

STATEMENT OF APPEAL

Thompson Single Use Pier Expansion, Placer County APN 098-210-012, TRPA File No.
ERSP2020-0373

May 16, 2023

Appellant: Mr. Paul Thompson
5400 Hanna Ranch Road, Novato, CA 94945

This Statement of Appeal is made pursuant to Article 11 of the Rules of Procedure. This Statement of Appeal incorporates by reference our letter of November 21, 2022 to the Executive Director in its entirety.

From prior correspondence, it appears staff and counsel apparently believe they are unable to even consider this project due to the action of the Board on the Gately appeal. (Appeal File No. ADMIN2021). That decision was based upon the facts presented as to that project at that time. Had the applicant in this case been advised that a hearing was to be held that could affect their rights, perhaps one could argue that rights could be foreclosed. However, in this case, the applicant was told from the outset that his project *could be approved*. Based upon the representations of staff that the project was approvable the applicant spent over \$70,000 in doing everything the Code requires in order for it to be approved. It was literally just as the notices were going out for the hearing for approval, with a recommendation for approval by staff, that there was an abrupt about face by staff and counsel.

The Board is always the final interpreter of your ordinances, based upon all of the facts and circumstances at the time. There is nothing, including a prior decision that the Board may have made, that cannot be overturned completely, modified or changed by the current Board. Boards can change their membership, and their minds, at any time. Under the Compact and the Regional Plan it is the Board that is the final authority at all times. Along those same lines, to the extent that staff and counsel may argue that as a matter of law the Board must find that what the applicant proposes in this case is an impermissible expansion, or that it is constrained by its own prior decision, we respectfully disagree. Again, it is the sole prerogative of the Board to interpret the Code in a way that furthers the goals of the Regional Plan. This is particularly true since it was staff and counsel's earlier position that the project could be approved at the time application was made, and the applicant relied heavily on that position. Clearly, the Code can be read in various ways depending on the circumstances.

The applicant proposes a project that will result in major environmental improvements. The Gately matter did not offer such improvements. Here, the applicant has what is likely the largest private rock crib structure on the entire Lake, aside from commercial marinas. The applicant proposes to completely remove all of the rock crib, and entirely rebuild with all open piling. As we will show at the appeal hearing, this will result in major improvements to scenic quality, fish habitat and remove a major blockage to littoral drift.

As we set forth in our November 21, 2022 letter, the vague language of the Code can be read in a way that authorizes this project as a “modification” (allowable), or it can be read in a way that treats this project as an “expansion” which would not be permitted. The staff previously had believed the project was approvable as a “modification”. Crucially, in terms of the facts, this means the staff *agrees* that the project:

1. Results in a net environmental benefit.
2. Brings the structure into greater compliance with development standards.
3. Does not increase the degree of non-conformance with any development standard.

These mandatory findings are contained at Section 84.4.3.F of the Code. If even the staff agrees that all of these things are true, why would one want to prohibit this project? We are at a loss to understand why such projects should not be encouraged.

The Code sections that govern projects need to be read in the light of all of the provisions of the Compact, the Regional Plan, and in particular the Thresholds and Goals and Policies set forth to achieve environmental improvements. The current interpretation being advocated by staff and your counsel incentivizes owners of piers to keep structures that negatively impact the environment “as is”. One of our major contentions will be that the staff should not foreclose opportunities for improvement, simply because it is easier to just say “no”.

In view of the above, as applied to this applicant, staff and counsel’s position is vague and overbroad, arbitrary and capricious, discriminatory, unconstitutional, violates the duty of government to act in fairness, and is otherwise in violation of the Compact and Regional Plan and the law. It is also clear that the applicant was induced to rely on staff’s former position that the project was an approvable “modification”, and caused the applicant to invest heavily in reliance on those representations, only to be told on the eve of hearing that it was suddenly not possible. As there is no factual reason to believe the project was a threat to the environment (again, the staff agreed it was a net benefit) there is no legitimate governmental interest served in the abrupt reversal. Under these circumstances, this is not legally permissible. We look forward to a constructive discussion at the appeal hearing, and we will be providing further supportive materials in advance of the hearing.

