

TAHOE REGIONAL PLANNING AGENCY
LEGAL COMMITTEE

Zoom

July 27, 2022

Meeting Minutes

CALL TO ORDER AND DETERMINATION OF QUORUM

Vice-Chair Ms. Novasel called the meeting to order at 10:46 a.m. on July 27, 2022.

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

Members absent: None.

I. APPROVAL OF AGENDA

Mr. Marshall stated no changes to the agenda.

Ms. Novasel deemed the agenda approved as posted.

II. APPROVAL OF MINUTES

Mr. Bruce Ms. Novasel asks for approval of minutes from the April 27, 2022 Legal Committee meeting. Mr. Yeates makes the motion to approve the minutes.

Motion carried by unanimous voice vote.

III. APPEAL OF CONDITION OF APPROVAL FOR RECONSTRUCTION AND EXPANSION OF AN EXISTING PIER, 1590 NORTH LAKE TAHOE BLVD., PLACER COUNTY, CALIFORNIA, APN 094-160-008, TRPA FILE NO. ERSP2020-2095; APPEAL FILE NO. ADMIN 2022-0014

Mr. Marshall presents for TRPA staff. This appeal concerns Special Condition 3.b.6. of the permit which required the applicant to bring the pier into a conforming standard in exchange for the enlargement of it [the pier]. [Slide 3] This is an aerial of the site with an arrow pointing at the current, nonconforming pier. [Slide 4] is the view of the pier structure going down from the pier head, up the stairs, and then the walkway back. The bump out/sundeck that is off to the left is the focus of this appeal. [Slide 5] This view is looking from the property out into the lake; from the walkway down to the deck area and then the stairs go down and the piles of the pier are visible in the lake. [Slide 6] This slide is the schematic site plan for the existing, as-built. TRPA made the highwater line red for clarity. Under TRPA's Code, a pier runs from just landward of highwater out into the Lake a prescribed distance and to serve as a pier for mooring and boating purposes, etc. This pier, as seen in the previous pictures and now in the schematic, is nonconforming. When TRPA refers to "the pier" it runs from the red line [high water] out to the end of the structure. It's nonconforming for a number of different reasons, primarily because of the sundeck; the use of the sundeck, plus the use of the boulder.

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[Slide 7] This is the original application where you can see the as-built pier sticking out from underneath the extension. Essentially the applicant wanted to take the portion of the pier that's supported by piles that is closer to the water, tear it down, and extend it out about another 140 feet, add a pierhead, and add a boatlift. Therefore, this application was to expand a nonconforming structure which TRPA does not allow unless the entire pier structure is brought into conformance with design standards. This was Tiffany Good's direction to the applicant: either they could keep the nonconforming structure as is or they could expand it but bring it all into conformance with design standards. To bring the structure into conformance, the applicant needed to get rid of the sundeck part of the pier structure.

[Slide 8] This proposal allowed the applicant to come into conformance and expand where the pier kicks off from the walkway at the highwater line. This allows the entire structure to be conforming and therefore eligible to expand. To make this work, staff added a condition to the permit that the entire nonconforming structure lakeward of highwater must be removed. The applicant can't have both. The key issues in the appeal, then, are can one avoid bringing a pier into conformance so one could keep their nonconforming structure but only define the pier as that portion of the structure that is already in conformity therefore you can expand it. That is a unique interpretation that any other applicant has offered. What the applicant is asking is to sever the conforming from the nonconforming parts of this pier structure because they believe they have independent utility.

Whether something has independent utility is not part of TRPA's definition of a pier. TRPA's definition is a structure from the highwater that extends into the lake. If we accept the applicant's definition, when we will see in the future is a lot of people saying that they want to keep parts of nonconforming structures but request to expand conforming parts of pier structures. This scenario does not move towards more conforming structures on the Lake which TRPA's Regional Plan directs us to do particularly in the shorezone which such structures as this one which have significant impact to TRPA's scenic thresholds. TRPA staff requests that the Legal Committee recommends that the Governing Board deny the appeal.

Mr. Gatto presents for the applicant/appellant. Mr. Gatto emphasizes that they appreciate staff's work in bringing this project nearly to completion with the one outstanding issue they're hoping to resolve today. [Slide 11] This appeal is solely of condition of approval 3.b.6 which requires that all existing structures lakeward of the highwater line be removed as a part of this project. [Slide 12] In addition to the existing pier that is the subject of the permit, this property has a sundeck perched atop a large boulder lakeward of the highwater line. This sundeck was constructed separately from the pier in 1960. [Slide 13] The threshold question that we're asking the Legal Committee to consider today is whether an independently constructed and separately legally recognized structure is considered a part of a pier. As Wyatt Ogilvy will explain later in this presentation, the answer to this question could result in a broad intrusion on grandfathered private property rights and a change in TRPA policy that has never been contemplated under the Code.

