

TAHOE REGIONAL PLANNING AGENCY
LEGAL COMMITTEE

Zoom

November 17, 2021

Meeting Minutes

CALL TO ORDER AND DETERMINATION OF QUORUM

Chair Mr. Bruce called the meeting to order at 10:34 a.m. on November 17, 2021.

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

Members absent: None.

I. APPROVAL OF AGENDA

Mr. Marshall stated no changes to the agenda.

Mr. Bruce deemed the agenda approved as posted.

II. APPROVAL OF MINUTES

Mr. Bruce asks for approval of minutes from the October 27, 2021. Mr. Yeates makes the motion to approve the minutes.

Motion carried by voice vote.

III. RESOLUTION OF ENFORCEMENT ACTION, UNAUTHORIZED MATERIAL DAMAGE TO TREES, DANA MARLIN, WREN CIRCLE, DOUGLAS COUNTY, NV, ACCESSORS' PARCEL NUMBERS 1418-27-810-013 & 1418-27-810-014

Mr. Sweet made the presentation for TRPA staff.

Mr. Sweet states that Mr. Marlin is being represented by Mr. VerStandig who is present for the meeting today. This violation involves unauthorized material damage to 14 trees located on adjacent properties of 269 Wren Circle owned by Dana Marlin. This property is located in the Cave Rock area of Lake Tahoe. The affected properties are owned by the US Forest Service and the Nevada Division of State Lands and are located at the end of Wren Circle in Douglas County, NV.

In June 2021, the TRPA inspected a report of unauthorized tree trimming at the end of Wren Circle on both USFS and NDSL properties. During the inspection, staff discovered that 5 trees located on USFS property, and 9 trees located on NDSL property all larger than 14 inches diameter at breast height had been limbed in the upper 2/3 of the trees' height.

After further investigation and discussing the issue with both NDSL and USFS, TRPA staff determined that unauthorized, live-limb removal, provided view-enhancement for the residence on the neighboring property and that Mr. Marlin would have had the greatest benefit from the

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view enhancement.

Mr. Sweet shows photos of the view enhancement from Mr. Marlin's property. The unauthorized, live-limb removal from 14 trees was in violation of TRPA Code Section 61.1.5: Requiring TRPA approval for the cutting, moving, removing, killing, or materially damaging of live trees greater than 14 inches DBH.

After several discussions with Mr. Marlin's representative, Mr. Marlin continues to deny any responsibility for the violations alleged but is willing to enter in to a settlement agreement as a compromise to all of the claims. Pursuant to the Settlement agreement attached to the staff report, Mr. Marlin will pay a penalty of \$29,000 to TRPA for the unauthorized, material damage to the trees. Both NDSL and USFS are continuing their investigation prior to taking any action pursuant to their own statute of limitations.

Mr. Bruce asks if the representative for Wren Circle would like to make any comments.

Mr. VerStandig comments for Wren Circle that they have worked extensively with Mr. Sweet to arrive at this resolution. Mr. VerStandig states that Mr. Marlin does deny any culpability or liability but it [the penalty] is a significant sum of money and, in candor, represents a similar amount that would have been incurred by Mr. VerStandig's firm in legal fees had this not been resolved. Mr. VerStandig states that Mr. Marlin is eager to move forward and hopes that TRPA finds this to be an acceptable resolution.

Mr. Marshall adds that TRPA is only looking at the civil penalty and the state and federal lands will be responsible for the restoration component.

Committee Comments & Questions

Mr. Rice asks if TRPA checked with neighbors to see if they knew which company came in to the limbing?

Mr. Sweet responds that he and the USFS did check with the neighbors but no one witnessed the limbing. Mr. Sweet states that the neighbor he spoke with stated that Mr. Marlin had made comments to him about having the USFS do the tree trimming. However, this neighbor had been away at the time and when he came back into town, the tree trimming had been done.

Mr. Bruce asks if the trees are expected to survive the damage done?

Mr. Sweet states that they aren't sure yet but one of the smaller trees is already starting to fade. Mr. Sweet reiterates that it'll be up to the two property owners, the USFS and NDSL, to work with Mr. Marlin for any remediation on the properties.