Exhibit "A"

Thompson TRPA Pier Modification Timeline of Events

- October 2, 2019 - Paul Thompson retains Kaufman Edwards to proceed with research on feasibility of pier extension and boatlift addition on non-conforming pier.
- September 30, 2019 – Kaufman Edwards contacts Tiffany Good at TRPA to set up meeting to discuss expansion of non-conforming pier.
- December 5, 2019 - Paul Thompson and Kaufman Edwards meet with Tiffany Good at TRPA. Discussions included what could be approved if the existing rock crib and concrete pier was converted to an open piled pier.
- December/January 2020 - Engineer was retained to prepare construction plans for pier modification.
- February 2020 – Kaufman Edwards prepared Scope of Work for client for permitting steps and costs pier modification.
- March 19, 2020 –Application was submitted to TRPA for pier modification.
- June 1, 2020 –Retained Historic/Cultural Architect to prepare cultural report.
- June 8, 2020 – Submitted application to Lahontan RWQCB for pier modification.
- June 16, 2020 - Submitted application to California Fish and Wildlife for pier modification.
- June 26, 2020 - Submittal application to the Army Corps of Engineers for pier modification.
- August 10, 2020 – Kaufman Edwards inquires with Tiffany Good re: status of application
- August 24, 2020 – Submitted application to California State Lands Commission for pier modification.
- October 22, 2020 – Kaufman Edwards contacts Tiffany Good at TRPA re: status of application. Tiffany Good informs Kaufman Edwards that notices for hearing meeting will be going out tomorrow.
- October 23, 2020 – Kaufman Edwards sends Tiffany copy of digital application for TRPA noticing.
- November 4, 2020 – Discussion with Tiffany at TRPA. Tiffany met with TRPA legal counsel (Jon Marshall) and it was determined that the Thompson pier project would not be approved unless we bring the proposed pier into 100% conformance to current design standards.
- November 5, 2020 – Kaufman Edwards asks TRPA for something in writing regarding the denial of the current pier proposal.
- November 6, 2020 – Tiffany Good responds to Nov. 5 email via email.
- November 10, 2020 – Kaufman Edwards Planning sent TRPA letter arguing Code definition of expansion, stating dates we were given approval to proceed, etc.
- December 1, 2020 – Received Fish and Wildlife approval (Streambed Alteration Agreement) for pier project.
- January 19, 2021 – TRPA issues formal letter denying project as submitted.
- January 22, 2022 – Paul Thompson sends Tiffany Good email to argue definition of pier expansion vs modification.

- October 11, 2021 – Kaufman Edwards submits QE for pier repair/crib encapsulation to TRPA.
- March 20, 2022 – TRPA issues approval for QE for rock crib encapsulation.

- may comply with the additional standards for multiple-use piers serving four or more littoral parcels, as set forth in (C) of this subsection.
2. Commercial or tourist accommodation facilities eligible for an additional pier under 84.4.2.C of this Section that are not deed restricted to be open to the public shall comply with the additional standards for single-use piers, as set forth in (B) of this subsection.
- F. Expansion or Modification of Existing Piers.** Subject to the following provisions, a legally existing pier may be expanded or modified. These provisions apply to legally existing piers outside of marinas; expansion or modification of legally existing piers within marinas is subject to subsection 84.6.3.E.
1. **Modification of a conforming pier.** An existing pier that conforms to the applicable development standards set forth in this Section may be modified if the modification results in a net environmental benefit and is consistent with the applicable development standards set forth in this Section.
 2. **Modification of a non-conforming pier.** An existing pier that does not conform to the applicable development standards set forth in this Section may be modified provided all of the following conditions are met:
 - a. The modification results in a net environmental benefit;
 - b. The modification brings the structure into greater compliance with applicable development standards set forth in this Section; and
 - c. The modification does not increase the degree of nonconformance with any applicable development standard set forth in this Section.
 3. **Expansion of a conforming pier.** An existing pier that conforms to the applicable development standards set forth in this Section may be expanded to the extent allowed by the applicable development standards set forth in this Section.
 4. **Expansion of a non-conforming pier.** An existing pier that does not conform to the applicable development standards set forth in this Section shall not be expanded except if all of the following conditions are met:
 - a. The expansion is limited to an existing boat house and does not increase the extent to which the boat house is non-conforming;
 - b. The expansion shall not increase the functional capacity of the pier;
 - c. The effect of the expansion is to increase the contrast rating of the structure; and
 - d. The expansion is the minimum necessary to accomplish the scenic quality improvement set forth in (c) above.
- G. Relocation and Transfer of Existing Piers.** Subject to the following provisions, a legally existing pier may be replaced with a pier in a different location on the same parcel (pier relocation) or with a pier on a different parcel (pier transfer):

such as painting, shingles and other non-bearing roofing materials, siding (except siding necessary to brace or provide shear strength), doors overlays upon existing paved surfaces, HVAC systems, sewer systems, water systems, electrical systems, furniture, and similar decorations and fixtures.

