

MINUTES
OF THE
REGULAR MEETING
CLAYTON CITY COUNCIL
TUESDAY, October 3, 2017

1. **CALL TO ORDER & ROLL CALL** – The meeting was called to order at 7:00 p.m. by Mayor Diaz in Hoyer Hall, Clayton Community Library, 6125 Clayton Road, Clayton, CA. **Councilmembers present:** Mayor Diaz, Vice Mayor Haydon and Councilmembers Catalano, Pierce and Shuey (arrived at 7:03 p.m.). **Councilmembers absent:** None. **Staff present:** Assistant to the City Manager Laura Hoffmeister, City Attorney Mala Subramanian, City Engineer Scott Alman, PE, Community Development Director Mindy Gentry, and City Clerk/HR Manager Janet Brown.

2. **PLEDGE OF ALLEGIANCE** – led by Mayor Diaz.

3. **CONSENT CALENDAR**

It was moved by Vice Mayor Haydon, seconded by Councilmember Catalano, to approve the Consent Calendar Items as submitted. (Passed; 4-0 vote).

- (a) Approved the minutes of the City Council’s regular meeting of September 19, 2017.
- (b) Approved the Financial Demands and Obligations of the City.
- (c) Approved the proposed schedule for the ten (10) Saturday “Concerts in The Grove” series in The Grove Park in 2018.
- (d) Approved the denial of a liability claim filed against the City by Ms. Brenda Defoe on behalf of Robert Joseph Smith, represented by Christopher Scranton, Esq., and authorize the City Clerk to send the Notice of Rejection.

4. **RECOGNITIONS AND PRESENTATIONS**

- (a) Certificates of Recognition to “Do the Right Thing” public school students selected for exemplifying the character trait of “Responsibility” for August and September 2017.

Mayor Diaz and first grade teacher Deborah Huaco presented Certificates to students Jonah Cesarin and Logan Konemann.

Mayor Diaz and Diablo View Middle School Principal Patti Bannister presented Certificates to students Scott Tomaszewicz and Amaia Perez.

Mayor Diaz and Clayton Valley Charter High School Academic Advisor (9th grade) Bob Ralston presented Certificates to students Samuel Pearson and Logan Schoffstall.

5. **REPORTS**

- (a) Planning Commission – Vice Chairman Bassam Altwal indicated the Commission’s agenda at its meeting of September 26, 2017 included a Site Plan Review Permit to allow the construction of a single-story addition on an existing single-story single-family residence. This item was approved with the staff recommendation.

(Councilmember Shuey arrived at 7:03 p.m.)

- (b) Trails and Landscaping Committee – Meeting held September 25, 2017.

Assistant to the City Manager Laura Hoffmeister indicated its last meeting’s agenda included a review of the Landscape Maintenance District first quarter report for the period of July 2017 through September 2017, a review of the draft Landscape Maintenance District year end budget report for FY 2016-17, and the selection of Chair Howard Kaplan and Vice Chair Dane Horton. The current members terms are set to expire. The committee also plans to meet in December to review their Citizens Advisory Committee 2016-17 Annual Report for the Trails and Landscape Maintenance District.

- (c) City Manager/Staff – No report.
- (d) City Council - Reports from Council liaisons to Regional Committees, Commissions and Boards.

Councilmember Shuey had no report.

Councilmember Catalano attended the Council Budget Subcommittee meeting and volunteered at the 14th Annual Oktoberfest sponsored by the Clayton Business and Community Association.

Vice Mayor Haydon attended the Council Budget Subcommittee meeting, the 2nd Annual Skip Ipsen Memorial Bocce Tournament, the Trails and Landscape Committee meeting, the Clayton Business and Community Association general membership meeting, and the 14th Annual Oktoberfest sponsored by the Clayton Business and Community Association.

Councilmember Pierce attended the Contra Costa Transportation Authority board meeting, the Association of Bay Area Governments Committee meeting, several meetings of the Metropolitan Transportation Committee, the inaugural meeting of the Committee on Affordable and Sustainable Accommodations, the 14th Annual Oktoberfest sponsored by the Clayton Business and Community Association.

Mayor Diaz attended the County Connection Board meeting, where he was selected to be the Secretary to the Board which is similar to the first vice chair. This is part of the leadership of the Board and next year he would be in consideration for the Vice Chair position. He also attended the Contra Costa County Association of Realtors meeting, the 2nd Annual Skip Ipsen Memorial Bocce Tournament, the JFK University luncheon in Pleasant Hill, the Clayton Business and Community Association general membership meeting, and the 14th Annual Oktoberfest sponsored by the Clayton Business and Community Association.