Public Comments & Questions

None.

Final Committee Comments

None.

Mr. Yeates made a motion to recommend approval of the settlement agreement.

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

Abstentions: Mr. Rice.

Motion carried.

Presentation can be found at <https://www.trpa.gov/wp-content/uploads/Consent-Calendar-Item-No.-13-Marlin-Violation-Resolution.pdf>

IV. APPEAL OF REJECTION OF APPEAL OF QUALIFIED EXEMPT DECLARATION QESZ2021-0152 AND DENIAL OF ADMINISTRATIVE DETERMINATION REQUEST ADMIN2021-0030, 1600 NORTH LAKE BOULEVARD, PLACER COUNTY, CA, ASSESSOR'S PARCEL NUMBER (APN)

Mr. Bruce asks for disclosure of any conflicts of interest or ex parte communications with the parties from the committee members. No committee members have any conflicts of interest or have had ex parte communications with either party.

Mr. Marshall introduces Nira Doherty whom the Agency retained to provide the Committee and later the full Board General Counsel services during the hearing of this item because this item focuses on a lot of communication that Mr. Marshall had with the parties as well. Mr. Marshall will be serving as the staff advocate only and not as the Committee's advisor.

Presentations

Mr. Marshall presents for TRPA. This is an appeal of a rejection of an appeal of a Qualified Exempt declaration as well as a denial of a request for an administrative determination. This is regarding two adjoining properties on North Lake Boulevard a little northeast of Tahoe City. The pier and boatlift in question extends from 1620 North Lake Boulevard which is Mr. Fialho's property. Both properties have a boatlift on the pier.

The Qualified Exempt site map demonstrates what TRPA approved. Qualified Exempts are submitted to TRPA with an attached declaration from the applicant and unless TRPA notifies the applicant within 5-days [that there is an issue], the applicant can proceed with the activity. This is because the only activity that's authorized by a QE is specifically detailed both in the Code [TRPA Code of Ordinances] and the application itself. As noted on the bottom left of the site plan in question, this QE authorized the applicant [Mr. Polite] only to excavate 3 cubic feet or less and that all of the excavation must be done by hand.

The QE that was stamped by TRPA staff included a note in recognition that the two parties are adversarial regarding access to the boatlift. TRPA stamped the QE, provided a copy to Mr. Fialho [the appellant], met Mr. Fialho on-site to hear his objections. Staff had been in discussions with counsel before that time period and maintain that the Fialhos did not submit an appeal of the Qualified Exempt declaration within the 21-day limit set forth in the TRPA Rules of Procedure; in fact, it was submitted substantially later so the timeliness of it is not really up for debate. The question before the Committee is, is there a reason to deviate from TRPA's Rules to allow this appeal to move forward.

Staff's perspective does not see any cause to deviate. Deviation would require a 5-5 vote, similar to a dual-project approval, pursuant to Rule of Procedure 2.4.4.d. Staff does not see a

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reasonable reason to deviate in this case. For staff, the issue comes down considering if there is a reason to excuse the late appeal. Counsel for the Fialhos knew of the appeal possibility and were aware of the appeal process and simply did not file their appeal on time.

If the Committee decides not to proceed with the appeal then the matter would end here but if the Committee decides to proceed to hear the merits of the appeal and deviate from the rules, then essentially the two issues for staff is whether the property owner's [Mr. Fialho's] signature was needed for this Qualified Exempt declaration; because this QE does not authorize any trespass, and because the Polite party has demonstrated a sufficient interest for staff to move forward in the easement area, staff determined the property owner's signature was not required. Because this QE does not provide authorization to either conduct activities on the neighbors' property that they don't already have permission to do and that they can only excavate 3-cubic yards of material by hand, TRPA staff does not believe there is any basis to revoke the QE declaration.

Mr. Marshall concludes his presentation.

