

O. 775.823.2900
One East Liberty Street
Suite 300
Reno, NV 89501-2128
lewisroca.com

Darren J. Lemieux
Partner
Admitted in California, Nevada, and Colorado
303.628.9579 direct
DLemieux@lewisroca.com

REPLY TO WILLIS K. POLITE’S OPPOSITION TO STATEMENT OF APPEAL

FIALHO REQUEST FOR ADMINISTRATIVE DETERMINATION REGARDING CONDITIONAL QUALIFIED EXEMPTION DECLARATION ISSUED TO WILLIS K. POLITE

October 29, 2021

Affected Properties: 1600/1620 North Lake Boulevard, Tahoe City, California
APN: 094-160-009, 010
TRPA File No.: QESZ 2021-0152
Appeal File No.: ADMIN2021-0030; ADMIN2021-0033

Helio Fialho and Therese Fialho (the “Fialhos”), as trustees of the Fialho Family Trust, respond to Mr. Polite’s opposition (“Opposition”) to the Fialhos’ September 27, 2021, Statement of Appeal (“Statement”) submitted to the Tahoe Regional Planning Agency (“TRPA”) Executive Director or Governing Board (“Board”). In the Statement, the Fialhos requested that the Board, first, vacate the Rejection of Appeal for TRPA File Number QESZ 2021-0152 and dated September 20, 2021 (“Rejection”), and, second, process and entertain the Fialhos’ Request for Administrative Determination (“Request”) challenging the Qualified Exempt Shorezone Activity Declaration (“QE Declaration”) issued on July 1, 2021, to Willis K. Polite Jr. (“Polite”).¹

Mr. Polite’s Opposition is long in length but short in substance. That is, Mr. Polite’s nine-page Opposition attempts to distract the Board and TRPA from the issues before it by reciting heavily disputed and, at times, demonstrably false facts that will be decided by the Court in the ongoing litigation. Those facts and issues are not germane to the issues before the Board and TRPA. The issues before the Board and TRPA are narrow and straightforward: whether the Rejection of the Request as an untimely appeal was proper and, more importantly, whether the QE Declaration should be rescinded. Tellingly, it is only at the very end of Mr. Polite’s Opposition, on the last page, that he attempts to address the merits of the Fialhos’ Statement and Request. The reason for this is transparent: Mr. Polite knows his QE Declaration was based on false and misleading facts and, therefore, it must be rescinded.

As it stands, the QE Declaration conditionally allows Mr. Polite to perform construction through the Fialhos’ property without the Fialhos’ permission, without going through TRPA’s formal permitting process, and despite a court order prohibiting him from engaging in construction. The Court already has rejected Mr. Polite’s narrative and his construction plans that he advances in the QE Declaration application. The Court held that Mr. Polite’s constructions plans (the same ones he submitted to TRPA) are insufficient because they fail to account for existing structures on the Fialhos’ property and are not reasonable because

¹ The Fialhos’ property is located at 1620 North Lake Boulevard, Tahoe City, California, APN No. 094-160-010. Mr. Polite’s property is located at 1600 North Lake Boulevard, Tahoe City, California, APN No. 094-160-009.

Mr. Polite has less intrusive means to power his boat hoist. Based on these findings, the Court issued an injunction, preventing Mr. Polite from *all* construction on the Fialhos' property. To protect the Fialhos' property, TRPA must rescind the improperly issued QE Declaration (based on false and misleading facts) and treat Mr. Polite's proposed construction as a project subject to the normal review and permitting process.

I. MR. POLITE'S OPPOSITION IS BASED ON AN IRRELEVANT AND FALSE NARRATIVE

Mr. Polite based his application for the QE Declaration on false and misleading statements. Now, he bases his Opposition on even more false and misleading statements, albeit ones that are completely irrelevant to the Fialhos' Statement.² The vast majority of Mr. Polite's distorted history of the Fialho and Polite properties is currently at issue before the Court in the case captioned *Helio Fialho, et al. v. Willis K. Polite Jr., et al.*, Case No., S-CV-0046361, in the Superior Court of the State of California in and for the County of Placer (the "Court Action"). These disputes, including the dispute concerning ownership of the pier,³ are not relevant to whether Mr. Polite can drill and trench through the Fialhos' property without their permission. Consequently, the Fialhos will not waste this Board's resources responding to each and every irrelevant misstatement by Mr. Polite—there are too many. However, it is important to highlight a handful of Mr. Polite's false statements concerning electrical to show that his Opposition (like his QE Declaration application) is not rooted in reality and lacks credibility.

