frymier

ORAL COMMUNICATIONS **There Were None**

Persons wishing to address the Planning Commission on any subject not on the agenda may do so under this portion of the agenda. Please note that the Planning Commission is not able to undertake extended discussion, or take action on, items that do not appear on this agenda. Matters requiring action will be referred to Town Staff for consideration and/or placed on a future Planning Commission agenda. Please limit your comments to no more than three (3) minutes. Testimony regarding matters not on the agenda will not be considered part of the administrative record.

COMMISSION AND STAFF BRIEFING

Commission and Committee Reports
Director's Report

PUBLIC HEARING

1. 80-E MAIN STREET: CONDITIONAL USE PERMIT TO OPERATE A SEGWAY RETAIL SALES BUSINESS; FILE #10809; Zelinsky Properties, Owner; Slide4less, LLC, Applicant; Assessor's Parcel No. 059-102-20 [LT **Voted 5-0 to direct Staff to return with a Resolution denying the application for the September 24, 2008 meeting**
2. 81 PASEO MIRASOL: AMENDMENT TO AN EXISTING PRECISE PLAN (THE RING MOUNTAIN PRECISE PLAN) TO CHANGE THE DESIGNATION OF A VACANT PARCEL FROM OPEN SPACE TO PRIVATE RECREATION USE; FILE #30802; Doug and Leslie Barry, Owner; Riley Hurd, Applicant; Assessor's Parcel No. 38-410-01 [SA] **Voted 5-0 to direct Staff to return with a Resolution denying the application for the September 24, 2008 meeting**

MINUTES

3. PLANNING COMMISSION MINUTES – Regular Meeting of August 27, 2008
Adopted as Submitted 5-0

APPROVED PLANNING COMMISSION
MINUTES NO. 971
September 10, 2008
Regular Meeting
Town of Tiburon Council Chambers
1505 Tiburon Boulevard, Tiburon, California

CALL TO ORDER AND ROLL CALL:

Chair O'Donnell called the meeting to order at 7:30 p.m.

Present: Chair O'Donnell, Vice-Chair Kunzweiler, Commissioners Fraser, Frymier and Corcoran

Staff Present: Community Development Director Anderson, Associate Planner Tyler, and Minutes Clerk Levison

ORAL COMMUNICATIONS:

There were none.

COMMISSION AND STAFF BRIEFING:

Community Development Director Anderson provided the following briefing:

- The Green Building Regulations and the final parcel map for the Tiburon Court project, a 3-lot subdivision off Trestle Glen Boulevard, are scheduled to be heard before the Town Council at next Wednesday's meeting.

PUBLIC HEARING:

1. 80-E MAIN STREET: CONDITIONAL USE PERMIT TO OPERATE A SEGWAY RETAIL SALES BUSINESS; FILE #10809; Zelinsky Properties, Owner; Slide4less, LLC, Applicant; Assessor's Parcel No. 059-102-20 [LT]

Associate Planner Tyler presented the staff report, stating that the applicant is requesting to open a Segway Personal Transporter (PT) retail sales business in the 547 square foot commercial space at 80-E Main Street (Ark Row). A Segway PT is a two-wheeled, self-balancing, electric motorized vehicle, which is steadily becoming a popular, environmentally-friendly form of alternative transportation.

Staff's primary concern is with demonstration and test-driving of the vehicles, given the proposed location on upper Ark Row. The proposed location of the use is far from ideal for this specific aspect of the use. Therefore, Staff has included a condition of approval that would prohibit the test-driving of Segways on any sidewalk or street in the downtown area. In addition, because the proposed use is unlike any other business in the downtown, Staff also recommends that this conditional use permit be reviewed after six (6) months of operation, or sooner for cause.