Mr. Lemieux presents for the appellants. Mr. Lemieux states that TRPA staff's rejection of the Fialho appeal was improper. TRPA has been enforcing their rules and regulations selectively creating a flawed process and unjust result for the Fialhos while rewarding Mr. Polite for engaging in illegal construction. When the Fialhos purchased their property in 2012, the staircase down to the joint-use pier was in disrepair. Pursuant to a 1980 easement, the staircase is on the Fialho's property but a provision grants access to 1600 N. Lake Boulevard to use the pier. After the Fialhos bought the property, 1600 N. Lake Blvd was owned by the Mettlers and they jointly applied to remove the dangerous and inoperative wooden staircase. This was done with the Mettlers consent and knowledge. When the stairs were rebuilt, it was done in a zig-zag formation pursuant to the easement and to TRPA's request to minimize the visual impact from the Lake. After the stairs were removed, Ms. Mettler then refused to install electrical for the Fialhos which has led to this ongoing dispute and ultimate litigation.

In August 2020, Mr. Polite purchased 1600 N. Lake Blvd and, without the Fialhos permission, permits, or plans, he showed up with a construction barge and began to install electrical on the pier. This is despite the Fialhos demand that Mr. Polite stop all construction, he did not yield until TRPA issued a stop-work order and, more importantly, the Fialhos went to court and obtained a temporary restraining order.

The reward for this conduct should not be an exemption. It should be to go through permitting to treat this as a project, assuming that the court ultimately rules that Mr. Polite has a right to do this which Mr. Lemieux believes is unlikely given the rulings received to date.

After the temporary restraining order (TRO) was issued, Mr. Polite applied for a QE, seeking an exemption to install electrical for a boat hoist through the Fialhos property. Only 4 days after that, TRPA informs him that a QE or a permit would require consent from both property owners, 1600 and 1620 [N. Lake Blvd]. In fact, TRPA informed Mr. Fialho and both parties that this was the requirement from TRPA which, Mr. Lemieux states, makes sense because Mr. Polite's plans are to go through the Fialhos property. Mr. Lemieux restates that in March 2021, TRPA's position was that Mr. Polite could not get a QE for work on the Fialhos property without their [the Fialhos] consent. Mr. Lemieux states this should have paused at that point with the pending litigation.

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In June 2021, TRPA issued a QE to Mr. Polite without the Fialhos consent or knowledge. Mr. Lemieux states that this is an example of a “moving target” and a flawed process because previously TRPA told Mr. Fialho that a QE couldn’t be issued without consent and authorization from both property owners. The staff report states that staff determined that Mr. Polite had “sufficient interest in the easement area”. Mr. Lemieux states that this determination came from one of Mr. Polite’s lawyers, Mr. Lien, advocating to TRPA behind the scenes that staff should determine this “sufficient interest” without Mr. Fialho’s involvement or knowledge.

Mr. Lien’s opinion is not a legal determination; this is an issue for the court that should be decided by the court. TRPA cannot unilaterally determine where the easement area is or what the party’s rights are under the easement especially when there’s ongoing litigation and an injunction.

After the first QE was issued in June 2021 it was rescinded which, Mr. Lemieux suspects, is because within days of it being issued, the court governing the litigation between the two parties issued an injunction that remains in place today. The court found that Mr. Polite showed up without permission, permits, or proper plans to engage in construction on the Fialhos property. The court found that Mr. Polite’s plans did not account for existing structures on the Fialhos property, that the Fialhos would suffer irreparable harm, and that the Fialhos are likely to succeed on the merits of their claims. TRPA should not be making legal or factual decisions on issues that are before the court. Placer County did what TRPA should have done which is when Mr. Polite applied for an electrical permit, and they found out about the ongoing litigation and the injunction currently in place, they decided to wait for the court to make a ruling on what each party’s rights and responsibilities are.