- (e) Other – None.

6. **PUBLIC COMMENT ON NON - AGENDA ITEMS** – None.

7. PUBLIC HEARINGS

- (a) Consider the Introduction and First Reading of Ordinance No. 478 amending Chapter 15.09 of the *Clayton Municipal Code* to adopt the 2016 California Fire Code with changes, additions and deletions as allowed by State law.
(Community Development Director)

Community Development Director Mindy Gentry presented the staff report noting the Contra Costa County Fire Protection District provides fire protection services to the city of Clayton with staff recommending ratification of the District's Fire Code Ordinance providing consistency in the application and enforcement of building and housing standards. Ms. Gentry noted the changes to the fire code included amendments for when automatic sprinkler systems are required for private and charter schools; updated requirements for standby EMS personnel for large events; additions to include the Fire Districts weed abatement program; and updated requirement for fire access roads. Ms. Gentry introduced Mr. Robert Marshall from the Fire District to answer any questions the city council may have.

Mayor Diaz opened the Public Hearing.

Robert Marshall, Fire Marshall, Contra Costa County Fire Protection District, advised a majority of changes made to the 2016 Fire Code have been carried forward from the last update. The standby EMS requirement was made due to the fire department was not an ambulance provider at the time and the language needed to be updated to reflect this change. The automatic sprinkler system requirements were added to private and charter schools greater than 2,000 square feet.

Mayor Diaz then closed the Public Hearing.

It was moved by Councilmember Shuey, seconded by Councilmember Pierce, to have the City Clerk read Ordinance No. 478, by title and number only and waive further reading. (Passed; 5-0 vote).

The City Clerk read Ordinance No. 478 by title and number only.

It was moved by Councilmember Shuey, seconded by Councilmember Pierce, to approve Ordinance No. 478 for Introduction with findings the adoption will not have a significant adverse effect on the environment and is therefore exempt under CEQA. (Passed; 5-0 vote).

- (b) Consider the adoption of Urgency Ordinance No. 479 placing an interim local moratorium on the operation or establishment of parolee homes and community supervision programs within the city of Clayton.
(Community Development Director)

Community Development Director Mindy Gentry presented the staff report noting this would extend the moratorium for one (1) year. This would be the last extension allowed by State statute, and would allow staff time to conclude its research and analysis, then draft regulations for both the Planning Commission and City Council to consider. The Ordinance is in repose to AB109 transferring the parolee responsibility from State to local jurisdictions. Staff concerns include the potential for negative impacts to public health, safety and welfare, particularly if there were a dense concentration of parolee

homes or service providers or if these uses were to be located near sensitive uses such as parks or schools. The County's Community Supervision Program, including parolee homes are not defined in the Clayton Municipal Code.

Councilmember Catalano inquired on when it is anticipated for this item to be brought back to City Council?

Ms. Gentry advised this item will be brought back in spring 2018 for City Council consideration.

Mayor Diaz asked if there has been any interest in anyone wanting to open up a Parolee residence?

Ms. Gentry advised there was one inquiry back in November 2016, however there has not been any other interest or follow up from that provider or any other providers.

Mayor Diaz opened the Public Hearing; no comments were offered. Mayor Diaz then closed the Public Hearing.

It was moved by Vice Mayor Haydon, seconded by Councilmember Pierce, to have the City Clerk read Ordinance No. 479, by title and number only and waive further reading. (Passed; 5-0 vote).

The City Clerk read Ordinance No. 479 by title and number only.

It was moved by Vice Mayor Haydon, seconded by Councilmember Pierce, to approve Ordinance No. 479 for Introduction with findings the Ordinance is not subject to the California Environmental Quality Act because this activity is not considered to be a project and it can be seen with certainty that it will not have a significant effect or physical change to the environment. (Passed; 5-0 vote).

8. ACTION ITEMS

- (a) Policy discussion of encroachments into the public right-of-way and fence locations for exterior side setbacks.
(Community Development Director)

Community Development Director Mindy Gentry noted in the month of September city staff initiated two code enforcement cases regarding the construction of retaining walls and fencing in the public right-of-way and were constructed without building permits. The right-of-way at 199 Mountaire Parkway is approximately 5 feet 6 inches from the back of the sidewalk; the unpermitted retaining wall that was constructed is approximately 2 feet from the back of the sidewalk and exceeds 36 inches in height, requiring a building permit. A wooden fence was also placed on top of the retaining wall, exceeding the six foot total height requirement, wall plus fence, and the fence does not comply with the setback requirement of 5 feet from the property line.