Steve Steinberg, applicant, owner of Segway of Oakland and operator of the Segway Tours on Angel Island, explained the benefits of the Segway, stating that each model is compact with an average wheelbase width comparable to a person's shoulders. It travels approximately twenty-four miles and costs roughly 80 cents per charge, is soundless and non-polluting and is allowed on most mass transit and ferry systems. Mr. Steinberg began the Segway rental operation on Angel Island; three thousand tours the first year generated nearly \$300,000 of income of which Angel Island received half. In addition to the growing number of private owners, including several Tiburon residents, Mr. Steinberg's client list includes the San Rafael Police and Parking Departments, College of Marin and the Sausalito Parking Company. Owners recommend the Segway due to the obvious parking advantages as well as cost savings on gas, tolls and vehicle maintenance.

Mr. Steinberg said he would like to open a retail location in Tiburon due to the green nature of the entire county, its proximity to his current North Bay client base, commercial rents at the proposed location and the immediate proximity to tourists leaving Angel Island. He reassured the Planning Commission that he does not plan to run a tour out of this location. His intention is to conduct tests within the store and then teach buyers how to operate their Segway within their primary environment. He foresees the only real traffic effects to the Town would be from resident purchasers.

Commissioner Frymier confirmed that the cost of Segways range from \$5,300 to \$6,100, that approximately six Belvedere-Tiburon residents own Segways, and that he chose Tiburon for his new store due to it being convenient to his work on Angel Island, it is a central location from which to serve his existing North Bay and San Francisco client base, and is a convenient work place for his current employees residing in the North Bay.

Chair O'Donnell asked Mr. Steinberg if he intends to perform any servicing in the proposed store. Mr. Steinberg explained that Segways are self-diagnostic and repairs are generally performed on location at people's homes or corporate offices. Any major repairs or servicing require parts to be shipped to New Hampshire and would be done out of the Oakland warehouse.

Vice-Chair Kunzweiler questioned and confirmed that functions from the store include taking sales calls, displaying new models, assisting walk-in traffic with in-shop demonstrations and using the site as a service base.

Vice-Chair Kunzweiler asked Mr. Steinberg how he would operate his store while complying with the proposed restrictions. Mr. Steinberg said that he was under the impression that the restrictions regarding Segway use on city streets applied only to the retail shop and not to individual owners. It is his expectation that owners would travel to his store just as they travel through Town now. Vice-Chair Kunzweiler clarified, asking if he envisioned owners riding up onto the sidewalk and into the shop. Mr. Steinberg explained that Segways are best suited to use in the streets and specifically bicycle lanes where available.

Commissioner Frymier questioned what would happen if she wanted to test a Segway near her home before committing to a purchase. Mr. Steinberg said that he would accompany, or ride with her to her home, and instruct her on its use there. He said that he was hoping to exit the downtown area via Main Street, head towards the trail by Richardson Bay and loop back around to the shop while avoiding the downtown area. He noted that streets on that route have bicycle

lanes and that vehicles tend to travel slowly there. Mr. Steinberg also said his primary plan is to offer potential buyers the opportunity to try the Segway on the Angel Island tour and if they purchased one, he would discount the purchase price in the amount of the tour.

Commissioner Fraser asked who the target consumer was and Mr. Steinberg explained that it used to be evenly distributed amongst “early adapters” or wealthy people over thirty who “just wanted something cool,” mobility assisted people and police or city groups. With the rise in fuel prices however, he has seen an increase in purchases by younger metropolitan commuters and teenagers travelling to and from school. In Tiburon, consumers might be a wealthy tourist as they tend to impulse buy Segways.

Commissioner Fraser asked Mr. Steinberg if he had read the staff report, and pointed out that staff and the Police Department had determined that test driving the vehicle would not be appropriate on downtown streets and that its operation would be unlawful on the Richardson Bay multi-use path as well as any other bicycle or pedestrian path owned by the Town. Mr. Steinberg acknowledged that the Town has that authority but reiterated that the majority of his customers live elsewhere and thus would not be riding on the Town’s streets and paths.

Commissioner Fraser said the Town has worked very hard to create a village environment and would tend to avoid the presence of dealerships in the downtown area as it is impractical. He asked Mr. Steinberg how his shop would address moving customers to another location in order to test drive the Segway. Mr. Steinberg said he is capable of transporting two of the vehicles in his car to another location but that primarily, he keeps a small rental fleet for people to try at home prior to purchasing.

