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July 12, 2021

**VIA EMAIL**

Tahoe Regional Planning Agency  
Governing Board  
c/o John Marshall, General Counsel  
128 Market Street  
Stateline, NV 89449

**Re: Opposition to Statement of Appeal of Stock/Johannessen New Single-Parcel Pier - Appeal File Number ADMIN2021-0014; TRPA Project File Number ERSP2020-0074**

Dear Honorable Members of the Governing Board and Mr. Marshall:

This Opposition to the Harrosh family (“Appellants”) Statement of Appeal is respectfully submitted on behalf of George “Chip” Johannessen and Virginia Stock Johannessen (the “Johannessens”), owners of the property located at 5568 North Lake Blvd. (the “Property”), and applicants for a new single parcel pier, TRPA Project File Number ERSP2020-0074 (the “Project”).<sup>1</sup>

On July 18, 2019, the Johannessens won the proverbial lottery, and were one of only five parcels awarded a new single parcel pier allocation for the 2019-2020 pier allocation period. Immediately upon receipt of this news, the Johannessens undertook extensive measures to prepare an application for submittal of a new pier that would conform to the Shoreline Plan requirements regarding placement of structures within the shorezone. These measures included detailed analysis of shorezone standards through their land use consultant Wyatt Ogilvy, site review for compliance with previous permit conditions, bathymetric surveying, biological reconnaissance and evaluation, and preparation of an Environmental Assessment. Ultimately a design configuration that fulfills TRPA’s Code of Ordinances’ (the “Code”) stringent design standards, meets all required findings for new piers, avoids environmental impacts, provides for navigational safety, and allows for pier functionality was selected and submitted to TRPA.

The comprehensive process that resulted in the final design for the Johannessen pier is precisely what was envisioned by the Governing Board when it adopted the Shoreline Plan. One of the organizing principles of the Shoreline Plan is to “implement predictable and consistent rules.” (Shoreline Plan Draft EIS (“DEIS”), p. 4-20.) To that end, the Shoreline Plan adopted design standards for single-use piers to ensure new piers would adequately serve their users while being

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<sup>1</sup> The Johannessens hereby incorporate by reference the complete administrative record of proceedings in this matter.



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sufficiently protective of scenic and safety standards. (*Ibid.*) By adhering to, and in some cases exceeding these standards, the Johannessen pier Project exemplifies appropriate and proper implementation of the Shoreline Plan. The Hearings Officer recognized this in approving the Project, despite Appellants' protestations that they would be inconvenienced if a new pier was built at this site.

The Hearings Officer's decision in approving the pier is supported by substantial evidence, is consistent with the TRPA Code and Compact, and fosters the policies outlined in the Shoreline Plan. Accordingly, the Johannessens respectfully request that the Board uphold the Hearings Officer's approval and deny Appellants' appeal.

## **I. Background Facts**

### **A. Adoption of Shoreline Plan and Certification of EIS.**

The Shoreline Plan lifted a longstanding moratorium on new shorezone structures at Lake Tahoe, setting caps and regulations for new structures such as piers, moorings, and public boat ramps. The Plan was the result of years of studies, litigation, stakeholder meetings, public hearings, and finally consensus with the adoption of the Plan in October 2018.

The Shoreline Plan was developed with five organizing principles: (1) protect and where feasible enhance the environment; (2) provide a fair and reasonable system of access; (3) adapt to changing lake levels; (4) preserve quality recreation and public safety; and (5) implement predictable and consistent rules. (DEIS, p. 4-20.) With these principles in mind, the Shoreline Plan meticulously analyzed proposed standards for new shorezone structures to insure that, with adherence to these standards, environmental impacts could be avoided, and the Compact's thresholds attained and maintained. The Shoreline Plan regulations include standards for eligibility, placement, and design of new piers. Ultimately, the Shoreline Plan allowed for up to 128 new private piers, to be allocated in a lottery held every two years.