Excavation

The digging out of earthen materials. See also "Grading."

Executive Director

The executive officer of TRPA.

Exempt

Activities that are not subject to review and approval by TRPA. See Section 2.3.

Exhaust Emissions

The products of combustion emitted into the ambient air from any opening downstream of the exhaust ports of an engine.

Existing

Legally present or approved on the effective date of the Regional Plan or subsequently legally constructed, commenced, or approved pursuant to necessary permits. Derelict structures are not considered existing for purposes of Chapters 50, 51, and 52 nor are projects whose approvals have expired.

Exotic Animals

Animals, other than household pets and other domestic animals such as farm animals, which do not occur naturally in the Lake Tahoe Basin. Exotic animals do not include established nonnative fish or game birds but do include mammals, birds, reptiles, and fish not indigenous to North America or the Sierra Mountain Range.

Expansion

Outside of the shorezone, "expansion" means an increase in size or extent of an existing structure or use that results in additional commercial floor area, additional residential units, additional tourist accommodation units, additional PAOTs, additional land coverage, vehicle trips, or other capacities regulated by this Code. Within the shorezone, "expansion" means an increase in size or extent, including an increase in the dimensions of a structure, and the addition of any structure or edifice to an existing structure.

Facility

A stationary man-made feature that is attached directly or indirectly to the lands or waters of the Region.

Factory-Built House

House constructed by an automated process entirely in a factory. There is little or no functional difference between factory-built housing and site-built housing. Factory-built houses include the following:

- A. "Modular Homes": This is a type of factory-built home in which the individual sections are constructed at the factory, transported to the site on truck beds, and assembled on site by local contractors. They are built to the state, local, or regional code where the home will be located.
- B. "Panelized Homes": These are factory-built homes in which panels, such as a whole wall with windows, doors, wiring, and outside siding, are transported to the site and assembled. The homes must meet state or local building codes where they are sited.

CHAPTER 81: PERMISSIBLE USES AND STRUCTURES IN THE SHOREZONE AND LAKEZONE

81.6 Existing Uses

81.6.2 Changes, Expansions, or Intensifications of Existing Uses

A. Nonconforming Uses

If an existing nonconforming use is discontinued for a period of one year or more, any subsequent use shall comply with the use regulations set forth in the local plan. Discontinuance of use for periods found by TRPA to be beyond the applicant's control, such as weather caused calamity, governmental seasonal regulations and periods during which TRPA was prohibited by court order from accepting applications for repairs related to the use, shall not be counted in establishing discontinuance of use pursuant to this section.

B. Uses Subject to a Specific Program Requiring Discontinuance or Modification of the Uses

A use subject to a specific program requiring discontinuance or modification of the use shall be discontinued or modified in accordance with the requirements of such program. Such specific programs shall be further defined and adopted by ordinance.

81.6.2. Changes, Expansions, or Intensifications of Existing Uses

Expansions and intensifications of existing uses, or changes in use to the extent permitted by this chapter, are subject to the requirements for a permit set forth in Chapter 2: *Applicability of the Code of Ordinances* and Chapter 82: *Existing Structures and Exempt Activities*. Modifications, expansions and other changes to structures are governed by other provisions of the Code and also are subject to the requirements of Chapter 2 and 82. Changes in use of a littoral parcel may not increase shorezone development potential.

A. Allowed Uses

Uses identified as allowed uses may be changed, expanded, or intensified in conformance with this Code. Any change, expansion, or intensification, resulting in a special use, shall be subject to the special use requirements.

B. Special Uses

Uses identified as special uses and for which the required findings pursuant to subsection 81.3.2 have been made by TRPA, may be changed, expanded, or intensified subject to subsection 81.3.2.

C. Nonconforming Uses

Uses identified as nonconforming shall not be expanded or intensified. A nonconforming use shall not be changed unless the new use conforms to the use regulations set forth in this Code. Expansions of structures containing a nonconforming use shall not be permitted. Modifications may be permitted only when TRPA finds that the modifications do not increase the extent of nonconformity.

84.3. MOORING STRUCTURES**84.3.1. Applicability**

- A. The provisions of this Section apply to the construction of additional mooring structures and to the relocation and conversion of existing mooring structures.
- B. As used in this Section, mooring structures include buoys, boat slips, boat houses, and boat lifts.
- C. For the purposes of this Section, a mooring structure is considered "additional" if it is to be created pursuant to a TRPA approval issued on or after October 24, 2018. The following are not "additional" mooring structures:
 - 1. The authorization of a legally existing buoy pursuant to 84.3.3.D.3 of this Section;
 - 2. The repair, reconstruction, or replacement, in the same location on the same parcel, of a legally existing mooring structure;
 - 3. The modification or expansion, on the same parcel, of a legally existing mooring structure;
 - 4. The relocation of a legally existing mooring structure on the same parcel;
 - 5. The conversion of a legally existing mooring structure to a different mooring structure pursuant to subparagraph 84.3.2.D;
 - 6. Essential public health and safety facilities.