Commissioner Fraser noted that Tiburon is a destination environment without pass-through traffic and asked Mr. Steinberg how this location would help him serve his current client base. Mr. Steinberg explained that the Segway is allowed on the ferry system and this location near the ferry terminal is ideal to serve those clients, as well as attract the interests of new clients.

Commissioner Fraser asked if he has considered another location, and Mr. Steinberg explained that he was most interested in the location at 21 Main Street immediately next to the ferry terminal but it required leasing the entire building and was cost-prohibitive.

Commissioner Fraser asked what the demographic of private consumers is with regards to the last twelve months of sales. Mr. Steinberg said it is primarily commuters with less than a twenty mile round-trip commute.

Commissioner Frymier asked Mr. Steinberg why he was not interested in operating his store in Sausalito, and Mr. Steinberg said this had been considered but that conversations with the operator of the Angel Island Ferry indicated that parking constraints and rents in Sausalito were prohibitive.

Commissioner Corcoran asked where the Sausalito Segway tour route travels. Mr. Steinberg explained that tour runs through downtown along the path to the Bay Model or to the Fort underneath the Golden Gate Bridge.

Commissioner Corcoran questioned if this was run by another company, and Mr. Steinberg confirmed it is operated by San Francisco Electric, one of his largest clients.

Commissioner Corcoran asked if Mr. Steinberg could envision doing rental tours in Tiburon. Mr. Steinberg stated he would be open to a discussion on it if the Town were interested. He explained that Angel Island had approached him about the tours and as a result of their agreement they currently receive half of the revenues generated from the enterprise with no overhead costs.

Commissioner Corcoran asked staff if there were any restrictions in the conditional use permit as written which pertains to rental tours. Community Development Director Anderson said nothing in the use permit authorizes tours. Mr. Steinberg added that he is open to whatever the Town desires with respect to tours and noted that he always pays a use fee in areas he maintains a rental fleet.

Chair O'Donnell opened the public comment period.

Public Comments:

Dick Brewer expressed concern over the Segway's lack of noise and called it a senior attack vehicle. He explained that as a senior citizen with balance issues, he has had alarming encounters with bicycles rounding corners and passing him quickly, and envisions the Segway to be a similar safety threat. Mr. Brewer also voiced concern with the lack of licensing requirements and regulations regarding operation of the vehicles.

There were no other speakers, and Chair O'Donnell closed the public comment period.

Commissioner Corcoran said he understands Mr. Steinberg's desire to open a location in the Town. While he agrees with the staff report that Ark Row may not be the ideal location for this, the area could benefit from increased pedestrian traffic and this may be a good way to generate it. He said regardless of this use permit, residents are still allowed to own and operate their Segway within the Town. He cited the list of conditional uses permitted in this area including a bus depot, service station and commercial parking facilities and noted that they would all result in a heavier use for the downtown area. While he thinks rentals would have a greater impact on the Town and fears fleets of Segways taking over the streets on weekends, he is also intrigued by the idea. Personal conversations with residents as well as neighbors of the proposed retail space indicated no opposition to the proposed use and said on balance, he does not find this to be dramatically different from what is already allowed under current zoning laws.

Commissioner Fraser said he finds Mr. Steinberg's explanation of the Segway's commercial, ecological and commute advancements of other areas compelling and thinks it is a bit unusual that municipalities are not embracing it. He noted that Tiburon does not have the commerce environment that drives people into Town on a daily basis and so is not heavy on the targeted commuter consumer. He said he is most troubled by the proposed location, noting that the Town has worked the last ten years to revitalize and change the downtown commerce mix and created a real village atmosphere. Managing cyclists is an ongoing issue and that as the Segway is still in the early stages of use, municipalities have not managed to develop a system to address them. He spoke with the Town's Chief of Police who implied he was against the idea, and given that conversation and the restrictions stipulated in the use permit, he could not foresee how Mr. Steinberg or his staff could successfully operate out of this location.