First, Mr. Polite gravely misleads the Board by stating that "Mr. Polite has the right to install/run power across Appellant's property to the pier, *provided doing so* does not 'compromise the structural integrity of any structures on the property.'" *Oppo.*, at 3 (emphasis added). The plain language of the Court's order demonstrates this is just another false statement:

Defendant [Mr. Polite] and all persons acting on his behalf shall be restrained and enjoined from construction, modification and/or installation on [the Fialhos] property, including construction, modification and/or installation on the steel retaining wall system and revetment wall, that could compromise the structural integrity of any structures on the

² Mr. Polite should not have been afforded the opportunity to respond to the Statement because he is not a party to the Fialhos' appeal. The Fialhos appeal TRPA's denial of the Request and refusal to rescind the QE Declaration. Under Rule 11.5, the only parties permitted to submit papers in support of their positions are the appellant (the Fialhos) and TRPA. It is not even Mr. Polite's property that Mr. Polite seeks to excavate. Therefore, Mr. Polite is not a proper party to this appeal. The Fialhos objected to Mr. Polite's Opposition when they were made aware he would be permitted to respond to the Fialhos' Statement. Even though he should not have been permitted to submit the Opposition in the first place, the Fialhos submit this response to his Opposition.

³ The issue of who owns the Pier is not before this Board. Still, Mr. Polite starts his Opposition by asserting that "Every prior owner of both the Fialhos' and Mr. Polite's lands are in agreement that the pier is (and always has been) jointly owned." *Oppo.*, at 2. This is categorically false. Notably, Mr. Polite fails to provide *any* support for this assertion. Mr. Polite cannot provide any support for his claim to ownership because there are no written documents transferring an ownership interest to Mr. Polite or his predecessors, thus, his interest is barred by the statute of frauds. While Mr. Polite has provided declarations from two prior owners of the Fialhos' property from 1977 to 1983, he has provided no evidence to support his claim "every prior owner" agreed the pier was jointly owned from 1983 to the present. Mr. Polite only raises the ownership dispute to distract from his false and misleading QE application.

property, including but not limited to [the Fialhos'] single family home and steel wall system.

Statement, Ex. A at Ex. 13, p. 7 (emphasis added). The language of the Court's order states that Mr. Polite is prohibited from all construction, "**including**" construction that could compromise the structural integrity of the Fialhos' property. Thus, Mr. Polite cannot perform any construction on the Fialhos' property *whether or not* it compromises the structural integrity of the property. Mr. Polite's brazen statement that he is *only* enjoined from construction on the Fialhos' property if it could compromise the property is simply not true—any construction on the Fialhos' property would violate the Court's order. If Mr. Polite truly believed he could engage in any construction despite the court's order, he would have already excavated the Fialhos' property. But, of course, he cannot proceed with construction absent a subsequent order from the court. Indeed, Mr. Polite already tried taking the position that he can perform any construction on the Fialhos' property when he showed up with contractors and attempted to install electrical without permits or the Fialhos' permission. TRPA issued a stop work order, the Placer County Building Department halted construction, and the Court immediately stopped Mr. Polite's construction when it issued the temporary restraining order (before issuing the preliminary injunction that remains in effect). *See* Statement, Ex. A at Exs. 10, 11.

Second, the Fialhos did not unilaterally destroy electrical conduit for some sinister purpose as Mr. Polite purports.⁴ As set forth in the Request, the circa 1985 electrical conduit was attached to the underside of the dilapidated wooden access stairway. *See* Statement, Ex. A. The former dilapidated wooden stairway and the electrical conduit attached to it was removed pursuant to the TRPA permit that provided: "This permit specifically authorizes . . . **removing an existing pier access stairway and landing system.**" Statement, Ex. A at Ex. 5 at 3. The Fialhos *and* the former owner of Mr. Polite's property submitted these plans for approval to remove the access stairway; the removal was mutually agreed upon *before* Mr. Polite came to own his property only last year. Mr. Polite continues that the Fialhos' "plans included replacement of the upper stairs, wood walk, and the electrical wiring." *Oppo.*, at 4. Once again, Mr. Polite fails to provide any support for this assertion. The permit issued by TRPA, which speaks for itself, does not provide for the re-installation of electrical to power Mr. Polite's boat hoist. Statement, Ex. A at Ex. 5.