Ms. Gentry noted the second code enforcement case is located at 401 Wright Court with a violation of a fence located on top of a retaining wall with total height exceeding the six foot height requirement; violation of setback location requirements; the wall and fence are located within the public right-of-way; and was constructed without building permits.

Ms. Gentry noted the components of these two cases have brought to light violations occurring citywide with discussion needed to address encroachments into the public

right-of-way; exterior side setback fencing regulations; code enforcement and public education.

Ms. Gentry advised when right-of-way is determined; it is based on current and possible future needs that may come with increased demands from both the public and governmental oversight agencies. Locally, Clayton may be faced with two such demands for additional space for data and wireless connectivity and from the Regional Water Control Board for storm water treatment of the city streets. By allowing private structures to be constructed within the public rights-of-way, the City could be severely limiting its ability to prepare for the future and could be pushing this issue off onto future generations rather preventing them now. The city does have the ability to require the owner of any encroachments that necessitate removal, relocation, or abandonment to be done so at the cost of the owner. However, this option raises possible logistical matters, including limited staffing and resources, adverse impacts to timing on necessary City projects due to enforcing relocation of these structures, additional paperwork to memorialize the encroachment as well as coordination with the property owners on the construction and removal of these structures.

Ms. Gentry advised the second issue is the exterior side setback fencing regulations, which currently allow a maximum of 30 inches in height within five feet of the property line and a maximum of six feet in height in the remaining portion of the exterior side setback. Staff opines the current fencing regulations for exterior side lots compromises privacy or sacrifices usable land in order to have a six foot fence. The City of Clayton does not maintain landscaping within the public right of way and is the responsibility of the property owner. If six foot fences were allowed on the property line, it would reduce the amount of space to be landscaped between the back of sidewalk and the fence. On neighborhood streets, the different placement of the fences can create an inconsistent visual appearance.

Ms. Gentry noted the third issue of code enforcement being reactive to complaints from the community and not proactively seeking out violations. Currently, staff time and resources are limited to address this community wide issue and also brings the question of fairness of enforcement. The City is not required to enforce its Municipal Code as courts have recognized due to limited resources, some violations of a city's ordinance will go uncited and that absent deliberate or intentional discrimination, such selective enforcement is legal.

Ms. Gentry concluded with the fourth issue, a Public Education effort to help get the word out to the community, which would be beneficial. Although fencing requirements are currently addressed in the Citizen's Guide and within the *Clayton Municipal Code* both available at City Hall, Library and on the city's website, more outreach could be done. A notification could be prepared for Homeowners Associations, fencing contractors, the homepage of the city's website and an article in the *Clayton Pioneer*.

Councilmember Shuey inquired in the event if the City allows a known problem, that was not properly constructed and a utility requires access to the public right-of-way, what is the potential impact on the city and the property owner at that time the utility needs to get into that space?

Ms. Gentry advised within the *Clayton Municipal Code* the city has the ability to remove any authorized or unauthorized structures for utilities to have access. The property owner would first be notified, if they are uncooperative to remove those structures, the City has the ability to remove the structures and place a lien on the property to recover the public funds used for the removal.

Councilmember Catalano inquired if the public right-of-way width is typically more than the concrete portion? Is it obvious to a resident where their property line is located?

Ms. Gentry advised there is not a set distance and this distance varies in certain parts of the community, in some areas there is a monolithic sidewalk and some that are detached. Typically, there are 6 inches of curb and 5 feet of sidewalk and usually 5 feet of public right-of-way behind the sidewalk; however for a property owner to obtain an accurate location of their property lines, they must hire a surveyor to mark them out.

Councilmember Pierce added the property line locations behind the sidewalk or curb if no sidewalks vary in each subdivision based on the location of public utilities. Councilmember Pierce requested clarification if a permit is required and had been requested prior to construction, would these requirements have been provided to homeowner or contractor.

Ms. Gentry advised if permits were sought prior to construction, the City would provide the regulations and information to the applicant, on the two cases presented this evening, they would not have been approved as they would not have met the requirements for height and location.

Mayor Diaz opened matter for public comments.

Robert Brenneman, a neighbor of 199 Mountaire Parkway, advised the retaining wall and fence is aesthetically very pleasing, prior to the retaining wall, there were overgrown junipers and difficult to see when leaving the driveway. The visibility has improved and would like to see the project continue.

Greg Roberts, a neighbor of 199 Mountaire Parkway, who also represents the contractor who installed the retaining wall and current improvements, believed the retaining was less than the height requiring a building permit. The current wall is just over 3 feet tall, built to the manufacturers specifications, compacted layers, base rock, drainage system, and anchored to the hillside, making it structurally sound.