Commissioner Corcoran spoke with Captain Hutton who was under the understanding that they would have to abide by the rules of motor vehicles. He questioned and confirmed that the Segway is actually not classified as a motor vehicle.

Vice-Chair Kunzweiler said the merits of the Segway are irrelevant to this application; the issue is whether or not this is an appropriate business in the selected location. He said Ark Row is a pedestrian, consumer- and visitor-friendly retail area. The general plan clearly states its desire to encourage pedestrian activity and interaction with businesses in that area and this is an inconsistent use. He believed that the business is a good idea and that other areas in Tiburon may be conducive to the proposed activities but, given the location, he could not support the application.

Commissioner Frymier concurred with Vice-Chair Kunzweiler and Commissioner Fraser. She said the goals of this business are inconsistent with those of the location. As a green community, everyone is aware of the drawbacks of fuel but she doubts the Town could sustain a real market for the Segway. She also noted her discomfort with the lack of licensing requirements to operate the Segway and said she finds them incomparable with bicycles. While she appreciates the idea and the business plan, she could also not support the use.

Chair O'Donnell stated that as a green community, the Town should promote alternatives like the Segway. He agreed that Ark Row may not be the ideal location but it is worth an attempt. He said that the Town is constantly looking for businesses that support the Town and increase tourism interest and he believed this could bring a lot of attention to Ark Row. His concerns were related to the location and the restrictions within the resolution and he suggested changing the resolution to allow demonstrations on Town streets. He said the Town has made it clear that Mr. Steinberg is not to operate a service center or tour operation from this location, and the restriction is enforced as part of the approval of the permit.

Vice-Chair Kunzweiler said the consensus seems to be that the location is problematic; the current location carries a lot of restrictions that could make this use unfeasible and suggested asking the applicant to consider other locations within the Town that would ease the Commission's concerns. He said while he hates to reject the application, he finds this operation on Ark Row to be untenable.

Commissioner Frymier asked why her fellow commissioners were stumbling over the Ark Row location.

Commissioner Fraser believed it was not a great location for an electric-powered vehicle dealership as it is not a place that he could or wants to see a free flow of motorized traffic.

Chair O'Donnell said the language of resolution is pretty clear in disallowing demonstrations and test drives and explained that his main concern was with the service aspect and the applicant attempting to troubleshoot or perform diagnostics or service on the sidewalks and streets. He reiterated that staff was very clear in its requirements and that if Mr. Steinberg would like to attempt to operate a sales office here, the business should be allowed to fail or succeed on its own merits.

Vice-Chair Kunzweiler said these restrictions are a way to get around the intended use as dictated by the general plan. While he believes they were created in an effort to allow the

business to operate at this location, he thinks they make the success of the business improbable. Chair O'Donnell said he believed, however, the issues created by the restrictions are for the business owner to mitigate.

Commissioner Fraser asked the Commission to consider the implications of as few as five residents purchasing the Segway and riding together through the downtown area.

Commissioner Corcoran reiterated his hesitation over a rental fleet riding through the Town but suggested that light use by residents could be positively looked at as one less car on the road. He said in a lot of ways, Tiburon could be the ideal community for this and it may actually help foster the small town community.

Vice-Chair Kunzweiler believed those were the merits of the Segway, but the issue at hand is the presence of a Segway dealership on Ark Row. This business requires transporting a large device in and out of the front door as opposed to the small pedestrian negotiable packages of neighboring businesses. He said physics dictates that business involving larger items requiring a greater maneuvering area be located outside of the downtown area.

Chair O'Donnell said Ark Row could use a business that would generate a shot of interest. Commissioner Corcoran said it is very difficult to find the right kind of business for Ark Row and felt this one was worth an attempt. He questioned whether or not there is a more suitable and available location in Town that would meet the requirements of the resolution. He agreed with Vice-Chair Kunzweiler that Ark Row is not ideal but the applicant is working very hard to make this location work and if it comes down to this or none at all, he would prefer to give it a chance.