### **B. Johannessens Awarded New Single-Parcel Pier Allocation.**

On July 18, 2019, the Johannessens were awarded one of five new single parcel pier allocations for the 2019-2020 pier allocation period. They immediately commissioned multiple experts to assist in the siting, permitting, and design of the potential new pier. As part of this work, the Johannessens commissioned an Environmental Assessment by Dr. Stanford Loeb, dated December 10, 2019 (the "EA"), to evaluate the Project's potential impacts to fisheries and fish habitat, littoral sediment drift, and Tahoe Yellow Cress. Based on the Project site and pier design, the EA concluded that "the construction of a new single-family pier will have no



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negative impact on the water quality, littoral sediment transport, fisheries, and fish habitat of Lake Tahoe,” and “[t]herefore, the project will have no adverse environmental impacts on the environment of Lake Tahoe at this specific location.” (EA, p. 23.)

### **C. Johannessens’ Outreach.**

After completing the design and analysis of potential environmental impacts of the Project, the Johannessens prepared an application for the new pier, which was filed on January 13, 2020. On June 5, 2020, Appellants contacted TRPA requesting copies of the pier plans, which were provided.

After learning that Appellants had potential concerns regarding the Project, Mr. Johannessen contacted Appellant Sam Harrosh to see if he was available to meet onsite to discuss the pier design. At that time, Mr. Johannessen explained the logic behind the pier siting and design, how it was intended to function in the rocky area, and how the Johannessens had attempted to balance the location of the pier between the adjacent piers to the north and south of the Property.

On March 17 and 18, 2021, the Johannessens reached out to Appellants and other neighbors to inform them of the then scheduled April 1, 2021 Hearings Officer meeting, and offering the services of their land use consultant to answer any questions or concerns. Appellants did not take the Johannessens up on their offer.

It was not until three days prior to the scheduled Hearings Officer meeting that counsel for Appellants contacted counsel for the Johannessens to request a continuance of the April 1 meeting. The Johannessens agreed to continue the hearing to April 29, 2021, to listen to the concerns of Appellants and see if a compromise solution could be reached.

Discussions with Appellants ensued, and a site visit was attended between the parties and their respective consultants and counsel, but ultimately no compromise could be reached.

### **D. Appellants’ Non-Conforming Pier.**

Appellants’ primary concerns with the Project result from the fact that their current pier is nonconforming in several respects to TRPA’s Code, and therefore, the addition of a new pier may require them to slightly modify their approach when entering their pier.

As shown in the picture below, Appellants’ pier contains a non-conforming superstructure, which, by Appellants’ design, requires Appellants to access from the north side of their pier.





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### **E. The TRPA Hearings Officer Approves the Project.**

On April 29, 2021, the TRPA Hearings Officer held a meeting to consider the Project. While Appellants' Statement of Appeal contends that "insufficient time was allowed by the Hearings Officer to make all the points we intended," collectively, Appellants, their consultant, and their legal counsel presented testimony for approximately thirty minutes, and the Hearings Officer acknowledged that he reviewed Appellants' presentation twice even prior to the meeting.<sup>2</sup>

Considering the testimony presented by Appellants, and the presentation by staff and the Johannessens, and based on substantial evidence in the record, the Hearings Officer approved the Project as proposed and made the findings required under the Code of Ordinances.

### **II. Standard of Review**

While appeals of denials of a project are reviewed *de novo* by the Governing Board (TRPA Rules of Procedure § 11.5), an approval by the Hearings Officer is subject to the substantial evidence standard of review. (*See* TRPA Compact art. VI(b).) Under the substantial evidence standard, the Hearings Officer's substantive factual conclusions are accorded great deference, and reasonable doubts are resolved in favor of the administrative finding and decision. (*See Sierra Club v. Tahoe Reg'l Planning Agency*, 916 F.Supp.2d 1098, 1108 (E.D. Cal. 2013); *see also Sierra Club v. Tahoe Reg'l Planning Agency*, 840 F.3d 1106, 1119 (9th Cir. 2016).)

The Statement of Appeal erroneously contends that on an appeal it is the applicant's burden to establish that substantial evidence supports the findings required under the TRPA Compact and Code of Ordinances. This contention reverses the respective burdens of the parties. In general, when challenging approval of a project, it is the appellant's burden to demonstrate that there is not sufficient evidence in the record to justify the agency's action. (*See Citizens for a Megaplex-Free Alameda v. City of Alameda*, 149 Cal.App.4th 91, 112-13 (2007).) As with all substantial evidence challenges, an appellant challenging an agency's findings for insufficient evidence "must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal." (*Tracy First v. City of Tracy*, 177 Cal.App.4th 912, 934-35 (2009).)