Regardless, TRPA did rescind the first QE, likely, Mr. Lemieux believes, owing to the injunction that prohibits any construction moving forward while the parties are in litigation. In July 2021, TRPA reissued the QE with a caveat and thereby rewarded Mr. Polite by issuing the QE. After it was issued, Mr. Lemieux states he spoke with Mr. Marshall on July 2, and Mr. Marshall told him that there wasn’t anything the Fialhos could do to challenge the QE because it’s not a permitted action. Mr. Marshall does not recollect this conversation. Under the TRPA Rules, the 21-day deadline to appeal is triggered by a “Final Action” which, Mr. Lemieux states Mr. Marshall told him, QEs are not. Mr. Lemieux states that at that time he informed Mr. Marshall that the Fialhos disputed the QE declaration.

Within 48-hours of receiving the conditional QE, on July 4, 2021, the Fialhos took immediate action and objected to the QE, explaining all of the same arguments made today. To say now that the Fialhos did not timely appeal is “form over substance”. There is no reason to strictly enforce the 21 day provision in light of the fact that TRPA own Rules don’t contemplate an appeal of a QE and in light of the representations received from counsel. Mr. Lemieux submits that the July 4 objection letter could be treated as substantially compliant to the extent that the Fialhos were supposed to appeal something that TRPA’s Rules of Procedure say cannot be appealed.

Mr. Lemieux points out that the Rules have not been strictly enforced with respect to Mr. Polite. There’s nothing in the Rules that Mr. Lemieux is aware of, that allow Mr. Polite to file an opposition to the Fialhos appeal. The Fialhos are the appellant, TRPA is the appellee, and yet Mr. Polite is permitted to respond here today; the Fialhos should be afforded the same type of leniency.

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The QE declaration itself says that TRPA has broad authority to rescind it. It states that TRPA can take any action deemed appropriate if the QE is based on false or misleading information or if TRPA has any other issue with it. There is nothing in the QE that states it requires an appeal to challenge it.

On July 7, Mr. Fialho did meet with Mr. Marshall and explained again his reasons for objection. During this meeting, Mr. Marshall agreed to take copies of the Fialhos documents and to “look into” the Fialhos request that the QE be rescinded. In light of the issues raised in the letter and Mr. Marshall’s agreement to meet and consider the issue, there’s no notice that the Fialhos were supposed to appeal to challenge the QE. Had Mr. Marshall simply told the Fialhos to provide the information as a filed appeal, Mr. Lemieux states that the evidence certainly shows they would have done that. Accepting all of the information without informing the Fialhos that they needed to file an appeal and then denying the appeal as untimely when it was ultimately filed seems like circular logic with the purpose of avoiding examining the issue of whether the QE should have been issued at all.

Mr. Marshall did respond on July 26 to inform the Fialhos that TRPA would not be taking any action. Mr. Lemieux states that this could be viewed as tolling the 21-day appeal deadline to the extent it applies. Mr. Lemieux would like to point out something that wasn’t in the staff report which is after the Fialhos received the July 26 response from Mr. Marshall, the Fialhos tried to file the request for administrative determination, but, if the Committee recalls, the Caldor fire was going on. Mr. Lemieux states that this was a barrier to physically filing the appeal in-person and, when South Lake Tahoe was being evacuated, the TRPA servers were physically moved and the Fialhos were unable to access electronic filing services. Mr. Lemieux states that this is good cause for the untimely filing and Mr. Lemieux asks the Committee what the harm in the delay is when there’s been no prejudice or no argument that this has caused any prejudice.

As the staff report points out, the Fialhos filed a request for administrative determination after finding the form on TRPA’s website. TRPA’s response letter stated that the agency no longer accepts requests for administrative determination and therefore the request had to be treated as an appeal which was untimely. Mr. Lemieux states that again, TRPA isn’t interested in whether the statements in the QE are false or misleading. It seems, to the Fialhos, that it didn’t matter how they attempted to challenge the QE, the answer kept being that they could not challenge it.

Mr. Lemieux submits that if the Fialhos had filed an appeal on the QE after it was issued, they would have received a letter from TRPA stating that they could not under the Rules. The merits of the Fialhos complaints were never reached or considered and still aren’t in the staff report. Mr. Lemieux points out that in the staff report states that if Mr. Polite’s statements [in the QE declaration] are false or misleading, TRPA will know once he starts construction. Mr. Lemieux believes this is the wrong approach given the injunction prohibiting this activity from taking place; TRPA should not be issuing the QE let alone giving Mr. Polite an opportunity again to show up and initiate construction to see if it violates the Code when it obviously will for the reasons outlined.