[Slide 14] The regulatory agencies consistently recognized the sundeck and pier as separate structures. [Slide 15] In June of 1960, Mr. Adelman's predecessor applied to Placer County to construct a walkway, sundeck, and stairs. This slide shows the application which does not include construction of the pier which was already in existence at the time. [Slide 16] This slide shows the accessor building records that were created in acknowledgement that the pier and the sundeck are independent structures. The Placer County evaluated both the pier and deck separately for assessment purposes. [Slide 17] This slide shows both a 2009 and 2015 TRPA

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approved site assessment that designates the pier and deck as separate structures. [Slide 18] This slide is a 2019 exhibit that was generated by a California State Lands commission in conjunction with the approval of the lease for the pier. This also depicts the deck as a separate structure from the pier. [Slide 19] It's important to note that the applicant is not actually severing the deck from the pier; it's always been treated separately. This slide is the 2018 MLS Listing for the property that was created prior to Mr. Adelman's purchase and it advertised the sundeck as a feature of the property separate and apart from the pier. It was a feature that was particularly appealing to Mr. Adelman. [Slide 20] If you take the deck as a separate and distinct structure from the pier, it does not meet the Code's pier definition, referenced by Mr. Marshall, which requires a fixed or floating structure intended as a landing or temporary mooring for watercraft. The deck itself at elevation 6239' is much too high for landing or mooring watercraft.

[Slide 21] On the flipside, this slide shows that with the common accessway, if we remove the portion of the deck that did not use the common accessway, the pier would still meet TRPA's definition which extends beyond highwater into the backshore. [Slide 22] There's no dispute that if this deck did not share a common accessway, it would be allowed to remain as a separate, legal nonconforming structure. The issue that presents a unique challenge here is that we have a structure that shares a common accessway with the pier. One of the concerns that Mr. Marshall raised is that if this appeal succeeds that this would result in other applicants trying to segment portions of [nonconforming] piers. Mr. Gatto thinks they've shown, based on the evidence in the record, this is a unique circumstance where the deck has always been treated as a separate structure. Mr. Gatto doesn't think this is a situation that would lead to a snowball effect where other people might try to leave portions of a pier in order to modify the pier.

Mr. Ogilvy continues the presentation to highlight some of the policy implications of determining that the deck and pier are a single structure. Mr. Ogilvy acknowledges that this situation of having a sundeck on top of a boulder in Lake Tahoe is very unique. There are also a number of unique circumstances tied to Shorezone development that pre-dated the Compact and things that could be construed as interconnected series of improvements but are not actually part of a pier. Mr. Ogilvy clarifies on his dialogue with TRPA staff through the course of review that the initial relocation for the conformity of the pier as seen in the two plans that Mr. Marshall included in his presentation. The relocation of the expanded pier was due to the need to bring the stairs connecting the sundeck and the pier deck into conformance. The issue of the conformance of the sundeck itself came up much later in review, right before the permit was issued. The pier, in Mr. Ogilvy's opinion, does come into conformance with current development standards for single-use piers as it was approved by staff without the condition that's of discussion today. Through the permitting of a project, TRPA has the opportunity to push things into conformance beyond just the structure being discussed today including BMP/Water Quality standards, scenic standards, and the like. Because a number of these lakefront properties were developed during a period prior to adoption of the Compact, there are a number of really unique improvements that occurred where you may have an expensive terrace, a deck, a seawall that alters where the natural rim of the Lake should be. Those amenities that are intrinsic to what the public or an owner views as an intrinsic value to the property, if the reach becomes too great through a pier project we may lose the opportunity to bring other elements of the property into conformance and ultimately trend toward threshold attainment. [Slide 23] In our opinion the applicant is not severing the deck from the pier, it has always, since its inception, been viewed as a separate structure, permitted as a separate structure, recognized by both Placer County and California States Lands commission. The inverse is, if the pier segment were damaged and only the sundeck remained, there's no mechanism to moor or land a boat to

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a boulder. We look at it as an independent structure which doesn't meet TRPA's definition of a pier. We feel it should be allowed to remain as an independent, nonconforming, grandfathered structure.

Mr. Marshall rebuts the appellants arguments. Their argument is two-fold; 1) that there's been prior legal recognition or that these items are somehow separated and 2) the fear of the extent of TRPA's reach into the backshore as a result of saying applicants need to bring their structure into conformance if it's nonconforming.

