

TAHOE REGIONAL PLANNING AGENCY
LEGAL COMMITTEE

TRPA
Zoom

August 24, 2022

Meeting Minutes

CALL TO ORDER AND DETERMINATION OF QUORUM

Vice Chair Ms. Novasel called the meeting to order at 8:34 a.m. on August 24, 2022.

Members present: Ms. Novasel, Mr. Rice, Ms. Williamson, and Mr. Yeates.

Members absent: None.

I. APPROVAL OF AGENDA

Mr. Marshall stated that there is no need for a closed session (Agenda Item No. 5) this month.

Ms. Novasel deemed the agenda approved as amended.

II. APPROVAL OF MINUTES

Ms. Novasel asks for approval of minutes from the July 27, 2022 Legal Committee meeting. Mr. Yeates makes the motion to approve the minutes with the corrections that he emailed to Ms. Huston.

Motion carried by unanimous voice vote.

III. ELECTION OF CHAIR

Mr. Yeates nominated Ms. Williamson to serve as chair of the Legal Committee. Ms. Williamson

Motion carried by unanimous voice vote.

IV. APPEAL OF DENIAL OF APPLICATION FOR EXISTING MOORING BUOY, 201 LAKEMILL RD., DOUGLAS COUNTY, NEVADA, ASSESSORS' PARCEL NUMBER (APN) 1418-10-710-005, TRPA FILE NO. BUOY2022-0273; APPEAL NO. ADMIN2022-0022

Mr. Marshall presents for TRPA staff. This an appeal of a denial by a buoy application by the Dobbins. The basis for their application is that they are littoral land owners so the question is whether or not TRPA staff was justified in rejecting the application finding the applicants [parcel] to be non-littoral.

[Slide 3] To orient the committee, the turquoise parcel on the slide is the Dobbins' parcel. Lot Z is described in red on this slide is the Glenbrook Homeowners' Association ("GHOA") parcel that lies between the Dobbins' parcel and the lake/lowwater. For TRPA's presentation, we will be

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focusing on the highwater mark which is lakeward of the Dobbins' parcel; close, but not abutting, which is what's required by the code.

[Slide 4] The record that the staff reviewed included the pictured 2009 Bathymetric survey that illustrates where the highwater line is in red and where the lakeward side of the Dobbins' parcel is in green. Since the green line does not abut the red line, TRPA staff found that the Dobbins parcel is non-littoral and not eligible for a buoy under their application. [Slide 5] This slide shows part of the Dobbins' argument of why they should be considered littoral. First, they argue that the GHOA Lot Z was not legally created and therefore the Dobbins parcel should extend to lowwater. TRPA's response to those very technical subdivision arguments is that TRPA approved a subdivision for this area in 1978 which has not been challenged and therefore is still valid and the lot recognized by TRPA in that subdivision has not been challenged in any proceeding. Therefore, it's valid.

The other argument that the appellants make is that sometime in the past the lot was littoral and, as a result of sand accretion, the highwater mark has marched lakeward. On this slide there is a dark blue line that nips the corner of the Dobbins parcel on the northwest corner. This is the line that the Dobbins' consultant prepared in their examinations and determined that perhaps in the 1980s the highwater abutted the Dobbins' parcel and therefore the parcel today should be considered littoral. TRPA staff examined this argument and determined that a) it was pretty speculative and b) in any event it did not meet the definition in TRPA code to be currently recognized as littoral.

Mary Marsh Linde presents for the appellants. Since 1988 when she was practicing with Larry Hoffman, author of *The Relatively Flat Lot*, she started focusing her practice on real estate. She's practiced 42 of her 47-year career in real estate law. This is a novel issue and one that the committee is not likely to be off the cuff familiar with so she's asking for the Legal committee's patience as she unpacks this issue. The underlying key issue is that at the time that Glenbrook Unit 2 was authorized by TRPA to be formed and the final subdivision map was recorded in May 1978, the state of Nevada owned to the highwater mark. It was not until July 1979 that the state relinquished the title down to the lowwater mark (6223'). At the time of the May 1978 recording this lot [Dobbins' lot] incorporates the highwater mark. The problem with that is that the state of Nevada owned the highwater mark at that time and the law is very clear; you cannot subdivide state land without consent of the state and you can't convey state land without first coming into title from the state. Title from the state never happened. In 1978, the developer purported to convey what is purported to be Lot Z to the homeowners association [GHOA]. This is the platform under which TRPA undertook to approve the GHOA buoy field.