Mr. Lemieux reminds the Committee of the TRPA Rules of Procedure 10.2 and 10.3. TRPA Staff rejected the Fialho’s objections stating that it was akin to arguing an equitable estoppel analysis but Mr. Lemieux doesn’t feel this is necessary to hear the merits of this appeal. The Fialhos are asking the Board to invoke its own authority to hear this appeal and, as the Committee is aware, under RoP 10.3 the Board may deviate from its Rules of Procedure and under 10.2, the purpose of this hearing is to get to the merits to get to a speedy, just, and economical determination. Mr. Lemieux argues that there has been no harm by the delay but that the delay is being used to prevent the merits from being heard. Kicking this appeal on a technicality, especially in light of

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the confusion surrounding TRPA's own Rules and attempts to challenge the QE, the request for admin determination form that was on TRPA's website, the delay from the Caldor fire, reveals a flawed process that should concern TRPA's Legal Committee and their constituents. The inconsistent Rule enforcement should be concerning as is the seeming inability to challenge a QE.

Mr. Lemieux concludes with 4 basic reasons why the QE should be rescinded. First, the Fialhos never consented. Mr. Polite represented on the application that he had the consent of the neighbor and he doesn't. We have not seen any authority from TRPA for how they can issue a QE for someone else's property. Second, it was inaccurate and misleading. The court orders attached to the Fialhos brief show that the court rejected the same argument and evidence that the Polites submitted to obtain the QE from TRPA including the plans. Third, this should be treated as a project and go through permitting. There would be no harm and that would afford everyone here due process and the chance to be heard. Mr. Polite will not be lifting and moving 2000 lb boulders by hand without moving more than 3 cubic yards of dirt. The QE is false and misleading and should be rescinded.

Mr. Lee presents for the permittee, Mr. Polite. The goal of Mr. Polite's QE submittal in April 2021 was to excavate soil to install underground conduit and power to his boatlift which is on the jointly owned and used pier. This entire procedure is necessary because the appellants ripped out the conduit that was already existing when they removed the stairs and didn't replace it. There's a dispute, certainly, the appellants claim that Ms. Mettler wouldn't reinstall it, but Mr. Lee states that's not what the evidence shows. We are here because the existing electrical was removed, but not replaced.

TRPA staff spent 3 months, between the time of the submittal [of the QE] and when it issued the stamped QE declaration. Everything that the Committee just heard has already been considered by TRPA staff both before and after the QE was issued. It was issued with two important limitations which address all the issues the appellants have raised. 1) Excavation is limited to 3 cubic yards of soil which much be done by hand and 2) the QE does not provide Mr. Polite with permission or authorization the Fialho property unless he already has it or thereafter obtains that permission. The litany of assumptions as to what may happen on the Fialho property as a result of the QE is simply not true. The QE does not authorize any work on the Fialho property.

It's beyond dispute that the appeal was late; 63 days after the QE was stamped, on September 1, 2021, the appellants filed the Notice of Appeal to which was attached the Request for Administrative Determination form. TRPA rejected it because it was untimely and because TRPA ceased issuing Admin Determinations years ago. Mr. Polite agrees with the staff's position and urges the Committee to decide that the pending motion be denied. The presentation that TRPA staff made this morning and, in its November 10, 2021 staff report addressed all of the issues cogently and clearly. There is no doubt that this appeal was late and appellant deadlines are not simple technicalities. The notion that you can be excused from meeting a deadline because you contact TRPA staff and try to engage them in a conversation would make it open season for everyone to do that.

Mr. Lee also states that it is obvious that the appellants here have been represented both by an attorney and by Agan Consulting Corporation throughout this entire process; they know what the Rules are, they just simply didn't follow them.