Commissioner Fraser reiterated his doubt that the applicant could successfully make this location work when its sole product cannot be used in or around the location. He said he has heard no objections to the business model or the concept of electric transportation but did caution that recent studies show that the silence of cars has become a safety issue across the county. He said he is unsure he could find the logic in a business model that requires the movement of a significantly sized item when its use is prohibited in that area.

Chair O'Donnell asked and confirmed that this application is for a six month conditional use permit. He confirmed that the applicant has already signed a lease for this location and Mr. Steinberg added that it is conditional upon approval of and effective for the duration of the use permit.

Commissioner Fraser asked if there was any merit in continuing the item in order to gain additional information on Segways and other municipalities or Towns that use them.

Commissioner Corcoran said he would like to hear what the Chamber of Commerce and local businesses think about the potential benefits to the Town. Commissioner Frymier reiterated her concern over the lack of licensing requirements and said she would be interested in speaking with the Police Department.

Vice-Chair Kunzweiler restated his disapproval of the Ark Row location and his desire for the applicant to consider alternatives.

Commissioner Corcoran suggested the Commission ask the applicant to exercise due-diligence in considering alternate locations.

Vice-Chair Kunzweiler offered the option to pass on the resolution at this meeting and ask the applicant to return for approval with a new location.

Commissioner Frymier said that while she is in favor of a six-month review period, the rainy season is approaching and she doubts the Town will get a true picture of the impact until April or May of 2009.

ACTION: It was M/S (Kunzweiler/O'Donnell) to approve the resolution, as drafted. Vote: 2-3 (Frymier, Kunzweiler and Fraser voted no).

Community Development Director Anderson announced that the motion failed and no action had been taken. If there seems to be a clear majority in favor of denying the application, staff would ask that the Commission make a motion directing staff to return with a resolution formally denying the application for consideration at the next meeting.

Vice-Chair Kunzweiler asked if the resolution could be amended to encourage the applicant and landlord to consider alternative locations. He stressed that the Commission would like to encourage the applicant to re-apply with a different location.

Community Development Director Anderson explained that this approach simply buys time. At the next meeting, the Commission will have received a draft resolution of approval, and a draft resolution for denial that it could consider. In the meantime, the applicant may attempt to secure another location for the business.

Vice-Chair Kunzweiler reiterated that location is the singular issue and his desire to have the applicant consider alternative locations.

ACTION: It was M/S (Kunzweiler/Fraser) to direct staff to draft a resolution denying the application and bring it back to the next scheduled meeting for possible action. Vote: 3-2 (O'Donnell and Corcoran voted no).

2. 81 PASEO MIRASOL: AMEDMENT TO AN EXISTING PRECISE PLAN (THE RING MOUNTAIN PRECISE PLAN) TO CHANGE THE DESIGNATION OF A VACANT PARCEL FROM OPEN SPACE TO PRIVATE RECREATION USE; FILE #30802; Doug and Leslie Barry, Owner: Riley Hurd, Applicant; Assessor's Parcel No. 38-410-01 [SA]

Director of Community Development Anderson presented the staff report. He stated that the applicants desire to install a fenced play area for their children and some landscaping on a roughly half-acre parcel of land under their ownership that was designated as "open space" on the Town's Ring Mountain Precise Plan drawing in 1983. They therefore are requesting a change in the Precise Plan map designation from Open Space to Private Recreation. The proposed play area would be 40 feet by 72 feet and would be surrounded by a 6 foot tall wood-and-wire fence. Several native trees and shrubs would be planted to provide screening for the play area. He

noted that partial work on these improvements was performed last year before the work was stopped for lack of permits.

Anderson noted that the staff report provides a brief history of the parcel from its initial approvals with the County of Marin to subdivision approval by the Town. He commented on the lack of visibility of the play area from inside the home at 81 Paseo Mirasol and stated that the play area could become an attractive nuisance for the neighborhood.

He recommended that the Commission hold a public hearing and consider the resolution that had been drafted.