Third, Mr. Polite falsely claims that the Court already held he has an implied right to install electrical conduit through the Fialhos' property. *Oppo.*, at 3. In reality, the Court declined to find that Mr. Polite had an additional easement allowing him to install electrical; instead, the Court issued the preliminary injunction in favor of the Fialhos:

[Mr. Polite] *argues* that he has a right to run electrical through [the Fialhos'] property under a "secondary easement". . . [Mr. Polite] *argues* that provision of electrical to run the boat hoist through [the Fialhos'] property is necessary for the exercise of his rights to use the pier and boat hoist. . . . The court concludes that ***even if a secondary easement exists to allow defendant to run electrical conduit through [the Fialhos'] property, [Mr. Polite]***

⁴ Here and before the Court, Mr. Polite has used name-calling tactics, seeking to portray Mr. Fialho as a "bully." Mr. Polite does so because he knows he loses on the law and the facts. Mr. Polite has no defense to support the false and misleading statements in his QE Declaration application and, accordingly, he leads with rather distasteful tactics to distract from the real issues before TRPA. His tactics should not be afforded any weight and do not warrant a response.

has not demonstrated that his proposed course of action is reasonable, particularly in light of other far less intrusive courses of action which appear to exist. . . .

The Court also finds that *[the Fialhos] have demonstrated a reasonable likelihood of prevailing on the merits*. . . Based on the foregoing, the court grants a preliminary injunction in favor of [the Fialhos].

Statement, Ex. A at Ex. 13, p. 5:3-17 & 7:3-10 (emphasis added). Contrary to Mr. Polite’s assertions, the Court explained that Mr. Polite cannot have a secondary easement because his proposed plans are not reasonable in light of the fact that he has “far less intrusive courses of action” to power his boat hoist. *Id.* The Fialhos presented several alternative options to the Court that provided power but did not involve excavating the Fialhos’ property. The Court found these more reasonable than drilling through the Fialhos’ steel wall and excavating their land. Ms. Abigail Edwards makes a similar argument in the QE Declaration application, stating that 1980 and 1985 agreements allow Mr. Polite to install electrical in 2021. In rejecting Mr. Polite’s claim that he has an implied right to install electrical through the Fialhos’ property, the Court rejected any arguments that the decades old agreements grant Mr. Polite a right to drill and trench through the Fialhos’ property. Accordingly, Mr. Polite’s and Ms. Edwards’ arguments that Mr. Polite has an implied easement—which the Court rejected—cannot be conceived as granting a right to install electrical through the Fialhos’ property. In fact, the Court rejected the vast majority of Mr. Polite’s narrative (the same narrative he uses here) to find that the Fialhos were likely to prevail on the merits of their claims.

While these three falsehoods are far from the only false statements in Mr. Polite’s Opposition, they reveal a pattern of dishonesty and deception. This pattern is evident in Mr. Polite’s statements to the Court, which were rejected, and in the QE Declaration application, which is based on false and misleading statements. Regardless, it is important for the Board to understand that while the Fialhos adamantly dispute the “facts” set forth in Mr. Polite’s Opposition, they are not relevant to the actual issues before the Board.

II. THE QE DECLARATION SHOULD BE RESCINDED

A. Mr. Polite Fails to Address the False Statements in His Qualified Exemption Application

After devoting six single-spaced pages to arguing irrelevant and disputed facts, Mr. Polite states that the QE Declaration should not be rescinded because TRPA is not an “arbiter of fact.” *Oppo.*, at 8. While the Fialhos certainly agree that the Court, not the Board, will decide the facts in dispute between the Fialhos and Mr. Polite, as this Board is well aware, it is the Board’s responsibility to ensure that TRPA staff is protecting the interests of the public, residents, and visitors. Here, that means deciding whether TRPA improperly issued the QE Declaration (based on false and misleading facts) and whether Mr. Marshall improperly denied the Request as an untimely appeal. These two tasks are mutually exclusive, but Mr. Polite attempts to juxtapose these tasks with heavily disputed issues before the Court, such as the 40-plus-year history of the pier, ownership of the pier, and the right to install electrical conduit.