This depiction of unit 2, importantly varies from the tentative map. No Lot Z was proposed in the tentative map. It was, by some chain of events that are not relevant here nor are they particularly well known, added to the final map. Nevada subdivision law says you can't put any lot into your final map that didn't have approval in the tentative map. It's interesting to note that in 1978, the developer, Glenbrook Properties, purported to sign off on the ownership certification for this map. It says, as every map of the time does, "We certify that we are the owners of all of the land included on this map." They couldn't truthfully certify that they owned Lot Z. When the certification was made by the developer as part of the mapping process that they owned that part of the lakeward portion of the land that was not in the tentative map, that was not accurate. It's interesting to note that at that very time, the gentleman with the developer who signed the certification was busy lobbying the State of Nevada to change the ownership of the to the lowwater mark. They knew what they were doing when they tried to do that but here's what they did. The map was amended September 8, 1978, so shortly after the

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recording of the original Platt, the amended Platt was certified and recorded probably without involving TRPA because it would not have been required. The effect of the amendment is to erase Lot Z. Lot Z by function of the Nevada Revised Statutes (“NRS”) 278.477, when you have an amended map that changes the boundary, that boundary is the new boundary and the old one ceases to exist.

Ms. Linde went to the recorders office and dug out the old maps to determine what happened to Lot Z? According to a surveyor she’s worked with in the past, once you move that boundary line, that boundary line is the final boundary line; it doesn’t magically reappear. So really, there’s no Lot Z for two reasons.

Mr. Yeates asked with the amendment if the highwater or the lowwater is the boundary line? Ms. Linde responded that they believe it’s highwater because it does not purport to go below this line [the lakeward terminus of the Dobbins parcel].

Mr. Yeates states that the argument is then that the point on the Dobbins parcel touches the highwater mark under the amended map so they have littoral rights. Ms. Linde agrees because Lot Z disappeared as a legal proposition.

Mr. Yeates clarifies that whatever TRPA did with Lot Z, it is irrelevant to Ms. Linde’s argument which is that the point of the Dobbins property is on the lake and therefore they’re littoral.

Ms. Linde continues that the conundrum arises for TRPA because they proceeded on the assumption that we attacked [the legality of Lot Z] in 2010 in the legal memorandum in support of the Buoy application made in 2009. It was void when it was formed so it couldn’t be the recipient of the reversion that happened when the state relinquished its title to 6223’. Ms. Linde has since discovered that the developer actually abandoned its attempt to have Lot Z recognized as a legal parcel because that’s the effect of that amendment. This issue was analyzed by a respected and senior law firm in San Francisco, which Ms. Linde will not name due to politically inappropriateness. They agreed with Ms. Linde’s analysis as to Mr. Dobbins’ lot. In the June 2010 memorandum, Ms. Linde was arguing the same consequence on behalf of three neighbors down on that road who has since opted not to press any arguments. Where they were not ready to agree was with an arguable remainder [of Lot Z] that was not within the highwater mark and therefore would have been conveyed validly [to GHOA]. As a remainder as the time of the relinquishment under the Nevada Supreme Court case of Nicholson v. Harvey would attach to the closest lakeward property line. That could be the foundation for the [GHOA] buoy field.

Mr. Yeates asked that if the argument Ms. Linde is making now was in the appeal nor was it made to State Lands when they disagreed with the argument that there’s no Lot Z, in Jim Lawrence’s 2009 letter. Mr. Yeates is trying to understand how novel the argument is regarding the amendment to the recorded Platt is. Ms. Linde replies that it’s the same issue of invalidity but on a second grounds. Mr. Yeates confirms he understands the invalidity but because, as TRPA staff has pointed out, TRPA has made decisions on that [GHOA] buoy field based on Lot Z.