Not only does the Statement of Appeal fail to demonstrate why all the evidence supporting the Hearings Officer's decision is insufficient, but it blatantly misrepresents the evidence in the record supporting such decision. For example, the Statement of Appeal claims that the "area was never evaluated for Tahoe Yellow Cress during multiple surveys." Yet, the Environmental

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<sup>2</sup> The log-in instructions for Hearings Officer meetings provides that "[i]ndividuals and groups will have three minutes of public comment time," meaning Appellants were allotted ten-times the amount of time ordinarily provided for public comment.



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Assessment unambiguously declares that “[d]uring the site visit to the project location, the shoreline was evaluated for the presence of this plant and evaluation of whether there was suitable habitat for the plant. No specimens of the plant were found at this specific location.” (EA, p. 21.)

Because the Hearings Officer’s decision is supported by substantial evidence, it should be upheld by the Governing Board.

### **III. Argument**

#### **A. The Findings Made by The Hearings Officer are Legally Adequate and Supported by Substantial Evidence.**

Findings required in support of a project approval must be in writing, supported by substantial evidence, and accompanied by a brief statement of the facts and rationales upon which they are based. (Code § 4.3.) The findings made by the Hearings Officer satisfy the standards required under TRPA’s Code, and accordingly, should be sustained by the Board.

##### *a. The Johannessens’ Pier is Compatible With Proximate Shorezone and Lakezone Structures and Uses.*

Code section 80.3.2(C) requires projects proposed in the shorezone be compatible with existing shorezone and lakezone uses or structures on, or in the immediate vicinity of, the littoral parcel. The Johannessens proposed pier meets all required standards for new shorezone structures, does not impact the ability of Appellants to utilize their pier, and is compatible with all other shorezone and lakezone uses in the area.