Mr. Polite’s juxtaposition is a diversion tactic; he is merely trying to avoid an investigation into the veracity of the statements that he has proffered as “facts” in obtaining the QE Declaration. Mr. Polite is well-aware that TRPA conducts investigations into *projects*, not QE Declaration applications. By definition, “[exempt] activities are not subject to review and approval by TRPA.” TRPA Ordinance § 2.3.1. The fact that TRPA

does not review exempt activities is precisely why the Fialhos ask the Board to rescind the QE Declaration and consider Mr. Polite's proposed construction as a project that is subject to review, approval, and a formal permitting process.

Even if TRPA is not inclined to act as a fact-finder, it does not have to do so. The Court has already found that the plans submitted to the Court—the same plans submitted to TRPA—do not account for existing conditions on the Fialhos' property and that "far less intrusive courses of action" are available to power Mr. Polite's boat hoist. *See* Statement, Ex. A, at Ex. 13 at 6:1-21. When issuing the preliminary injunction, the Court admonished Mr. Polite: "**[Mr. Polite] still has not presented approved engineering plans which account for existing conditions on the property.**" *See* Statement, Ex. A at Ex. 13 at 6:1-21. Despite the fact that the Court found Mr. Polite's plans were insufficient and unreasonable in light of other options to power his boat hoist, Mr. Polite still asserts that, based on *his plans*, the proposed construction will not require excavation of more than 3-cubic yards. *Oppo.*, at 8. The Fialhos have presented evidence, based on the *existing structures*, that this is false. *See* Statement, Ex. A at 5-6. Equally as important, the Fialhos have presented evidence (which the Court accepted) that Mr. Polite has far less intrusive means available to power his boat hoist. Mr. Polite's pursuit to drill into, trench through, and excavate the Fialhos' property, which would require removal of boulders weighing up to 2,000 pounds, is less about his need to power his boat hoist and more about his mission to distress the Fialhos.

Indeed, there are at least four categorical and fatal flaws in the QE Declaration application that demonstrate precisely why Mr. Polite's proposed construction should be treated as a project: (1) the Fialhos never agreed to permit the proposed construction on their property, (2) Mr. Polite's construction plans do not account for existing structures on the Fialhos' property, (3) Mr. Polite's plans are based on non-existent site conditions (*i.e.*, alleged preexisting electrical conduit that does not actually exist), and (4) Mr. Polite's construction cannot be performed by hand without the use of heavy machinery as he purports. *See* Statement, Ex. A. Tellingly, Mr. Polite has failed to address, let alone rebut, *any* of these facts in his Opposition (because he cannot do so).

Instead of addressing his false statements, Mr. Polite points to the condition in the QE Declaration as evidence that he will not proceed with any construction without the right to do so. But Mr. Polite already has proceeded with construction without permission from TRPA, without permission from the Fialhos, and without permission from any other agencies at all. When Mr. Polite made the same argument to the Court and asked the Court to trust that he would not perform construction, the Court rightfully rejected his argument:

[The Fialhos] have satisfied their burden of showing harm if the preliminary is not granted. [Mr. Polite] commenced work to reinstall electrical conduit for the purpose of powering his boat hoist, with the clear intention of drilling through a steel revetment wall constructed by [the Fialhos], and trenching through property owned by [the Fialhos]. ***The work was commenced without [the Fialhos] knowledge, without engineering plans, and without necessary permits and approvals.*** Although the temporary restraining order was initially issued on March 19, 2021, [Mr. Polite] still has not presented approved engineering plans which account for existing conditions on the property. [Mr. Polite's] argument that [the Fialhos] fail to demonstrate harm because work cannot be commenced without regulatory

approval and permits is *not persuasive in light of the fact that [Mr. Polite] previously attempted to perform the work without such approval and permits.*

See Statement, Ex. A at Ex. 13 at 6:1-21 (emphasis added). The Court declined to accept Mr. Polite's representations and instead sent a clear message—Mr. Polite cannot be taken at his word given his past actions. Therefore, the false and misleading statements in his QE Declaration application cannot simply be taken as true.