Mr. Lee states that he wishes to address some misstatements from the appellants presentation. Starting with the highlight of the 1980 Easement, the special condition that was highlighted was to remove an existing pier access stairway and landing system, not to remove the electrical that

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was under the stairway but that's that the Fialhos did. There is a quote of the easement grant [on the slide] but what's not quoted is the 1985 amendment to that easement which Mr. Lee will highlight subsequently.

The appellants have made constant misrepresentations both in the court and to TRPA. The construction barge highlighted by the appellants was present for Mr. Polite's approved revetment project. Mr. Lee agrees that there was a stop work order but that order had nothing to do with the pier; it had to do with the need for a pre-grade inspection which was ultimately conducted. The barge had nothing to do with the electrical work or the pier.

Mr. Lee points out in the March 16, 2021 email from Ms. Good to Ms. Edwards contains a highlight which does not include "as far as any modifications to the pier". The email is not discussing trenching or excavation being done on the Polite property with respect to the need for consent. When the appellants discussed the court's June 8, 2021 injunction, they did not cite the court's ruling on pg. 4, lines 5-7, which explicitly acknowledges the Polite parcel has an implied easement to install electrical as a result of the 1985 Amendment. In addition, what is not highlighted [by the appellants] on the slide is the most critical language of the injunction. What is prohibited is work that could compromise the structural integrity of structures on the Fialho property; that's all that's prohibited. This notion that all the permits and applications were submitted to the court is simply not true. Rather, the court noted that Mr. Polite hadn't yet submitted his permits and applications which he is in the process of doing.

Mr. Lee notes that the appellants highlighted Placer County building departments note on the application and that Mr. Polite has been in discussion with them; they had asked for more details on the plans and Mr. Polite is in the process of providing that information. Moreover, issuing the electrical permit is for the Placer County building department; that's not TRPA's responsibility.

Mr. Lee urges this committee to make a recommendation to deny the appeal.

Mr. Lemieux rebuts stating that the reward for illegal construction, which is what the court found happened, when you look at the injunction that precludes Mr. Polite from engaging in any construction on the Fialho's property, should not be an exemption. If Mr. Polite wants to engage in this construction, he should go through the permitting process. Mr. Lemieux states that the issuance of the QE has been problematic because Mr. Polite has been weaponizing it in the litigation. Mr. Lemieux states that TRPA should not be getting involved in ongoing litigation and should stand down. There is an injunction, a court order in place, that could be violated here.

The merits of the appeal have not yet been addressed except to be called false [by Mr. Lee]. The statements in the QE are incorrect and misleading. The court order states that the Fialhos are likely to succeed on the merits of their case. It did not say that Mr. Polite has an implied easement; that argument was rejected when the TRO was issued because Mr. Polite did not meet their burden with the supplied plans. These are the same plans that were submitted for the QE declaration from Wittels. The TRO was entered in March and the injunction was June; part of that delay was the court requesting for proper plans which Mr. Polite failed to do. Mr. Polite is still working on that and it's now November. The claim that there is an implied easement is categorically false.

This should be treated as a project. There is a Loss of Exemption Rule 2.3.7 which TRPA and this Committee could invoke which is if a project granted a QE is going to have a substantial impact on the land, then it can lose its exemption status. This should happen in this case. TRPA should

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stand down until the court rules on what the parties' rights and remedies are. It's obvious sitting here before the Committee today there's numerous legal issues and disputes and TRPA should not be involved. If the court rules in Mr. Polite's favor, which is unlikely, but if it does, TRPA should still follow the Loss of Exemption rule and require this be a permitted project. There is no way anyone is going through this revetment wall by hand moving only 3-cubic yards of dirt. Mr. Lemieux implores the committee to vote to recommend approval of the appeal and to request that the Board rescind the QE.