84.3.2. General Standards**A. Moorings per Littoral Parcel.**

Unless otherwise allowed under this Chapter, a littoral parcel not associated with a public agency, homeowners' association, or marina shall be permitted a maximum of two moorings.

B. Watercraft per Mooring.

Only one watercraft shall be allowed per mooring, unless otherwise allowed as a permitted concession associated with a marina per subsection 84.10.2.

C. Boat houses.

- 1. Additional boat houses shall be prohibited.
- 2. Legally existing boat houses are allowed to be repaired and maintained.
- 3. Modification or expansion of legally existing boat houses may be allowed pursuant to subsection 84.4.3.

D. Conversion of Existing Mooring Structures.

Subject to the following conditions, certain legally existing mooring structures may be converted from one type of structure to another.

1. Converted mooring structures shall comply with all applicable development standards for additional mooring structures in this Chapter.
 2. Allowed Conversions.
 3. A serviceable, legally existing marine railway may be converted to a buoy or boat lift. A boat lift converted from a marine railway pursuant to this subsection shall not be subject to the maximum number of boat lifts per single-use pier as set forth in subparagraph 84.4.3.B.2, not to exceed two boat lifts total per pier. The converted boat lift shall be considered an additional mooring per 84.4.3.E below. Conversion of a marine railway to a pier shall be prohibited.
 - a. A legally existing boat slip within a marina or public facility may be converted to a buoy within the same facility, and vice-versa.
 - b. A legally existing buoy may be converted to a boat lift, and vice-versa, consistent with the maximum number of mooring structures and buoys set forth in 84.3.2.A and 84.3.3.D.1 of this Section, respectively, and the provisions for additional boat lifts set forth in 84.3.2.E.6 of this Section.
- E. Allocation and Permitting**
1. **Maximum Number of Additional Moorings.** TRPA may permit up to a maximum of 2,116 additional moorings following the date of adoption of this Chapter.
 2. **Allocation of Additional Moorings.** Of the additional moorings authorized in this Section:
 - a. 1,486 moorings shall be used for private moorings as either buoys or boat lifts.
 - b. 330 moorings shall be allocated for use by marinas as either buoys or boat slips.
 - c. 300 moorings shall be allocated for use by public agencies (for use as buoys or boat slips). The Executive Director may utilize a portion of this allocation for private applicants once the moorings available under Subsection 84.3.2 (E)(2)(a) are exhausted and subject to finding that sufficient capacity exists for public agency anticipated use. If the Executive Director allocates such moorings for private applicants, a minimum of 100 moorings must remain for future use by public agencies.
 3. **Phasing of Applications for Additional Private Moorings**
 - a. **Permit Review Priority.** TRPA shall give first permitting priority to those applicants with previous state or federal approvals issued before September 1, 2018 or pending project applications with TRPA. Following completion of review for priority applicants, new project applications shall be reviewed in the order they are received.

- (iv) On a different littoral parcel within the same unit and within the upland; and
 - (v) In a different non-attainment unit.
- e. Scenic Credits. Scenic Credits are defined as the difference between the existing visible mass and the proposed visible mass associated with shorezone structures. Banking of scenic credits may be allowed subject to the following provisions:
- (i) Scenic credits may be used to offset additional visible mass only for projects in the same Scenic Unit; and
 - (ii) Scenic credits may only be used on the parcel on which scenic improvement is achieved.
7. **Fish Habitat Mitigation.** Pier construction in spawning habitat shall comply with the mitigation requirements in Section 84.11, Mitigation.
8. **Lighting on Private Piers.** Lighting on additional private use piers shall be directed downward and only onto the pier deck and shall not exceed two feet in height above the deck. Lighting shall be the minimum illumination necessary to ensure safety and shall comply with all applicable standards set forth in Chapter 36, *Design Standards*. Pier lights for navigational purposes must be approved by the United States Coast Guard and the Army Corps of Engineers.
9. **Floating Piers.** Applications for new piers and pier extensions that include floating piers or floating portions longer than 25 feet must submit a site-specific littoral drift and wave analysis which evaluates the sediment movement along the lake bottom during low, mid, and high lake levels. The lake level condition with the greatest effect on littoral transport and backshore stability shall be used to design the floating pier section so that wave heights are not reduced by more than 50 percent and the floating pier section is no greater than 50 percent of the length of the site-specific design wavelength.
10. **Accessory Structures.**
- a. Boatlifts, handrails, and other allowable accessory structures and safety devices shall not extend more than four feet above the pier deck, with the exception of flag poles.
 - b. A maximum of one flagpole is permitted on any private pier. Flag poles shall be medium or dark in color and shall have a value of 4 or less on the Munsell Color Chart. Flagpoles shall have a non-reflective finish, shall be a maximum of 20 feet high above the pier deck and have a maximum diameter at the base of 6 inches.
 - c. Allowable visible mass as set forth in Paragraphs (B) and (C) below shall include any catwalk but shall exclude the visible mass of a boat lift, watercraft on a boat lift, and other allowed accessory structures.