In particular, TRPA's action of stamping off on a site assessment which is directed to coverage. TRPA through the site assessment process is not recognizing the existence of any shorezone structures or the fact that the applicant, when they submitted their site plan, happened to put the name of a deck on one part of a structure and "pier" on another part of the structure. There's no legal effect of TRPA stamping a site assessment for coverage purposes that should then constrain either the Legal Committee or staff from saying the pier structure is segmented or one whole. If the applicant had wanted to verify that the structure was a pier, they would file a Verification Application. In addition to that, the question that we really need to look at is what is the definition of a pier and it's a structure that extends from the backshore out into the lake. That includes the existing walkway which, therefore, the applicant has to remove in order to shift it somewhere else or expand on the pier.

Turning to the precedential part of the appellant's argument, it's clear that TRPA has been doing these kinds of projects for a long time and no one yet has complained that we're overreaching that when a pier structure comes in for expansion, that you have to bring the structure itself – not other parts that just happen to be in the backshore – into conformance. That fear hasn't happened to date and there's nothing that staff did with this project that would heighten or increase the likelihood of that happening. Mr. Ogilvy agrees, there's lots of different designs of structures that happened pre-Compact that are out on the lake. TRPA's fear, of course, that this could generate additional requests that nonconforming structures be able to be maintained. For years TRPA has received arguments that a deck that extends over highwater is actually a pier that should be allowed to expand because watercraft can be tied to it.

Committee Comments & Questions

Mr. Rice has been swayed back and forth by the arguments but ultimately agrees with staff that, since the applicant wants to build an improved pier, they have to remove the entire nonconforming structure.

Ms. Novasel asks if the applicant applied for the pier verification. Mr. Marshall responds that they did not but that staff would have verified the entire structure as a pier because, as Mr. Gatto said, it extends from the backshore, over the highwater, and obviously serves as a mooring for the pier use. TRPA would have determined that it was a pre-existing, nonconforming pier. Mr. Marshall clarifies that there are many claims where an applicant says that something sitting on a boulder with a walkway into the lake can function as a pier. This applicant didn't need it to be verified as a pier because they already had the rest of the structure. Ms. Novasel asks then if the totality of the walkway is considered part of the pier and Mr. Marshall confirms that it is. Ms. Novasel continues that you need the walkway to have the structure meet the definition of the pier and, with it removed, you lose the connection to the definition which necessarily includes the connection through the sundeck.

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Mr. Marshall responds to Mr. Rice's comment that he should remember what purpose California State Lands and Placer County's records are serving. Placer County is not identifying these two shoreline structures as distinct; they're simple building permits. Placer County doesn't regulate the difference between a sundeck and a pier that are both going out into the water. They aren't making, from a government authorization perspective, a distinction between the deck and the pier. The California State Lands has no reason to charge for a lease for the deck because that's not their regulatory purpose. Their regulatory purpose is to provide a lease for the structure that lives on state lands which would be the extension out into the water that has the piles. Their action did not authorize the deck and then authorize two different structures.

Ms. Novasel asks about the reference to the applicant's statement that there were separate instances of building between the deck structure and the pier structure. Mr. Marshall says it's assumed that the deck was built first necessarily in order to build the structure into the lake that extends from the deck. For TRPA regulatory purposes the order of operations in construction doesn't make a difference because the entire structure fits within the definition of a pier.

Public Comment

Jan Brisco with Tahoe Lakefront Homeowners Association is concerned about some things she's heard staff say today which is why she decided to comment. There is a viewing sundeck over near Cave Rock and for years they were trying to get it classified as a pier and TRPA said, no that is strictly a viewing platform as it's up on boulders and cannot be used for any boating purposes. It extended beyond the highwater mark and there was no question about it. So this case has to be looked at in a similar way in that this is a causeway with a viewing platform, and then it drops down into the actual pier. Ms. Brisco believes that they are in fact two distinct structures whether they extend beyond highwater or not. The common sense approach is to look at what the utility is of it and understand that the Code and the revisions made to the Code were primarily to get to the issue of utility and making sure we had those really clearly defined. You can think of it as a causeway out that has a sundeck and then down to the actual pier. The second thing to be aware of, and she disagrees with Mr. Marshall's response on this, the sundeck does not even reach the low-water mark which is in the jurisdiction of the California State Lands commission. Only a portion of the lakeward end of the pier extends beyond low-water so the state lands commission would not have any position on that whatsoever. They do, in fact, charge separately for sundecks vs. piers; they do make the distinction very clearly under their Category 1 and Category 2 rate structures. Perhaps staff doesn't realize that but the sundeck and the extension going down to the pier don't reach the low-water mark to be in the purview of a lease with California State Lands commission. Ms. Brisco urges the Legal Committee to take another look and perhaps postpone their decision to look more closely. Ms. Brisco states that they've seen these appeals come before the Governing Board too many times and it's indicative that there's an issue of how we're interpreting the Code.