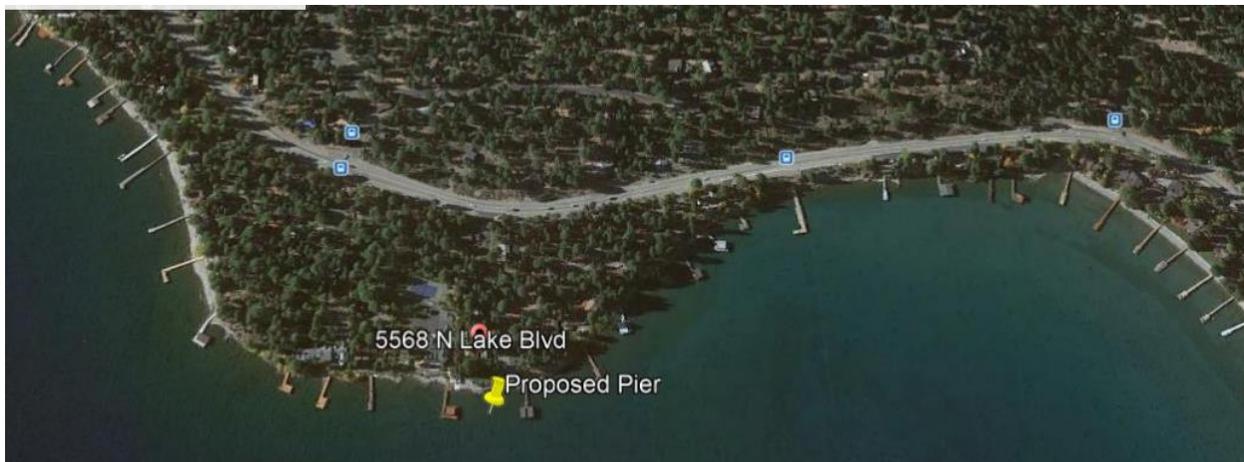
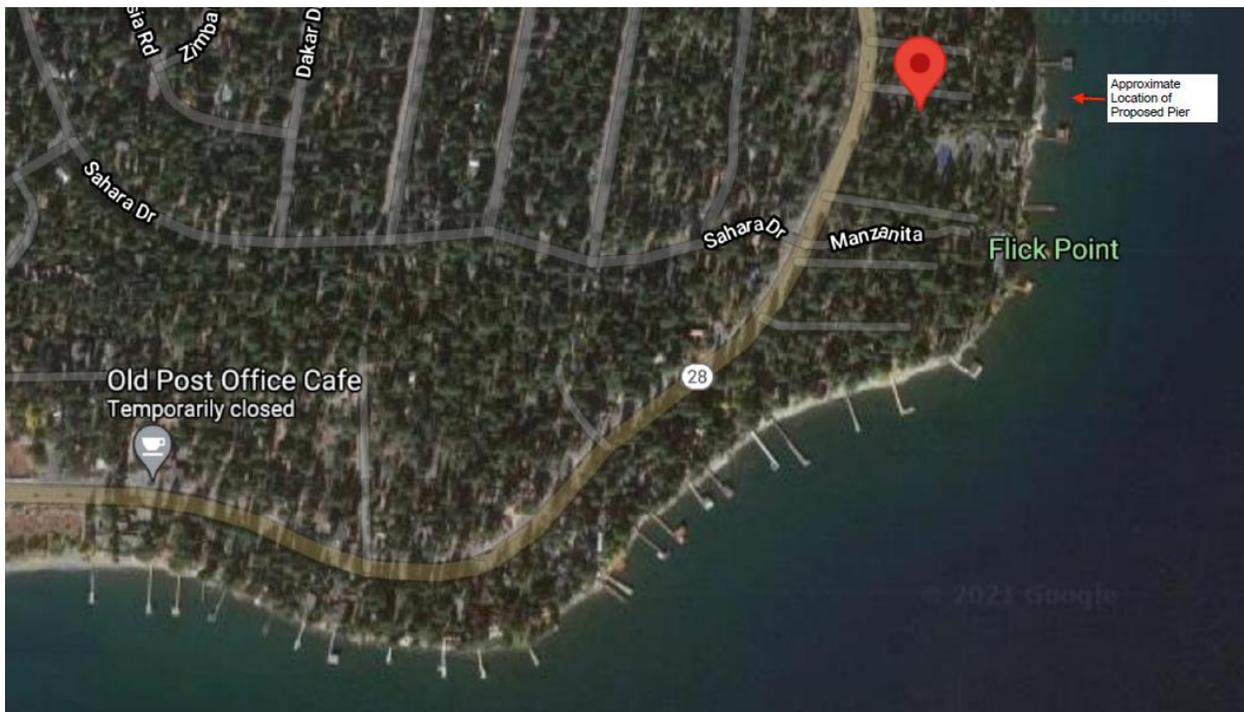
The Shoreline Plan adopted standards regarding placement and eligibility of structures within the shorezone, which would ensure that all new shorezone structures are consistent with permissible uses. (DEIS pp. 4-19 - 4-20.) The DEIS prepared for the Shoreline Plan concluded that structures built in compliance with the Shoreline Plan standards would have a less-than significant impact in relation to compatibility with established land uses. (*Ibid.*) The Johannessen pier meets or exceeds the minimum standards required under the Shoreline Plan (including the required setback between piers), and there are no other unique circumstances in this area that would otherwise render the Johannessen pier incompatible with Appellants’ nonconforming pier.

Appellants appear to conflate “compatibility” with “convenience.” Appellants may no longer be able to access their pier over one of many routes that they have previously utilized, but that in no



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way renders the Johannessen pier incompatible with existing shorezone uses. Indeed, a simple canvass of piers within the general area of the Johannessens' proposed pier reveals a multitude of piers that are sited much closer to each other than the nearly eighty-foot setback proposed between the Johannessens' and Appellants' piers.

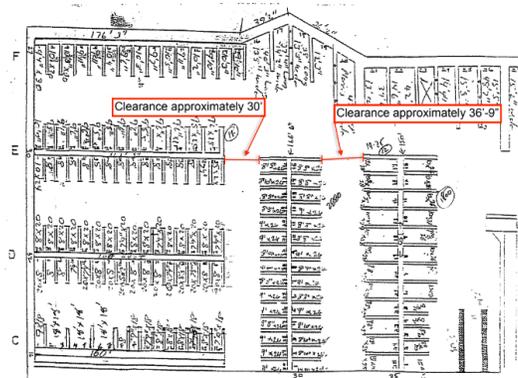




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The width of rows between slips in the Tahoe City Marina provides further evidence of compatibility. As depicted below, rows in the Tahoe City Marina range from approximately 36 feet nine inches to 30 feet. The distance between the Johannessens' proposed pier and Appellants' nonconforming pier is more than double that width and provides ample room for safe maneuvering.