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- d. Visible mass used to calculate required scenic mitigation for piers as set forth in subsection 84.4.3.A.6 shall include all accessory structures, including boat lift and watercraft on a boat lift.
11. **Prohibited Structures on Piers.** Superstructures, permanent umbrellas, canopies, storage racks for non-motorized watercraft, plant containers, and furniture other than benches shall be prohibited on piers.
12. **Signage.** In addition to the requirements set forth in subsection 84.8.5, signs on piers shall not be larger than 12 inches high by 18 inches wide by 2 inches thick, unless otherwise required to meet safety regulations. Signs shall not exceed the standard railing height and shall be mounted on railings or on the pier rim joists.
- B. Additional Standards for Single-Use Piers**
1. **Applicability.** These provisions apply to:
- a. Piers on littoral parcels serving one to two residential units on the same parcel; and
 - b. Piers on littoral parcels serving a single primary residence with ownership of more than one adjacent vacant littoral parcel. Such piers shall be allocated as multiple-parcel piers pursuant to subsection 84.4.4.
2. **Development Standards.** Piers shall be constructed consistent with the following provisions as shown on Figures 84.4.3-1 and 84.4.3-2:
- a. Pier orientation shall be perpendicular to the shoreline, as feasible, according to property boundary projection lines;
 - b. Piers shall extend no farther lakeward than elevation 6,219 feet Lake Tahoe Datum or the pierhead line, whichever is more limiting, except as provided under Subparagraph (c) below. Up to an additional 15 feet in length lakeward may be permitted provided 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;
 - c. Properties with deep water adjacent to shore, such as parts of Crystal Bay or Rubicon Bay, where placement of a pier is not feasible under the limits above, may orient the pier in a non-perpendicular fashion. The non-perpendicular pier but shall be no more than 30 feet in length and no portion of the structure may be located more than 30 feet lakeward of the shoreline. The pier may include a catwalk and boatlift;
 - d. Pier width shall be a maximum of 10 feet, not including a catwalk;
 - e. Allowable visible mass shall not exceed 220 square feet (Figure 84.4.3-3). Visible mass due to lateral public access accommodations (e.g. added height, ladders, or stairs) shall not count towards the visible mass limit

Exhibit "G"

54.4.B Design And Construction Standards: Design and construction standards are:

- (1) The width of piers shall be a maximum of 10 feet, which shall include all appurtenant structures except for a single low-level boat lift and a single catwalk. A catwalk below the level of the main deck, and not exceeding three feet in width by 45 feet in length, may be permitted. Additional width for a single catwalk may be permitted where TRPA finds it is necessary to facilitate barrier free access but at no time shall the entire width of the pier and catwalk exceed 13 feet. A low level boat lift with forks not exceeding 10 feet in width may be permitted.
- (2) Pier decks shall not extend above elevation 6232.0 feet, Lake Tahoe Datum. Boat lifts, pilings, and handrails and other similar safety devices, shall not extend more than four feet above the pier deck. Pier decks may extend up to elevation 6234.0 feet in limited situations where TRPA finds that the additional height is necessary for safety reasons or that local wave characteristics represent a real threat to the integrity of the structure.
- (3) To permit free circulation of water, piers shall be floating, or shall be built on an open piling foundation, but in no case shall a pier be supported on a foundation that is less than 90 percent open.
- (4) Superstructures shall not be permitted on any lake or lagoon in the Region unless the structure is assured to be removed upon discontinuation of the use or the need for the structure; and it is either:[§]
 - (a) for the purpose of conducting research identified in the Environmental Impact Program or conducting ongoing monitoring of environmental conditions identified in TRPA's monitoring program; the nature of the research or environmental monitoring requires an over the water location for data gathering instrumentation and is the minimal size necessary; and no watercraft will be housed in or on the superstructure; or
 - (b) required by a public agency for public health and safety purposes (such as a radio transmitter or a light beacon); by its very nature the superstructure requires an over the water location and is the minimum size necessary; and no watercraft will be housed in or on the superstructure.
- (5) Fueling facilities shall not be permitted on piers located adjacent to littoral parcels on which the primary use is residential.
- (6) The standards set forth in Subparagraph (1), above, may be waived for piers recognized by TRPA as multiple use pursuant to Section 54.8.