Riley Hurd, applicant and legal counsel for Doug and Leslie Barry, explained that he is seeking to change the precise plan designation of "Parcel A" from open space to private recreation. Mr. Hurd said the parcel is not traditional open space as is evidenced by its history, ownership status and the law. He reviewed the history of the parcel as well as the responsibilities and rights of the owners of 81 Paseo Mirasol as spelled out in the staff report. The CC&R wording allowing the owners of 81 Paseo Mirasol to "cross over and use parcel A" anticipates a use more than simply crossing over. In addition, both the Town zoning maps and general plan designate the land as residential and violate the Subdivision Map Act that states there cannot be a conflict between approved subdivision contracts, the general plan and the precise plan.

Mr. Hurd said the Barrys were first alerted to their rights when they were approached by a developer who expressed a desire to build a home on Parcel A. The Barrys looked into the matter, retained Mr. Hurd's firm to file a quiet title action and became the fee owners of Parcel A in 2006.

Mr. Hurd explained that the Barrys began construction on a play area for their children on Parcel A in 2007 after hiring a contractor and obtaining permits. Because Parcel A does not have a street address, the contractor used the address of 81 Paseo Mirasol on the application and was issued a stop work order once the Town was alerted that construction was not taking place on the approved property.

Mr. Hurd acknowledged the Town's receipt of one piece of late mail correspondence regarding the property. The correspondence states that the surrounding neighbors are concerned because they were assured this was open space when they purchased their homes. Mr. Hurd argued that neither the general plan, zoning plan or parcel map call it open space and all of the neighbors are part to the CC&R stating the Barrys' right to use the land. He also discussed neighbors' concerns regarding visual obstruction, stating that the fence would be equally visible if it were located at 81 Paseo Mirasol. In regards to design issues, he said there are no plans to install any structures and that the landscaping and overall look would be for the Design Review Board to address. He said the Barrys complied with all of the Town's notification requirements and also distributed a personal letter inviting neighbors to view the site and discuss any concerns.

Mr. Hurd concluded that at one point this parcel was intended to be open space but this did not occur when no one wanted to take responsibility for it. The Barrys now own this land and carry with them rights of ownership that would be legally questionable to extinguish. He encouraged the Commission to follow staff recommendations and change the designation of Parcel A to private recreation.

Vice-Chair Kunzweiler asked what the title of 81 Paseo Mirasol states. Mr. Hurd said the owner purchased the land and home at 81 Paseo Mirasol and the responsibility to pay taxes on and maintain Parcel A, as well as use Parcel A.

Commissioner Fraser asked how that use is defined, and Mr. Hurd responded it is not defined.

Vice-Chair Kunzweiler asked what the custom of use at that time was and Mr. Hurd said he would interpret it as anything less than a buildable lot.

Commissioner Frymier confirmed the property was purchased by the applicants in 1998.

Vice-Chair Kunzweiler asked why private open space was not listed as an ownership option and Mr. Hurd said it is because the owners wish to use the land as recreation space.

Chair O'Donnell asked for clarification on the building permit obtained for the property. Mr. Hurd explained that since Parcel A does not have an address, the contractor obtained the permit for 81 Paseo Mirasol.

Commissioner Fraser asked if the homeowner failed to properly review the documentation with the contractor and was not aware that the application was misrepresented. Mr. Hurd confirmed this and stressed that it was unintentional.

Commissioner Fraser confirmed that Parcel A has its own assessor parcel number on the parcel map and asked if that number was used on the application. Mr. Hurd said he was unsure and did not have a copy of the application on hand.

Chair O'Donnell asked if the required plan drawing accompanied the application. Mr. Hurd said one was submitted but that it was incorrectly drawn. Community Development Director Anderson explained that the submitted drawing showed the play area located on 81 Paseo Mirasol between the house and the property line with Parcel A.

Chair O'Donnell asked what the applicant's plans for the play area are and why Astroturf has been rolled out if there is no play structure. Mr. Hurd said the plan is to have a flat natural grass or Astroturf play area enclosed by a fence and surrounded by plantings to act as screening and minimize visual impact.