B. The Fialhos Have a “Sufficient Interest” in Preventing Mr. Polite from Trenching Through Their Property and Have Alleged Violations of Law, Rules, and Policies

Mr. Polite's argument that the Board should decline to hear the appeal under Rule 11.6.1 fails. Under Rule 11.6.1, the Board may decline to hear an appeal if “[(1)] the appellant does not have sufficient interest in the outcome of the appeal to make an appeal or [(2)] has not alleged a violation of law, the Compact, Plan Area Statements, Goals and Policies, Code, or other adopted TRPA plan.”

First, Mr. Polite's argument that the Fialhos lack a “sufficient interest” in their own property strains credulity. The Court issued an injunction against Mr. Polite precisely because the Fialhos have a significant interest in defending the integrity of their property. See Statement, Ex. A at Ex. 13. The Court already held that the Fialhos satisfied their requirement to show that Mr. Polite's proposed construction would harm the Fialhos' property: “[The Fialhos] have satisfied their burden of showing harm.” See Statement, Ex. A at Ex. 13 at 6:1-21. The Court's finding that the Fialhos would suffer harm from Mr. Polite's proposed construction was based on the same exact plans that Mr. Polite submitted to TRPA. See Statement, Ex. A at Ex. 15. Accordingly, Mr. Polite's assertions that the Fialhos do not have a significant interest already has been rejected by the Court and also should be rejected by the Board.

Second, Mr. Polite's assertion that the Fialhos have not alleged a violation of law, rule, policy, or goal also fails. The Fialhos have presented evidence that TRPA violated its own ordinances and policies when it issued the QE Declaration based on false statements and when it authorized construction on the Fialhos' property without the Fialhos' permission. The Fialhos assert that TRPA Ordinance 2.3.7 has been violated because Mr. Polite's proposed construction should be considered a project, not an exemption. The Fialhos assert TRPA violated its policies because on March 23, 2021, TRPA informed Mr. Polite's consultant that “we will need to have both property owners signatures on the application as it is a shared use pier and the work is on both properties.” See Statement, Ex. A at Ex. 14. Despite this policy, TRPA issued the QE Declaration without the Fialhos' permission. And, the Fialhos assert that refusing to rescind the QE Declaration even though it is based on false statements, violates the language of the QE Declaration itself, which states that if any information in the QE Declaration application is “inaccurate, erroneous, or incomplete, TRPA may rescind any approval.” See Statement, Ex. A at Ex. 1. Thus, the Fialhos have alleged numerous violations.

III. THE APPEAL IS TIMELY

The Fialhos promptly asked TRPA to rescind the QE Declaration after it was issued. See Statement, at 2-4. Only two days after TRPA notified the Fialhos, they objected to the QE Declaration. Over the next month, the Fialhos communicated with Mr. Marshall about the QE Declaration and whether TRPA would

reconsider the QE Declaration.⁵ Finally, less than two months after the Fialhos were notified of the QE Declaration, they filed their timely Request for Administrative Determination. The urgency and intent to challenge the QE Declaration is evident from the Fialhos' actions. Moreover, relying on Mr. Marshall's statements that a QE Declaration cannot be appealed, the Fialhos moved forward with a Request for Administrative Determination.

Despite these prompt actions by the Fialhos, Mr. Polite argues that TRPA should wholly deny the Fialhos' appeal and wholly deny the Fialhos' request that TRPA rescind the QE Declaration. Mr. Polite argues that the fact the Request was filed more than 21 days after the QE Declaration was issued is grounds to automatically deny the appeal. This is not so. The Fialhos filed a Request for Administrative Determination as they had no notice or reason to believe TRPA no longer entertains such requests. In fact, they relied on the ability to file such a request, which was reasonable because TRPA's own website provides the form for a Request for Administrative Determination. *See* Statement, at 4-5. The "so what" as Mr. Polite so curtly put it is that the Fialhos had good cause to believe their Request for Administrative Determination was proper and timely.