[§] Amended 02/25/98

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November 21, 2022

Ms. Julie Regan
Executive Director
Tahoe Regional Planning Agency
P.O. Box 5310
Stateline, NV 89449

Re: Thompson Single Use Pier Modification, Placer County APN 098-210-012; TRPA File Number ERSP2020-0373

Dear Ms. Regan,

We are writing to you with regard to your staff and counsel's initial determination that this project is unable to be approved. For all the reasons set forth below we strongly believe that this initial decision should be revisited.

This project involves the conversion of an immense rock crib and concrete pier to an open piled pier. This is the type of project that should be encouraged. In spite of this, your staff and counsel have initially determined that because the project involves additions to the pier that are completely conforming to your Code, it is not approvable. Central to the analysis are the definition of an "expansion" and what permissible "modifications" are.

An important factor here is that before this project was even applied for, your staff met with the applicant and his consultant, and represented that the project was indeed approvable. In reliance on that representation, the applicant invested \$70,000 in preparing applications, engineering, independent experts and consulting. It was literally just as the notices were going out prior to the TRPA Board hearing for approval when the staff and counsel abruptly reversed course.

We are bringing this to your attention in the hopes that our disagreement can be resolved, and we can resume processing of this application. If we are unable to reach agreement, we ask for a final decision that can be appealed to your Board.

Set forth below is our analysis of the relevant considerations for your review. Paramount in our view is the fact that if the current interpretation stands any incentive for lakefront owners with non-conforming piers (very few are "conforming") to move toward conformance to design standards or offer environmental improvements will evaporate.

This Project Will Result in a Major Net Environmental Benefit:

The applicant proposes to convert one of the largest remaining rock crib piers on the entire Lake to an open piling pier, as well as making it smaller in overall size. The net environmental improvements resulting from that conversion are dramatic:

1. Reduction In Interference With Littoral Drift: Rock crib piers are notorious for blocking littoral drift, which creates bottom scouring on one side of the pier and accumulation of sediments on the other side. The degree to which the negative impacts occur depends upon Lake elevation, wind magnitude and direction. Suffice it to say that such effects can be severe, and the current structure will absolutely cause a major shoreline erosion event at some point in the future. This is particularly true on the West Shore, when easterly wind events at high Lake elevation have been documented to cause erosion of the shoreline at a rate of several feet per hour, especially where scouring occurs due to the presence of a reflective structure. Shoreline erosion has been identified as a major source of phosphorous and other contributors to phytoplankton primary productivity. TRPA is far behind in Threshold attainment as to water quality, and this project will provide a direct and substantial benefit.
2. Improvement to Fish Habitat: While this area is mapped as "feed and escape cover" and "marginal" habitat, it is also actually spawning habitat for several species of forage fish and other native fish in the summer months. Turbidity associated with rock crib can cover spawned eggs resulting in lower survival rates. In addition, 1,156 square feet more fish habitat will be created due to removal of concrete and cribbing from the lake bottom.
3. Scenic Improvement: The project greatly reduces the visual mass along its most impactful horizontal segment. That segment is between the water level and the pier deck, which is the area through which the observer looking from offshore can see the beach and shoreline. In the development of TRPA's shoreline ordinances, TRPA's visual mentors identified this segment as crucially important to observers looking from offshore. Occluding the view of the bank or the structures in the upland above is far less important.

We do not believe that the TRPA staff disagree that these benefits would be realized, as they are self-evident. TRPA has encouraged such improvements consistently since at least the adoption of the 1987 Regional Plan and even before.