Chair O'Donnell asked what the term, "quiet title action" signifies. Mr. Hurd explained that a quiet title action is used to obtain a court ruling identifying the fee owner of a parcel when the ownership is questionable.

Vice-Chair Kunzweiler read from the CC&R's, said Mr. Hurd has taken a broad expansion of the term use and asked him to explain what types of restrictions are implied on that use. Mr. Hurd said the primary restriction is that this is not a buildable lot and reiterated that the general plan, Town zoning and the Parcel Map all label it as a residential lot.

Commissioner Corcoran asked if the Zoning Code has a definition of private recreation. Mr. Hurd said no; because this situation is unique, he wanted to formulate a term that would be very limiting.

Commissioner Corcoran asked if the Zoning Code would need to be amended to approve this designation. Community Development Director Anderson clarified that the Zoning Ordinance in effect at the time the Ring Mountain precise plan was approved defined private recreation as “any recreation use not owned by a public agency” and now reads “any recreation use not owned or operated by a public agency and for which a fee is charged.” It can be found in section 16-1 of the Zoning Ordinance.

Chair O’Donnell asked if a swimming pool is considered a private recreation use. Community Development Director Anderson explained that it is a normal ancillary use that you would expect to find on a lot that is a building site, i.e. a permitted use accessory to a single family home.

Chair O’Donnell questioned and confirmed that private tennis or basketball courts would be considered a private recreation use.

Commissioner Corcoran asked how much the plan would have to change if the applicant were to build this project on 81 Paseo Mirasol rather than on Parcel A. Mr. Hurd responded that he did not know the square footage comparisons, but noted that construction on 81 Paseo Mirasol would require significantly more cutting and would ultimately place the play area further from the home.

Commissioner Fraser asked if the quiet title action attributes an advantage to the owner or if it was simply for clarification purposes. Mr. Hurd said the clarification is the only real advantage.

Commissioner Fraser asked if the play field could have been constructed on Parcel A without a quiet title action. Mr. Hurd explained that it would still have been possible given the language of the CC&R’s.

Commissioner Frymier asked what the owners thought Parcel A was when they purchased their home. Mr. Barry said the realtor described the land as a non-buildable lot that they would have to pay taxes on and would be able to use.

Chair O’Donnell opened the public comment period.

Public Comments:

Tom Lahey said he lives on Paseo Mirasol directly beneath the Barry home, but that his home is not part of the HOA and he was not a party to any notification of the construction. He worked closely with the original developer to limit the number of home lots and assign specific areas as open space and this was a determining factor in the decision to purchase his home. He likes the land as it exists and short of seeing any benefit to the community, nature or the appearance of the neighborhood, he is strongly opposed to changing the property’s designation. He was upset that the project was initiated without permits, and while Mr. Hurd’s explanation reassured him it was unintentional, he thinks the property should be restored to its previous state.

Marshall Jainchill said as a neighbor of the Barrys, he agrees that the only flat areas for children to play in the neighborhood are located in potentially dangerous traffic areas. He was initially opposed to the play area as his property directly faces that parcel and both the Astroturf and fencing would be out of place. He no longer opposed to the Barrys creating a play area there as long as the materials used are in keeping with the aesthetics of the neighborhood and do not

obstruct his view. He asked that if the Commission approves this request, the resolution not state that everything is consistent with the surrounding area as he does not feel that would be the case. He expressed displeasure that he was never notified of the quiet title action, read the CC&R's and understands that the Barrys have purchased a special easement with the right to go onto the property. He noted that the Barrys are the homeowners' association managers and is concerned that they acted as both the plaintiff and defendant in the quiet title action.

Commissioner Corcoran asked and confirmed that Mr. Jainchill supports some version of the play area as long as it does not include the use of AstroTurf or a fence. Mr. Jainchill added that 81 Paseo Mirasol is a steep lot situated on a dangerous curve and that he really would like the Barrys kids to have a place to play safely.