### TAHOE CITY MARINA - NAVIGATION



Any inconvenience Appellants complain of is solely a result of their existing nonconforming pier, which projects into the pier setbacks and contains a superstructure that does not allow for watercraft to enter the pier from a straight approach. Despite the claim of inconvenience, Appellants played a video for the Hearings Officer demonstrating that they can easily navigate into their pier utilizing a route that would avoid the Johannessen pier, even when their watercraft is travelling at a high rate of speed. There simply is no incompatibility with the Johannessens' proposed pier and Appellants existing pier or any surrounding shorezone/lakezone uses.

- b. Agencies With Jurisdiction Over Navigable Waters in the Basin Have Determined the Johannessens' Pier Will Not Adversely Impact Navigation or Create a Threat to Public Safety.*

Code section 80.3.2(G) states that for any shorezone project, "TRPA must find that the project will not adversely impact navigation or create a threat to public safety pursuant to the determination of agencies with jurisdiction over the navigable waters in the Basin." (Emphasis added.) This finding vests the determination of impacts to navigation and public safety on agencies with jurisdiction over navigability, not to neighboring property owners. To make this



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finding, TRPA presents shorezone projects to a Shoreline Review Committee comprised of various agencies with jurisdiction over Lake Tahoe, including the California State Lands Commission, the US Army Corps of Engineers, and the US Coast Guard.

The Shoreline Review Committee reviewed the Project on two separate occasions and had no concerns regarding navigability or public safety. Staff and the applicant also separately reached out to both the US Army Corps and Coast Guard for specific comment on the Project, and both responded that they had no concerns regarding navigability. These facts alone are sufficient to uphold the Hearings Officer's finding.

Moreover, the Shoreline Plan EIS analyzed safety and navigational impacts associated with permitting new piers and found that clustering private piers actually reduces navigational impacts. The Shoreline Plan EIS ultimately determined that "new private piers constructed within the required setbacks and within the pierhead line rarely constitute a navigational hazard." (DEIS p. 15-18.) Accordingly, the proposed pier will not adversely impact navigation or create a threat to public safety.

*c. The Project Area Does Not Contain Spawning Habitat.*

The Statement of Appeal falsely claims that there are fish spawning gravels in the area of the proposed project, and that the Project will therefore interfere with fish spawning. As explained below, there is no gravel substratum present in this littoral zone area, and therefore, there is no spawning habitat that would be impacted by the Project.

Fish habitat that is dominated by cobbles and boulders is considered "feed and cover" while "spawning habitat" is defined as those areas where the substrate is predominantly comprised of very small cobbles or gravel, or any combination thereof. (EA, p. 9.) The Shoreline Plan EIS explains that spawning habitats are composed of relatively small diameter gravel substrates (between 2 and 64 millimeters). (Shoreline Plan DEIS, p. 5-16.) TRPA mapping of the fish habitat within the area shows that the Project site is categorized as feed and cover habitat, and not spawning habitat. Reconnaissance of the area and review of relevant scientific literature confirmed that Project site is unsuitable for fish spawning, and that construction of a pier will not be detrimental to the fishery or fish habitat at this specific location. (EA, p. 18.) Therefore, the Project will not interfere with fish spawning.

**B. The Proposed Project is Consistent with Article 5(g) of the TRPA Compact.**

The Statement of Appeal broadly and baldly claims that findings under the TRPA Compact (Article 5(g)) cannot be made, yet provides only two examples where Appellants believe the



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Project is deficient.<sup>3</sup> Appellants claim is based on a perversion of the record, “that this area was never evaluated for Tahoe Yellow Cress during multiple surveys,” and that “it appears that areas suitable for fish spawning are indeed present.”