Ms. Williamson states that she would like to hear Mr. Marshall’s rebuttal after Ms. Linde is finished her presentation.

Ms. Linde states that she only discovered this [the issue of the amended maps] point two nights ago which is why it’s only been raised now and they’re happy to have the committee take time to consider or have them come back as they [the committee] needs to do to achieve clarity on this because it is a question of Law. Ms. Linde comes to the same basic point, from her analysis,

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approval of the Dobbins' buoy application does not have to undo the GHOA buoy field approvals because of the reversion effect of the strip. The fact is that the other people along Lakemill do not touch the highwater mark. At the most, the exposure would be two lots having littoral rights under Ms. Linde's analysis.

Mr. Yeates clarifies that lots 17-19 [on the Glenbrook Unit No. 2-A map provided by Ms. Linde] do not have the projection down [to highwater] that Ms. Linde is arguing that Lot 16 [the Dobbins parcel] and Howard [Lot 15] must have. Ms. Linde confirms this is correct. Mr. Yeates states that there appears to be a vacant line which Ms. Linde is arguing that those landward properties would move towards the Lake if, in fact, this amendment took out Lot Z.

Ms. Linde states that she's not prepared to decide what happens to the other parcels, only to explain what happened to the Dobbins parcel, and to suggest that it would not be that tricky to create a correct parcel [Lot Z] that had the reversion. There is an arguable strip of land that is not displayed that would have occupied that portion that is above the highwater mark and to the other property lines of the other lots. That could be a big enough strip. Ms. Linde is not clear on how big the strip would need to be because there's no discussion about how immediate the relationship has to be between the highwater mark and littoral right. It [the Code] says "abut or adjoin" but in the Dobbins case they're [the highwater mark and the property line] "like kissing cousins" if not actually in the water. Ms. Linde states that she's not here to try to resolve definitely the effect of the earlier approvals of the Lot Z buoy fields and in no way are trying to disturb them to accommodate and acknowledge the correct analysis of Lot 16 [Dobbins lot] and its projection lines.

Mr. Marshall states that his is all fascinating and that this is essentially a question of quiet title. The question is really if this is the context in which to resolve that at a minimum creative argument. The question for Legal Committee, whether or not for TRPA's purposes was the decision made supported by the documents in the record. This is de novo review under TRPA Rules of Procedure but to be clear, should they determine to be littoral as a result of any quiet title action, that doesn't preclude the Dobbins from coming back and re-applying. The question before the Legal Committee is was it appropriate on this record to deny the buoy application because they couldn't establish that they were littoral.

Mr. Marshall makes the second point that the subdivision is a meets and bounds discussion. The lakeward projection of this parcel is not to the meander line or some indication that moves you down to highwater if, in fact, they're not at highwater. [Slide 5] This just establishes that the highwater mark is lakeward of the meets and bounds description of the Dobbins parcel and therefore was never littoral to TRPA perspective. Since it didn't make it to highwater it couldn't, by operation of Nevada law, extend to lowwater.

Committee Comments & Questions

Ms. Novasel asks for a definition of meets and bounds. Mr. Marshall responds its how these parcels are actually described with the numbers on the map. It's not described as a parcel "lakeward to the meander line" for example which is how a lot of littoral parcels in older subdivisions are described. What a court would look at is where is the exact line on the subdivision map because this was a relatively recent subdivision by Tahoe standards.

Mr. Yeates asks if Lot Z were erased for the moment, if the point where this parcel ends, per meets and bounds, TRPA asserts that it never touched highwater. Mr. Marshall confirms this is

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correct. Mr. Yeates clarifies that the decision made to deny the Dobbins application is that they're not littoral [because their parcel does not touch the highwater mark].