A Last-Minute Change In Policy Is Unfair and Counterproductive:

After a year of processing in good faith reliance on TRPA's representations that the project could be approved, and right on the eve of a Hearing's Officer meeting (I believe) to approve this project, TRPA staff abruptly pulled the rug out from under the applicant. The stated reason for this was that TRPA counsel had found that as a matter of law, the only possible interpretation of your Code was that the project involved an "expansion of an existing nonconforming pier" and therefore could not be approved unless the pier came completely into compliance with the

standard for a new single use pier. (See the Thompson Project Timeline attached as Exhibit "A".) This is fundamentally unfair and constitutes a breach of the general governmental duty to treat the governed in a way that is not arbitrary or capricious.

This is especially true given the fact that both the applicant and the applicant's representative met with TRPA staff before even making an application to ensure that it could be processed under the TRPA Code. Having received reassurance that what was proposed was feasible, the applicant proceeded to hire an engineer as well as other outside experts, and submitted all of the materials to TRPA for the application to be deemed complete. Not only that, the applicant also completed full applications to the Lahontan RWQCB, Fish and Wildlife, US Army Corps and the California State Lands Commission. As previously alluded to, between the cost of the consultant, engineer, historic/cultural expert, filing fees and other costs, the applicant has spent in excess of \$70,000, and has also invested countless hours coordinating this project.

It is legally significant that all of this expenditure of time and resources was done solely in reliance on TRPA's representation that this project could be approved. While all applicants assume the risk that at a final hearing for approval, one or more Governing Board members may have questions, or that additional conditions of approval may be imposed, or even a requirement for a change in the design, but that was not what happened here. What happened here was that TRPA decided that the application should not have been accepted in the first place, and that it was not possible to take this project before the TRPA Board. This was not a risk that the applicant should have to run. Simply stated, given the applicant's good faith reliance on TRPA staff's representations, it is inequitable to reverse course at the last minute, and deny access to the decision makers and policy makers.

TRPA Staff and Counsel Have Denied Access to the Final Authority on Interpretation of Your Code: The Governing Board

As will be explained below in further detail, this is a matter of interpretation of your Code. TRPA staff and legal counsel were not charged with the ultimate authority to adopt, change or interpret your Code. That authority rests with the TRPA Board as described in Article III of the TRPA Compact. In addition, staff and counsel are not delegated the authority to act on certain pier projects. The TRPA staff had previously made a determination that this project could not be approved by the staff, presumably in accordance with the TRPA Code at Section 2.2.2, which requires hearings on certain types of projects.

Staff and legal counsel cannot have it both ways. In effect the staff said at the outset this project was approvable initially by the Hearings Officer and/or the Board. On the eve of the hearing, they abruptly reversed themselves and not only said that the TRPA was unable to approve, but that the staff decision on the project was the decision of the Agency. This is inconsistent, especially since the decision was based upon an interpretation of your Code, which has always primarily been the province of the TRPA Board. As will be seen below, your Code is ambiguous on its face, and subject to interpretation.

Is This Project an "Expansion" or a "Modification"?

Before looking at the language of the Code, it is important to keep in mind the goals of the Compact, the Thresholds and the Regional Plan. The guiding principle in TRPA's mission is to look for and programmatically encourage incremental movement toward environmental improvement. There have been many occasions since the adoption of TRPA's Regional Plan in 1987 where unrealistic code language or interpretation have led to missed opportunities to improve the environment by blocking incentives for the private sector to help move Tahoe's environment in the right direction. Most of those counterproductive provisions are now gone, and have been replaced by balanced incentivized programs such as conversions of commercial and other existing development to workforce housing, transfer programs for coverage to be relocated away from sensitive lands and to high capability lands, and so on.

The current interpretation by staff and counsel in this case constitutes a pivot back to the many similar failed policies of the past. To "just say no" must also be understood to say no to very opportunities for environmental improvement sought to be encouraged by the Regional Plan.

The standards for modification of a non-conforming pier are set forth at Section 84.4.3.F of the Code (Copy attached as Exhibit "B".) All of the following must be met:

- a. The modification results in a net environmental benefit.

Here there is a major and undeniable benefit as to water quality, scenic impacts and fish habitat, as described in detail above.

- b. The modification brings the structure into greater compliance with applicable development standards set forth in this Section

The modified pier will be much smaller in terms of total mass, as the rock crib will be replaced with open piling. In terms of dimensions, it will also be smaller as to width along the pier as well as at the pierhead. The project overall will be in much greater compliance.

- c. The modification does not increase the degree of nonconformance with any applicable development standard set forth in this Section.

The staff references the additional length of the pier as an increase in the extent of the pier, which could make the project an "expansion". As to length, the pier is currently shorter than current standards would allow, and the proposed pier will be in compliance with that new standard which allows an additional 15 feet as a matter of right at this location. To be consistent, however, it was the decision of the Board on the Johannessen new single use pier project just last year under the same Code language that the 15 feet additional is conforming. If a brand-new pier can extend to the length allowed by the Code, then the additional length proposed here, by definition, is in compliance with the development standard as to length.