That good cause is grounds to entertain the Fialhos' Request for Administrative Determination regardless of whether it is treated as an appeal or not. Because TRPA is not in the business of strict compliance, but rather in the business of protecting the interests of the public, residents, and visitors, the TRPA Rules state that "for good cause not contrary to law, ***the Board may permit deviation from these Rules and regulations.***"⁶ Rule 10.3. Furthering this goal, the TRPA Rules "***shall be liberally construed to secure just, speedy and economical determination of all matters before the Governing Board.***"⁷ Rule 10.2. And, not to forget the language of the QE Declaration itself, which states that if any information in the QE Declaration application is "inaccurate, erroneous, or incomplete, TRPA may rescind any approval." *See* Statement, Ex. A at Ex. 1. There is no temporal limitation on TRPA's ability to rescind the approval.

It would be patently unjust to deny the appeal as untimely merely because the Fialhos relied on Mr. Marshall's representations that he would reconsider the QE Declaration, relied on his representations that QE Declarations cannot be appealed, and filed a form readily available on TRPA's website. At all times, the Fialhos acted in good faith to protect their property rights and property from Mr. Polite. Therefore, there

⁵ After referring to Mr. Fialho as a "bully," Mr. Polite hypocritically claims that the Fialhos have launched *ad hominem* attacks on Mr. Marshall. *Oppo.*, at 7. This is not the case. The Fialhos have set forth their discussions and interactions with Mr. Marshall to provide the Board with the series of events leading to this appeal. The Fialhos have raised concerns about Mr. Marshall's actions, scope of authority, and impartiality in this matter; concerns that are warranted by the facts and sequence of events set forth in the Fialhos' Request and Statement. Those concerns are not personal, however, the Board exists to review the actions of TRPA staff, including Mr. Marshall. TRPA initially informed Mr. Polite that his proposed construction required the Fialhos' approval. *See* Statement, Ex. A at Ex. 14. Mr. Marshall then advanced the QE Declaration (even though the Fialhos objected), refused to reconsider the QE Declaration (even though the Fialhos provided evidence the proposed construction did not qualify for exemption), and denied the Request as an untimely appeal (even though he told the Fialhos the QE Declaration could not be appealed). These are unbiased facts that should be taken into consideration by the Board.

⁶ *See* TRPA Rules, Authority, at vi.

⁷ The TRPA Ordinances "shall be liberally construed to effect their purposes." TRPA Ordinance § 1.6.

is good cause to deviate from TRPA's rules to secure a just, speedy, and economical determination on the issue of whether the QE Declaration should be rescinded.

Equally important, TRPA has deviated from its own rules and policies in favor of Mr. Polite and to the detriment of the Fialhos on multiple occasions. First, TRPA explained that Mr. Polite's qualified exemption would require the consent of both property owners, *i.e.* the consent of the Fialhos. Then, contrary to this policy, TRPA issued the QE Declaration even though the Fialhos objected to its issuance. Second, after the QE Declaration was issued, the Fialhos invited Mr. Marshall to their property to prove that Mr. Polite's proposed construction could not be performed without excavating 3 cubic yards (as required for an exemption) and without removing the Fialhos' 2,000-pound boulders with heavy machinery. Again contrary to its own ordinances and the QE Declaration's prohibition against inaccurate statements, Mr. Marshall declined to reconsider the QE Declaration. Accordingly, requiring the Fialhos to strictly comply with a deadline they were told did not apply because a QE Declaration cannot be appealed while simultaneously deviating from the rules for the benefit of Mr. Polite is unjust. This too provides good cause to entertain the Fialhos' Statement and Request.

IV. CONCLUSION

The Fialhos request that the Board rescind the improperly issued QE Declaration. When the Fialhos initially made this request to the Board through the Request for Administrative Determination, Mr. Marshall denied their Request without any input from the Board. In doing so, Mr. Marshall withheld from the Board all the factual and legal reasons why the Board should rescind the QE Declaration. The Request and its exhibits (attached as Exhibit A to the Statement) set forth the numerous reasons why it would be patently unjust not to rescind the QE Declaration that conditionally permits Mr. Polite to perform construction on the Fialhos' property without their permission and without any vetted constructions plans. Accordingly, the Fialhos request that the Board rescind the QE Declaration by granting their appeal of Mr. Marshall's denial of the Request, then treating the Request as a timely appeal or as a Request for Administrative Determination.

Dated: October 29, 2021



Darren J. Lemieux, Esq.
*Counsel for Helio and Therese Fialho as
trustees of the Fialho Family Trust*