Jerry Riessen said that while he cannot speak to the history of this particular site, Tiburon is rife with tiny pockets of open space sacrificed by developers. He understood how the Barrys came to own the land but said that "use" was intended to entitle them only to walk on and pay taxes on the land; it was never intended to house any structures that include AstroTurf and fencing. He said it is important that the Town respect these small pockets of open space and the deal that was cut to preserve them. He concluded by reminding the Commission of a similar issue regarding Blackie's Pasture and the decision that a passive use would be in the best interests of the Town.

There was not further public comment. In rebuttal, Mr. Hurd explained that the developer, not the homeowners' association, was the defendant in the quiet title action and that the homeowners published notices on the action as required. He countered Mr. Riessen's statements stating that he believes the parcel's designation to be the result of a mistake rather than a deal. The Parcel Map is the one piece that does not fit or comport with the government code and that is what he is asking the Commission to change. He said neighbors' concerns with the materials used for the play area are obviously something for the Design Review Board to address and is not the issue before the Commission.

Chair O'Donnell closed the public comment period.

Vice-Chair Kunzweiler believed there are clearly a lot of peculiarities with the issue. The Town frequently trades open space for development rights and while documentation has been inconsistent and mistakes made, there are documents that specify the original intention and state the restrictions of use on this parcel. He cautioned against allowing open space to morph into another use and said while the reasons always sound fair, the Town needs to draw the line somewhere. He recommended rejecting the proposal as presented.

Commissioner Fraser agreed with Vice-Chair Kunzweiler that there are discrepancies in the documentation but whether it was a mistake or not is speculative at this point. He questioned the Barrys difficulties with the permit process, noting that it is very thorough and contains many documents the owner should thoroughly review before signing. He noted that the CC&R's describe Parcel A as "not a buildable site" and that the grading and foundation work already done seems like construction in his mind. He found the neighbors' concerns over maintaining open space to be sound and added that such areas only add to the community as a whole. He expressed empathy for the owners' situation and acknowledged their need for a safe play area, but noted that they were aware of the limitations of their property when they purchased it. He said the structure as it is planned would be an eyesore even if this was a buildable site and said

he was in favor of rejecting the application and requesting that the land be returned to its original contours.

Commissioner Frymier agreed with Commissioner Fraser's comments on the permit process and said she has no hesitancy in denying the resolution. She expressed great discomfort with the notion of changing any amount of open space to private recreation use, and disagreed with the wording in the staff report with regards to intent, stating that the Town wanted that area to remain as open space and they need to preserve it as such. She concurred with Commissioner Fraser and requested that the resolution be amended to require the site be restored to its original state.

Commissioner Corcoran concurred with fellow Commissioners and added that he wanted to honor the work, deliberation and decisions previously made; the Town has made a lot of really good decisions including which lots are buildable and which are not. The Precise Plan Map makes it clear that this is an open space area and he fully supported Mr. Riessen's and the Commissioners' statements regarding open space.

Chair O'Donnell expressed empathy for the Barrys but agreed with the other Commissioners. He said paying taxes on a parcel does not entitle the owner to certain benefits on that land and that assuming the taxes on an adjacent open space parcel is actually a benefit to the property itself. He said the circumstances of this application do not add up and that if this application were granted, it could morph into a greater concept of private recreation use.

Commissioner Frymier reiterated her desire to request that the land be restored to its former state, and Community Development Director Anderson explained that doing so is an enforcement issue typically addressed by staff.

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| <p>ACTION: It was M/S (Kunzweiler/Fraser) to direct staff to draft a resolution denying the application and bring it back to the next scheduled meeting for possible action. Vote: 5-0.</p> |
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MINUTES:

4. PLANNING COMMISSION MINUTES – Regular Meeting of August 27, 2008

Commissioners requested no amendments to the Minutes.

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| <p>MOTION: It was M/S (Kunzweiler/Fraser) to approve the minutes of August 27, 2008. Vote: 5-0.</p> |
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ADJOURNMENT:

The Planning Commission adjourned the meeting at 9:50 p.m.

EMMETT O'DONNELL, CHAIRMAN

ATTEST:

DANIEL M. WATROUS, SECRETARY