Ms. Williamson asks how close the red and green lines are on Slide 5. Mr. Marshall states that he doesn't know the scale of this map but that it's very close. Ms. Linde adds that the tentative map shows that wave runup crosses the Dobbins parcel boundary line. Mr. Marshall states that wave runup is different than highwater and that TRPA would not accept that as establishing a littoral parcel. Mr. Marshall clarifies that "adjoining" means that the highwater line and the property line of the parcel touch or are the same line. The situation with the Dobbins parcel is not a new scenario and is fairly common around the lake where there are strip parcels between privately owned parcels and the lake. Often the subdivider will grant a strip parcel in front of the lake parcels for the benefit of everyone in the subdivision including back lot owners and lakefront owners.

Ms. Linde agrees but that what the Nevada Supreme Court found in *Nicholson v. Harvey* was that the meander line is not the proper line to consider, it is the actual water body i.e. where does the water actually go? Ms. Novasel has Ms. Linde clarify that that the Nevada Supreme Court meant the highwater mark and not the meander line. However, pinpointing the exact highwater mark is tricky and in this case there's no opportunity for anyone to occupy lakeward of the Dobbins parcel so as a practical matter it is the lakefront parcel. It is not defined in regulation or elsewhere how one abuts or one adjoins. In other words the Dobbins parcel is pretty abutting and TRPA was provided documentation that show the northern most point of the Dobbins parcel underwater. Ms. Linde states that it's somewhat academic if not entirely academic whether that [the distance between the boundary of the Dobbins parcel and the highwater mark] is a foot or six inches. It also changes with the accretion of sand. There are a number of questions to resolve and it's important to keep this in perspective. We're here talking about one buoy in a field that right now has 73 buoys which, under current regulations, could allow 278 buoys because the current regulations allow as many buoys as there are lots in the homeowners association. What we're talking about is the next step of having to litigate quiet title meanwhile getting an injunction against removal of the buoy which is supposed to come out in October enjoining that while they litigate and come to a final determination as to the quieting title. It seems to Ms. Linde that's that an awful lot of effort to go through for the sake of a few inches. Ms. Linde has never encountered a real estate question that involving going back to 1906 to figure out who had what and what went to the highwater shore, etc. and going through all of the assembly notes with regards to the reversion.

Ms. Williamson agrees that the history is fascinating and that there's one legal path where TRPA denies the appeal, the Dobbins brings an action to quiet title, file an injunction if they want to as these are all legal steps at their disposal. The question before the Legal Committee even with the de novo review is did the record below support the decision, absent these new facts, based on the maps in the record. Ms. Linde clarifies that it's also under the assumption that Lot Z is correct which they've argued from 2010 that it is not.

Mr. Marshall states that TRPA also follows state of Nevada's determination that Lot Z exists and that the Dobbins parcel is therefore non-littoral which determination was made in 2009. To that extent these arguments [about the validity of Lot Z] have been rejected. Whether there are nuanced arguments about Lot Z, from TRPA's perspective 1) TRPA recognizes Lot Z and from there uses it to regulate the GHOA buoy field and 2) the state of Nevada recognizes Lot Z and does not recognize the Dobbins parcel as being littoral. Mr. Marshall states these are grounds on which staff determined the Dobbins parcel is not littoral and that this is an appeal of a denial. As a result, of that the Legal Committee's review is de novo and so the question to be answered

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is whether this lot is littoral which can be bolstered by the presence of Lot Z or, even without Lot Z, staff's perspective is that the surveys and maps reviewed demonstrate that the Dobbins parcel is not littoral. Whether or not Lot Z exists or who owns that lot is not controlling because the determination of littoral status comes down to whether or not the parcel in question abuts or adjoins the highwater mark.

Ms. Williamson asks, since abut and adjoin seemed to be used interchangeably, if Mr. Marshall can give an example of how they differ. Mr. Marshall responds that there are lots where the highwater nips just part of the parcel which would be abutting highwater in part differentiated from full adjoining where the entire parcel side touches highwater. Regardless of how those words are interpreted, they both mean there has to be no daylight between the two lines at some point on the parcel.