As referenced above, as part of the Environmental Assessment for the property, the site was specifically evaluated for the presence and suitable habitat of Tahoe yellow cress (“TYC”). (EA, p. 21.) No specimens were found onsite, and the Environmental Assessment concluded that the overall habitat in the vicinity of the proposed Project is not suitable for TYC. (*Ibid.*) Multiple surveys within the proximate vicinity were also previously conducted, and no specimens of TYC were ever found in this general area. (*Ibid.*) Subsequently, an inspection was conducted by TRPA staff on June 15, 2020, and no specimens were identified. Further, condition 3.C. of the Project approval requires the Johannessens to conduct a TYC survey prior to commencement of any proposed work during the growing season, and if any TYC or TYC habitat is found during the survey, the Johannessens must submit a TYC avoidance and protection plan for TRPA’s approval prior to any work. The Johannessens filed for this inspection again in 2021 and the results from that inspection are pending.

Additionally, as discussed above, the Project site contains no fish spawning habitat. The findings required by Compact Article 5(g), as implemented through the Code, have all been made and are supported by substantial evidence.

**C. An EIS Is Not Required, and Appellants’ Challenge to the Visual Mass Portion of the Code of Ordinances is Barred by The Statute of Limitations.**

Appellants claim that an environmental impact statement (“EIS”) should have been prepared for the Project because the visual mass portion of the Code evaluation system does not provide for adequate evaluation of scenic impacts. The Compact only requires preparation of an EIS when a project may have a significant effect on the environment. (TRPA Compact art. VII(a); Code § 3.7.) The proposed Project has no possibility of any significant impacts, and therefore an EIS is not required.

While Appellants acknowledge that the proposed pier meets existing scenic standards, they believe those standards are “wholly inadequate to maintaining the thresholds and the goals of the regional plan.” Potential scenic impacts resulting from adoption of the Shoreline Plan and

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<sup>3</sup> The Compact itself does not set forth findings that must be made in order to approve a project. Rather, it requires TRPA to adopt ordinances prescribing specific written findings that relate to environmental protection, insure that the project under review will not adversely affect implementation of the regional plan, and will not cause the adopted environmental threshold carrying capacities of the region to be exceeded. These findings, contained in Chapter 4 of the TRPA Code of Ordinances, were made by the Hearings Officer.



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related Code provisions were fully evaluated and mitigated as part of the Shoreline Plan EIS. Appellants attempt to challenge that process through the appeal of this Project, more than two and a half years after adoption of the Shoreline Plan and certification of the EIS, is barred by the Compact's sixty-day statute of limitations. (Compact, art. VI(j)(4).)

#### **D. Additional Length is Necessary for the Functionality of the Pier.**

Code Section 84.4.3(B)(2) allows piers to extend lakeward of elevation 6,219 feet if (i) the project applicant demonstrates that the additional length is necessary for the functionality of the pier, and (ii) the average grade of the lake bottom beneath the additional pier length is a minimum of three percent.

The proposed pier will extend to the pierhead line, 12 feet 3 inches past elevation 6,219 feet. The average grade of the lake bottom beneath the additional pier length is 16.3 percent.

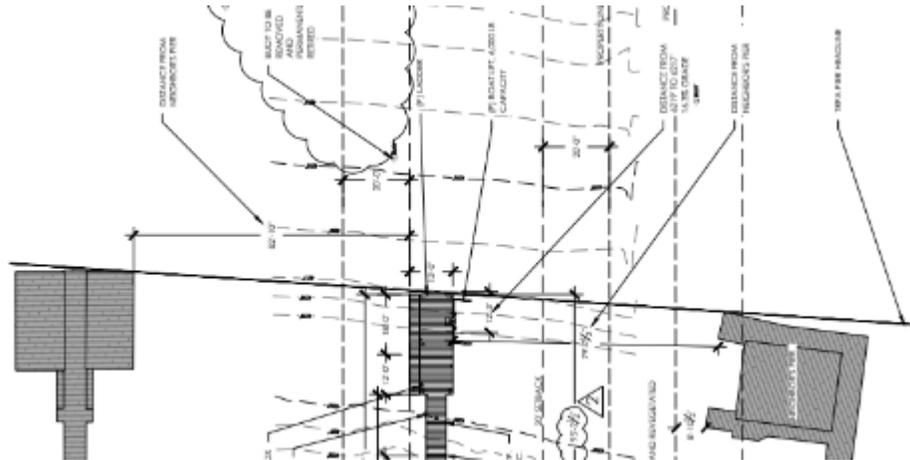
Due to the rocky substrate of Flick Point and adverse navigation conditions at periods of low water, the additional length is necessary for the functionality of the pier. The United States Coast Guard has expressed concern regarding navigability in this area under drought conditions. Declarations submitted by the Johannessens to the Hearings Officer also evidence Appellants' recognition that additional pier length is necessary for navigating this rocky area. The declarations outline an event where the Appellants retained a contractor to remove rocks from the lake bottom on the approach to Appellants' boat slips and transport them closer to shore in front of the Johannessens' house.