Chair Bruce gives Mr. Marshall time to follow up. Mr. Marshall states that the Committee can see from the vigor and strength of both attorney's presentation that staff's issue is how to navigate between parties like this. What the Committee sees in this record is staff attempting to do that. The key determination for staff in this case: was there sufficient interest in the easement to move the QE forward. That was Mr. Marshall's determination based on the representations of all involved. There was a substantial disagreement, but the QE was focused on and authorized only that grading; not necessarily the electrical work because that's for the county to deal with. When you get to the merits, the question is, did TRPA appropriately use the QE to authorize up to 3-cubic yards of soil by hand. They cannot grade mechanically, it's got to be kept to 3 cubic yards, or else they need to come in and get a permit.

Committee Comments & Questions

Mr. Yeates appreciates Mr. Marshall's last comments. Mr. Yeates states that the TRO and Injunction referenced haven't been issued against the TRPA so TRPA is left with an application for a QE which has been restricted to the limits of the QE – 3 cubic yard maximum and it's not allowed on the Fialho property. The dispute here is to what rights Mr. Polite has on access to a pier which, from what Mr. Yeates understands from the record, appears to be a multiple use pier which had at one time functioning electrical for both boat lifts. Mr. Yeates states that TRPA staff made best effort to proceed with a QE assuming that Mr. Polite could satisfy that, then it wouldn't require a permit. As far as the question of whether an appeal was filed; no, it wasn't. Mr. Yeates is in favor of denying the appeal and leaving the parties to argue on their different views of who has rights of access. If, in fact, Mr. Polite cannot do what's required under the QE, then the nature of QE will prohibit him doing further action.

Ms. Novasel tends to agree with Mr. Yeates. From what she's heard, what TRPA has done is legal and what staff tried to do was do their due diligence of how they permit something. The issue of the appeal being too long [i.e. not filed on time] because of Caldor, Ms. Novasel states she was in the basin on August 30, one day before the appeal was filed so she doesn't see that that argument has any relevance. Ms. Novasel agrees [with Mr. Yeates] that TRPA issuing a QE to allow for grading for electrical work to be done is proper.

Mr. Rice concurs with Mr. Yeates as well. This is a matter that is going to be finally adjudicated in the courts and he sees no reason for TRPA to muddy the waters further.

Ms. Williamson further agrees with Mr. Yeates and the other committee members.

Mr. Bruce asks Mr. Marshall whether TRPA Staff, Code Compliance manager Steve Sweet, goes out to check if limitations on QEs are being respected especially in a situation like this where it's highly disputed. Mr. Marshall states that pre-inspections are not required for QEs. Mr. Sweet confirmed and stated that staff would inspect a complaint.

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Mr. Bruce asks if the Fialhos submitted a complaint that the Polite constructing is exceeding the QE, is that something that TRPA staff would promptly inspect? Mr. Sweet confirms that they would.

Mr. Bruce asks then if the QE limitations are exceeded, there would be consequences to that. Mr. Sweet confirms there would be as Mr. Polite would then incur a violation of TRPA Code. Mr. Bruce states that there's a lot going on with respect to this dispute and Mr. Bruce wants to ensure that the TRPA requirements with respect to the QE are treated very seriously; otherwise it should be withdrawn.

Mr. Marshall states that if the QE is not followed, the project will be shut down and they would need to apply for a permit. Mr. Marshall corrects a statement that Mr. Yeates made earlier for the record; if Mr. Polite already has a right to go on the property which he is already enjoined from doing unless he can meet the conditions of the preliminary injunction, the QE would allow excavation by hand in that easement area.