Ms. Novasel notes that part of the definition requires a littoral parcel to abut or adjoin highwater at time of the application which would make the argument of shifting sands irrelevant. Mr. Marshall agrees that if we're reopening littoral status based on historic littoral drift or other things in the past, that would open a can of worms in terms of a lot of lakefront lots.

Mr. Yeates asks that if TRPA were to determine that this lot is littoral if that would do anything to Nevada's decision. In Nevada Division of State Lands ("NDSL") letter their definition of littoral is a parcel line down to 6223' which is the lowwater line. Then they acknowledge Lot Z as an interceding parcel that prevents the Dobbins parcel from being littoral which is not the argument presented to the Legal committee right now. Whether or not Z exists, TRPA is looking at littoral status as a parcel boundary line at 6229.1' which wouldn't be disagreeing with NDSL's determination because theirs is based on 6223'. Mr. Marshall states that there are two things to take from the NDSL letter 1) their position on Lot Z and 2) if it runs to 6223' then it wouldn't be dispositive or contrary to them if we're using 6229'. Now NDSL looks at running to highwater as opposed to lowwater.

Mr. Williamson asks whether this is truly so novel as Ms. Linde described or, if the appeal were to be granted, would it open up a lot of other issues. Mr. Marshall states that it would because the situation of a parcel being very close to highwater but not abutting or adjoining is not new. Lakefront parcels that have a strip in front of them is not unique or that are only deeded down to meets and bounds. TRPA Staff Matt Miller agrees that this is not unique as described by Mr. Marshall. Mr. Marshall states that TRPA has consistently denied buoys applying under littoral status where the highwater lines and parcel boundary lines are not directly adjoining or abutting.

Ms. Linde comments that there were four different surveys of this parcel and they do not all concur by a span of a foot or two based on the different surveys of Lake Tahoe. Even by the efforts of one of the best surveyors at Lake Tahoe, Resource Concepts, there was not a difference in the highwater and property boundary lines. Removing Lot Z as an impediment to a littoral parcel plus or minus a foot or a few inches. It's inconsistent to the nature of a shoreline to determine a lakefront parcel to be a few inches off and therefore not be littoral. Ms. Linde states there are other ways of resolving this that doesn't open "pandoras box" through a settlement agreement or having the decision apply only to this case which would narrow the effect from the decision.

Mr. Rice states that in his opinion this will make a very interesting court case.

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Public Comment

No public comment.

Final Committee Comments

Mr. Yeates made a motion to deny the appeal.

Ayes: Ms. Novasel, Mr. Rice, Ms. Williamson, and Mr. Yeates.

Motion carried.

Presentation can be found at <https://www.trpa.gov/wp-content/uploads/Agenda-Item-No.-VIII.-A.-Appeal-No.-ADMIN-2022-0022.pdf>.

Amended Map of Glenbrook Unit 2: <https://www.trpa.gov/wp-content/uploads/Legal-Comm-Item-4 -Agenda-Item-VIII.A-AmendedGlenbrookMap.pdf>

NRS Ch. 278, section 278.477: https://www.trpa.gov/wp-content/uploads/Legal-Comm-Item-4 -Agenda-Item-VIII.A-NRS_278_278.477-AmendmentofRecordedSubdivisionMap.pdf

V. CLOSED SESSION WITH COUNSEL TO DISCUSS EXISTING AND POTENTIAL LITIGATION

No closed session.

VI. POTENTIAL DIRECTION REGARDING AGENDA ITEM NO. 5

No direction.

VII. COMMITTEE MEMBER COMMENTS

None.

VIII. PUBLIC INTEREST COMMENTS

None.

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VII. ADJOURNMENT

Mr. Yeates moved to adjourn.

Meeting adjourned at 9:28 a.m.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "K. Huston", with a long horizontal flourish extending to the right.

Katherine Huston
Paralegal

The above meeting was recorded in its entirety. Anyone wishing to listen to the recording may find it at <https://www.trpa.gov/meeting-materials/>. In addition, written documents submitted at the meeting are available for review. If you require assistance locating this information, please contact the TRPA at (775) 588-4547 or virtualmeetinghelp@trpa.gov.