Councilmember Shuey inquired on how Mr. Roberts thought the structure met regulations?

Mr. Roberts advised as he understood in most jurisdictions, a retaining wall is allowable up to 4 feet without a permit.

Councilmember Shuey inquired on who the contractor is on this project?

Mr. Roberts advised Viking Pavers constructed the retaining wall and is doing the current work in the backyard.

Mrs. Kalt advised A & J Fencing built and installed the fencing on top of the retaining wall.

Councilmember Pierce inquired if A & J Fencing currently holds a Clayton Business License?

Ms. Gentry advised A & J Fencing currently does not have a Clayton Business License and has been notified several times by the City that a business license is required to perform work in the City of Clayton. Ms. Gentry advised shortly after the stop work order was issued, Viking Pavers obtained a Clayton Business License.

Mr. Roberts advised the retaining wall was constructed over a year ago and the second phase of the project recently started for a patio.

Aaron Kalt, 199 Mountaire Parkway, added there will be an addition of a gate to the fence , setback approximately one foot to close off the backyard with the remaining installation of the pavers, AstroTurf, and drought tolerant landscape. Mr. Kalt advised he and his wife moved into the residence about 4 years ago and found the junipers to be an eyesore to the neighborhood and wanted to make improvements. Mr. Kalt spoke to neighbors about the improvements they wanted to make and then presented them to the Homeowners Association for approval. Once the improvements were approved, Mr. Kalt hired the most reputable contractors in the area for construction of the project; thinking he was going about the project appropriately.

Mayor Diaz, a former Dana Hills resident, inquired if the Homeowners Association provided any feedback on this project?

Mr. Kalt advised that the Homeowners Association provided favorable feedback on the removal of the junipers and making the property visually appealing. On May 26, 2016 Mr. Kalt received a letter from the Homeowners Association approving his plans.

Councilmember Shuey requested to review the letter Mr. Kalt received from the Home Owners Association.

Councilmember Catalano noticed a fire hydrant located on the corner of the property and inquired if there is sufficient accessibility to it by the Fire Department if it were needed in an emergency.

Mr. Kalt advised an adjacent neighbor had a fire about 6 months ago and this particular fire hydrant was used to put out the roof fire with no known issues.

City Engineer Scott Allman added Contra Costa Fire Protection was contacted regarding the clearance around the fire hydrant and was advised a three-foot minimum clearance is required and this property looks to meet the requirements.

Councilmember Shuey advised the approval from the Homeowners Association notes that Mr. Kalt is responsible to obtain the necessary permits and building inspection services required from the City for this project.

Mr. Kalt advised he assumed the contractors he hired would obtain the necessary permits needed. Mr. Kalt would like fair and equitable treatment in regards to retaining walls that are already in place and is willing to go through the necessary steps to rectify the situation and complete the project.

Councilmember Pierce advised the City Council is not ruling on his particular property, but is establishing a policy for current and future structure violations and how to protect the public right-of-way of the City and for the installation of future utilities and Regional Water Control Board needs.

Councilmember Shuey added this issue has come up before and the contractors Mr. Kalt hired had an obligation to inform Mr. Kalt of the requirements needed to complete his project. Mr. Shuey advised a policy decision on encroachments needs to be made for consistency purposes throughout the community and if the desire is to allow encroachments, there needs to be indemnification to protect the city that can be prepared by the City staff and the City Attorney.

Ms. Gentry added, wooden fences need to be moved 10 feet from the back of sidewalk to be compliant in the *Clayton Municipal Code* as the Code requires it to be 5 feet from the property line and in this case the property line is 5 feet behind the sidewalk.

Mayor Diaz closed public comments.

By general consensus, City Council provided direction to staff to create a revocable encroachment agreement with indemnification language to protect the city, including appropriate insurance for the encroaching structures; to draft an ordinance to allow a six-foot fence at the property line for exterior side lots, with all other current requirements to remain; to pursue code enforcement cases if the City is aware a violation; and to conduct a public education effort regarding the regulations for the construction of fences.

- (b) Discussion of staff recommendations for various local policy issues arising from the California voters' passage of Proposition 64 and the State legislature's passage of SB 94 – the Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) regarding local regulation of cannabis.
(Community Development Director)

Community Development Director Mindy Gentry provided a brief background noting on December 20, 2016 the City Council passed an Urgency Ordinance banning the personal outdoor cultivation of cannabis and staff requested direction regarding Proposition 64 - the Control, Regulation, and Tax of Adult Use of Marijuana Act (AUMA). The City Council directed staff to not regulate the indoor cultivation for the personal use of marijuana; add provisions to the Clayton Municipal Code to treat marijuana similarly to alcohol with no consumption allowed in public; further address marijuana in 2017 to allow more time for legal clarification and to determine what actions neighboring jurisdictions have taken.