Without the additional pier length, portions of the pierhead would be located at an approximate lake bottom elevation between 6221' and 6220', giving only two to three feet of draft, and making these portions of the pierhead unusable even under normal to high water conditions. This situation would only be further exacerbated under drought conditions, especially given the rocky shoreline at this area.

As shown below, the proposed pier length is commensurate with the length of Appellants' pier and the pier immediately to the north, as well as other piers in the area that extend to the pier headline because of the rocky lakebed in the area.



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**E. Potential Impacts to the Public Trust Were Reviewed, Considered, and Addressed By TRPA and California State Lands Commission.**

The California State Lands Commission (“CSLC”) is responsible for administering the Public Trust on the California side of Lake Tahoe, which entails oversight of the public’s rights pertaining to, but not limited to, commerce, navigation, fishing, recreation, and ecological



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preservation. CSLC is responsible for the leasing of State sovereign lands lakeward of the low-water elevation of Lake Tahoe for Public Trust consistent uses and for administering the Public Trust easement between the low and high-water elevation for public access to and along Lake Tahoe on the California side.

As part of the adoption of the Shoreline Plan, TRPA and CSLC required the adoption of an MOU that details a process to coordinate review of applications for new and modified piers and other structures that could be placed in the Public Trust easement in California. (Shoreline Plan FEIS p. 4-37.) As part of that process, TRPA facilitates monthly Shoreline Review Committee (SRC) meetings for agencies with permitting jurisdiction along the shoreline and within Lake Tahoe to coordinate the permitting of projects. During the October 2020 Shoreline Review Committee meeting, CSLC staff requested public access and appropriate signage be incorporated into the pier design in the Public Trust easement. To accommodate these comments, the Project approval includes a condition requiring public access and appropriate signage indicating public access that meets the requirements of the CSLC be incorporated into the final pier design. (Permit ERSP2020-0074 Condition No. 8.)

With incorporation of Condition No. 8, CSLC, the state agency vested with authority to administer the Public Trust, determined the Project would not have any impacts to the Public Trust.

#### **F. The Johannessen Property Does Not Have Access to a Homeowners Association Pier.**

The Johannessens extensively addressed the specious contention that they have access to a homeowners association pier in a September 1, 2020 letter that is a part of the record before the Governing Board. As the letter explains, and as TRPA staff and the Hearings Officer concurred, the Johannessen property is not a member of a homeowner's association as defined by law and past TRPA precedent. There are two required features of a homeowners association: (i) membership must be mandatory; and (ii) there must be some kind of common area appurtenant to a lot owner's separate interest.

The Agate Bay Pier and Swim Club does not satisfy either of these requirements. It is a voluntary recreational club, and there is no appurtenant right to use the pier associated with the Johannessen ownership of its parcel. In testimony before the Hearings Officer, Appellant Michael Harrosh himself admitted that the existence of the Agate Bay Pier and Swim Club does not preclude eligibility for the Johannessens' pier "because it's not an HOA, because it's a club, that qualifies them to get a pier." (Hearings Officer Testimony of Michael Harrosh, 1:04:12 – 1:04:17.) As Michael Harrosh recognized, and the Hearings Officer correctly concluded, the



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Agate Bay Pier and Swim Club is not a homeowners association, and the Johannessens do not have access to a homeowners association pier as defined under Code section 84.4.2.5.

**G. TRPA Committed No Procedural Errors in Approving the Project.**

Appellants complain of a variety of procedural errors, with no evidence to support their contentions. Proper notice was provided, and Appellants were given ample opportunity to provide argument to the Hearings Officer. Appellants have not demonstrated any procedural errors or prejudice arising therefrom that would nullify the decision of the Hearings Officer.

Based on the foregoing, Appellants respectfully request that the Board uphold the determination of the Hearings Officer approving the Project.

Respectfully,

Greg Gatto