In summary, this project is approvable under the language of the Code as to “modification” of a non-conforming pier. It provides distinct environmental improvements and is just the kind of project that TRPA should encourage.

Is the Project Also an “Expansion”?

The definition of an “expansion” is set forth in the attached Exhibit “C”. In pertinent part, that definition says that an expansion is “an increase in size and or extent, including an increase in the dimensions of a structure, and *the addition of any structure or edifice to an existing structure*” (emphasis added).

As with ANY ordinance provision, under the rules of construction, this over-broad language must be read in the context of the Code as a whole, and the Goals and Policies of the Regional Plan. The wisdom of the Regional Plan is lost if one simply reads the definition of “expansion” in isolation. It is our belief that Code Section 81.6.2.C beautifully and succinctly summarizes that context and intent. That Section is attached as Exhibit “D”, and the crucial language reads:

“Modifications may be permitted only when TRPA finds that the modifications do not increase the extent of non-conformity.”

This is also the general policy as to non-conforming uses and structures generally in jurisdictions and municipalities throughout the country. Stated another way, if the modifications conform to the development standards for new single use piers, it should be a “modification” and not an “expansion”.

Apparently, the language in the definition of “expansion” that troubles staff and legal counsel is the phrase “the addition of any structure or edifice to an existing structure”. Obviously, this last phrase would mean you couldn’t add any physical object of any kind, but TRPA has allowed many types of things to be added to non-conforming piers over the decades since the 1987 Plan was adopted.

TRPA Code Section 84.3.2.D.3.b (see Exhibit “E”) allows for the conversion of one type of mooring for another. While the Code requires the conversion to meet design standards, it is our position that this was not intended to be an insurmountable task. According to one of those who participated in the last round of Shoreline Plan negotiations, Jan Brisco, this nuance pertaining to “expansion” versus “modification” was never highlighted or discussed since it would be a deal breaker to just about every pier owner wishing to take advantage of this option. Piers that are conforming today are in the minority, and under the staff’s onerous interpretation very few piers could qualify for an otherwise routine conversion. During the Shoreline planning meetings, Jan Brisco understood that this type of conversion was not to be limited to only a few.

Jan and I believe the intent of TRPA Code Section 84.4.3.A.10.a. Accessory Structures (see Exhibit “F”) is clear - - boat lifts, handrails, and other allowable accessory structures and safety

devices are accessory to the pier and the addition of "conforming" accessories were not intended to constitute an impermissible "expansion".

Again, consistency with past permitting and practice is vitally important to the understanding and expectation of fairness, as is a look at the Regional Plan as a whole. Our interpretation of the current Code is consistent with the prior Code under TRPA Code Section 54.4.B(2) (see Exhibit "G"). TRPA has routinely allowed accessory and safety structures on non-conforming piers in dozens of projects since the 1987 Code was adopted, including boat lifts, railings, and flagpoles. In those cases, there has been no mention of expansion or expansion findings. Under the prior Code, any "expansion" would have required the pier be modified to reduce the level of non-conformity with the design and location standards.

The conversion of one mooring type to another should be encouraged, not made impossible. Mooring a boat on a boat lift is a far superior method than mooring to a buoy in terms of safety to the user, risk of the boat sinking in rough water, bilge-pump cycling, and the possibility of the boat becoming untethered from the mooring buoy. Rough water can present dangerous conditions when using a buoy, and much less of a risk to the boater by using a lift to raise the boat out of the water and allow passengers to safely enter or exit the vessel.

Conclusion

For staff and counsel to say that there is only one possible interpretation of your Code, and to deny access to the real decision makers is patently erroneous. This is a matter that should be considered by the Board, which is invested with the final authority to interpret the Code and to make policy.

Before that occurs, we would ask that you please reconsider the staff's initial decision that TRPA is unable to approve this project for all the reasons we have discussed. Of course, we would greatly prefer to go before the Board with a recommendation for approval, and we would very much appreciate the opportunity to discuss this further. If we are unable to make progress, then we ask that you provide us with an appealable final staff decision so that we can take this before the Board in that manner. Thank you for your time and your thoughtful consideration of this matter of great importance to my client.

Very truly yours,



Gregg R. Lien

Enclosures

Cc:

Mr. John Marshall, Esq.

Ms. Wendy Jepson

Ms. Tiffany Good

Ms. Abigail Edwards

Client