Ms. Gentry noted there have been no changes to the federal Controlled Substances Act; however a bill has been introduced to change marijuana from a Schedule I narcotic to another controlled substances schedule. On June 26, 2017, Governor Brown signed into law SB 94 – Medical and Adult Use Cannabis Regulation and Safety Act (MAUCRSA); combining the medical and adult use of cannabis systems into one licensing structure with the same regulatory framework governing both medical and adult use facilities. The most notable change is vertical integration is now allowed, as it pertains to cannabis businesses. On September 16, 2017, AB 133 was signed into law noting technical fixes or changes to MAUCRSA.

Ms. Gentry noted Clayton's local regulations mostly pertain to medical purposes with the *Clayton Municipal Code* being silent on the recreational or adult use of marijuana. The City of Clayton has prohibited medical marijuana dispensaries; testing laboratories; facilities that store or maintain marijuana as part of their operations; and outdoor cultivation or production of cannabis; and some indoor cultivation. The City Council did not prohibit the delivery of medical marijuana due to accessibility concerns for patients within the community.

Ms. Gentry further noted the neighboring communities of Antioch, Brentwood, Pittsburg, Danville, and Orinda have banned all commercial cannabis businesses for both medical and adult use. The City of Concord has directed staff to draft an ordinance to put a ban in place; however will revisit the issue once more clarity has been provided by the State. Contra Costa County has prepared a permanent ordinance to prohibit all commercial uses until an ordinance to fully regulate all aspects of cannabis is completed. The City of Pleasant Hill Planning Commission has recommended to its City Council to allow retail medical cannabis. The City of Walnut Creek has placed a moratorium for all

commercial cannabis, however their staff will be returning in the next two months with additional information for its City Council to consider and provide further direction to its staff.

Ms. Gentry advised the City of Clayton is not required to have an ordinance in place by January 1, 2018, however cities only have sixty days to respond to the State once notified of an application to open a business in the jurisdiction. Further, under SB 94, if a local jurisdiction does not have an ordinance enacted to address the licensed activity, the State can unilaterally issue a license for that business. The State is only prohibited from issuing a license if the business would violate local ordinances. If there is not an applicable local ordinance, then there is no violation. The local regulation of medical and recreational cannabis does not have to be consistent with one another; however staff is recommending the Clayton Municipal Code be amended to thoroughly to address both medical and adult use cannabis. If it only addresses one area it can create an interpretation issue that could be legally challenged for denying a permit if an ordinance does not cover the activity.

Ms. Gentry concluded that staff was seeking direction from Council on retail sales; indoor/outdoor cultivation; distribution; adult use delivery; testing; and manufacturing.

Councilmember Catalano inquired on the prohibition of the regulation of personal indoor cultivation and asked about the regulation of outdoor cultivation should this be included?

Ms. Gentry advised back in December 2016 the City Council passed an urgency ordinance prohibiting the outdoor grow for personal use, and staff was not recommending any change. Personal indoor is allowed under SB 94 up to 6 plants per home – not per person.

Councilmember Catalano inquired on the issuance of Home Occupancy permits in regards to the edibles and resale. Should this also be included?

Ms. Gentry advised the City Council could provide further direction on this as there is a cottage food industry that has special state regulations; however, further research would need to be done. Staff is recommending a blanket prohibition of any home based cannabis businesses.

Vice Mayor Haydon inquired on the definition of commercial cultivation?

Ms. Gentry noted commercial cultivation is anything beyond the six (6) allowable plants per residence as defined in the State law.

Mayor Diaz opened matter for public comments; no comments were offered.

By general consensus, City Council provided direction to staff to prepare an ordinance that would prohibit the retail sales of cannabis; testing laboratories; manufacturing; distribution facilities, any businesses that store or maintain cannabis as part of their operations; and outdoor cultivation or production of cannabis. The City Council directed staff to allow delivery of adult use cannabis to a residence from a location outside of the City. The adult use delivery would be consistent with the current allowable medical delivery.

9. COUNCIL ITEMS – None.

10. CLOSED SESSION – None.

11. **ADJOURNMENT**– on call by Mayor Diaz, the City Council adjourned its meeting at 9:10 p.m.

The next regularly scheduled meeting of the City Council will be October 3, 2017.

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Respectfully submitted,



Janet Brown, City Clerk

APPROVED BY THE CLAYTON CITY COUNCIL



Jim Diaz, Mayor

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