Final Committee Comments

Mr. Yeates asks what exactly the applicant is asking to keep; just the sundeck or the entire nonconforming pier? Mr. Marshall responds that they're asking to keep the walkway portion of the pier and the sundeck portion of the pier but take everything from the stairs out and then build the conforming expansion of the pier.

Mr. Yeates asks if they didn't have the extension now that exists on the nonconforming structure and they only had the walkway to the boulder, what would TRPA call it?

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Mr. Marshall responds that TRPA would determine it to be a nonconforming structure. We would not recognize that structure as a pier because it doesn't have the pier utility. The entire structure is recognized as a pier because it then goes down and out [into the lake] and is able to function as a pier.

Mr. Marshall confirms that the use and structure of the deck on the boulder is not consistent with current TRPA rules which makes it nonconforming. Mr. Marshall adds on the state lands issue, that his point was that the state lands lease only applied to the very end of the pier structure where it's over State lands. So, the lease itself does not authorize the sundeck portion because it's not subject to their lease. The function of that document is not to independently approve or provide the authority for the sundeck.

Mr. Gatto is recognized by the chair to clarify the State Lands exhibit. While State Lands does not lease anything below the low-water mark, they do regulate the public trust there. As part of their evaluation for the lease, they are looking at the structures within the public trust between the highwater and lowwater mark to determine if they interfere with the public trust. Therefore, State Lands does evaluate structures as part of their lease.

Ms. Williamson asks if the utility piece of this is for evaluating the definition of "pier"; whether you're intending a landing or temporary mooring for watercraft. Mr. Marshall confirms this is correct and that this was added in 2018 in response to getting a lot of applications that argued that because a corner of a deck extended over highwater, applicants should be able to expand it into a full length pier when the existing structure never served the utility of what a pier does.

Ms. Williamson asks that it's the walkway piece, the fact that the pier is connected through the common walkway. Mr. Marshall confirms and adds that the sundeck is not an independent utility structure from the pier structure. The sundeck is how someone gets from the backshore out on to the pierhead. Ms. Williamson confirms with Mr. Marshall that there is no separate ingress or egress.

Mr. Rice asks if TRPA approves building a sundeck on top of a boulder. Mr. Marshall states that TRPA does not and this was constructed pre-TRPA in 1960s. Mr. Marshall states that they can keep and maintain this nonconforming structure but, in order to expand, they have to bring the entire structure into conformance.

Ms. Williamson clarifies that if they wanted to keep the entire nonconforming structure they couldn't expand at all, i.e. add a boatlift. Mr. Marshall confirms that the addition of a boatlift is an expansion of the pier.

Mr. Rice confirms that this is an "either/or". The applicant can either leave the structure as is or they can build a new pier with a boat lift but remove the old pier. They can't have it both ways. Mr. Marshall confirms.

Ms. Novasel wants to clarify on Ms. Brisco's comments concerning the viewing platform. Ms. Brisco stated it was a causeway where TRPA gave an exception? Mr. Marshall states that he believes it's in Lakeridge HOA heading south through Cave Rock you can see a platform out on boulders with a walkway out on boulders. Ms. Brisco raised that TRPA says that's not a pier because it doesn't function as a pier and therefore it can't be expanded. Mr. Marshall agrees with that characterization of TRPA's position. It may have qualified under our old definition but

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not under our new definition. There's another issue of it being a multi-use structure which is not relevant to this appeal today. Ms. Good states that the Lakeridge viewing pavilion is a bit of a different situation but that all points made about it are fair.

Mr. Yeates made a motion to deny the appeal

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

Motion carried.

Presentation can be found at <https://www.trpa.gov/wp-content/uploads/Legal-Committee-Item-No.-3-and-Agenda-Item-No.-VII.-A.-Adelman-Appeal.pdf>

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

Mr. Yeates makes a motion to move into closed session.

Motion carried by voice vote.

V. POTENTIAL DIRECTION REGARDING AGENDA ITEM NO. 4

Mr. Marshall states that there is no direction needed.

V. COMMITTEE MEMBER COMMENTS

None.

VI. PUBLIC INTEREST COMMENTS

None.

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VII. ADJOURNMENT

Mr. Yeates moved to adjourn.

Meeting adjourned at 12:19 p.m.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "K. Huston", with a long horizontal line 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.