Public Comments

Mr. Fialho states that he wasn't planning on speaking today but after listening to opposing counsel's dialogue and the insanity that came out of his mouth he feels that he needed to speak up. First of all, no electrical was ever, as opposing counsel stated, "ripped out". It was removed, as per, both the revetment project on Mr. Fialho's property that was approved by TRPA and per the authorized permit that was for the renovation of the pier which was approved both by Mr. Fialho's family and by Mr. Mettler's family (Mr. Polite's predecessor). Furthermore, Mr. Lee went on to state that the 1985 amendment somehow gives Mr. Polite the right to install electrical. The 1985 amendment that, if this Committee actually takes the time to read it, does not stipulate that they [1600 homeowners] are authorized to run any electrical out to the pier. In fact what it does stipulate is that they have to run electrical to run Mr. Fialhos boatlift, not theirs, but his. Then, the unbelievable assertion that Mr. Gregg Lien made that states that they have sufficient interest on Mr. Fialho's property because of the easement is a complete fallacy. The actual easement speaks to only one thing and is fully limited, if you take the entire agreement, is to walk on the stairs to ingress and egress the pier. There is nothing, in any agreement, that allows them to even have sufficient interest on Mr. Fialho's property. If this Committee believes that, then we probably do need to move forward with, as was mentioned right now TRPA is not enjoined in any fashion, but if we have to go there, then that's what we have to do. Mr. Fialho finds that sad that we have to be even discussing this matter because the facts, if the Committee would have read all 138 pages, they would have known that Mr. Fialho was correct. Mr. Fialho's meeting with John Marshall, he knows for a fact, that the work can't be done moving only 3 cubic yards. Mr. Fialho and Mr. Marshall sat on Mr. Fialho's property and calculated that it would be 3.8 cubic yards. Then, Mr. Fialho states, Mr. Marshall had the audacity to say "we don't quite measure that 100%" and he made the insane comment about the 2000 lb boulders that maybe if he [Mr. Polite] hires a bunch of Samoans, they could do it by hand. Mr. Fialho asks if that's the kind of people he has to deal with and the kind of BS that is sent out and discussed. Mr. Fialho apologizes for his animation, but this is personal and there's no reason why this committee should allow Mr. Polite under these circumstances any QE to even step on Mr. Fialho's property to do any electrical work and for that matter, to dig through his revetment project that took Mr. Fialho 5 years to get passed through TRPA. For them to come in and now just go digging on his property is completely not fair.

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Final Committee Comments

Mr. Bruce asks Mr. Marshall to address any part of the public comment if he feels he should. Mr. Marshall states that only if the Committee wants to hear a story about another lakefront owner who hired a number of Samoans to move boulders, he'd be happy to do that but that's the only thing Mr. Marshall would need to respond to.

Mr. Bruce asks if part of the decision that the Committee is making here is that there is an actual easement interest that allows this to occur? Is the Legal Committee making that determination independent of anyone else? Mr. Marshall defers that question to Ms. Doherty.

Ms. Doherty states that no, the Legal Committee is not making a determination of the easement interest. The issuance of a Qualified Exemption does not authorize the work to occur. It simply exempts from further TRPA review, the work. In order for the work to occur the applicant still has to possess all of the requisite authority to do the work. Mr. Bruce asks, independently of the Legal Committee's decision? Ms. Doherty confirms this is correct. Mr. Polite still needs to obtain building and electrical permits, other county, city, and special district permits to enable certain work to occur. Ms. Doherty clarifies that this list is anecdotal because she does not know what the actual requirements from the County are but TRPA does not exempt any other requisite authority by issuing a Qualified Exemption, nor does the confirmation of a Qualified Exemption authorize an applicant to not have to proceed with authority with respect to access or property interest.

Mr. Bruce asks then when the comment is made that TRPA is allowing someone to go "dig out" someone else's property, that's not what this QE is allowing to happen, is that correct?

Ms. Doherty confirms this is correct. Staff's role in issuance of the QE is not to interpret pending judicial proceedings.

Mr. Yeates made a motion to recommend denial of the appeal.

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

Abstentions: Mr. Rice.

Motion carried.

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

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

Mr. Yeates made a motion to move to closed session.

Motion carried by voice vote.

Committee members held a closed session with TRPA General Counsel John Marshall.

Mr. Yeates moved to return to the public session.

LEGAL COMMITTEE

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Motion carried by voice vote.

VI. POTENTIAL DIRECTION REGARDING AGENDA ITEM 5

Mr. Marshall stated that there's no direction from the committee needed.

VII. COMMITTEE MEMBER COMMENTS

None.

VIII. PUBLIC INTEREST COMMENTS

None.

IX. ADJOURNMENT

Mr. Yeates moved to adjourn.

Meeting adjourned at 11:53 a.m.

Respectfully Submitted,



Katherine Hangeland
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.