

TAHOE REGIONAL PLANNING AGENCY  
LEGAL COMMITTEE

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October 27, 2021

**Meeting Minutes**

CALL TO ORDER AND DETERMINATION OF QUORUM

Chair Mr. Bruce called the meeting to order at 10:30 a.m. on October 27, 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 September 22, 2021. Mr. Yeates makes the motion to approve the minutes.

**Motion carried** by voice vote.

III. APPEAL OF DENIAL OF REMAND OF APPEAL ADMIN2021-0004 (DENIAL OF NON-LITTORAL EXISTING MOORING BUOY), 4100 DOE AVENUE, PLACER COUNTY, CALIFORNIA, APN 085-161-014, APPEAL FILE NO. ADMIN2021-0029

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.

Presentations

Mr. Marshall presents for TRPA. He reminds the Legal Committee that this is the second time this appeal has been before them on this application for a non-littoral buoy permit for Mr. Bryan who owns the parcel at 4100 Doe Avenue. Mr. Marshall states that under TRPA Code of Ordinances 84.3.3.D.3.b, non-littoral parcel owners must provide two pieces of evidence to qualify for a buoy permit showing that (i) that the buoy existed in the water before February 10, 1972 (i.e. before a time where there was any permitting requirement), **and** (ii) a valid authorization from the applicable federal or state agency with jurisdiction at Lake Tahoe. Mr. Marshall reminds the Committee that the last time they met on this appeal, the focus was on “valid authorization” and whether or not Mr. Bryan had submitted sufficient information. Mr. Bryan is relying in the main on the Grandfathering Letter from the U.S. Army Corps of Engineers that essentially satisfies the requirement that Mr. Bryan demonstrate that the buoy in question

has been in the Lake prior to 1972. However, it does not, in staff's interpretation and practice, provide the required "valid authorization" because it is not, in fact, authorizing anything. It [the letter] is merely a recognition that, as a matter of fact, the buoy was in place prior to 1972 and therefore does not need any permitting or authorization from the Corps because it is exempt from their own regulations. However, there was concern from the previous appeal that Mr. Bryan be given an additional opportunity to show the essential connection between the buoy and the lot that Mr. Bryan owns in order to provide background to any sort of authorization claim. Mr. Bryan provided additional information that was provided in the staff report. Staff review that additional information [provided by Mr. Bryan], found that it did not provide the authorization necessary to satisfy TRPA Code 84.3.3.D.3.b(ii). The Corps in their letter, does not require anything that relates to the ownership of the buoy. It simply asks, has the buoy been in the Lake, and asked Mr. Bryan to submit evidence that he owns the parcel at 4100 Doe Ave. The Corps does not ask for any evidence, and there's no finding that, Mr. Bryan owns or that this parcel is in control of this particular buoy. TRPA could not find anything that would constitute an authorization from any entity. The email chain between himself and the Corps, for example, and that correspondence highlights the fact that the Corps is looking for whether or not there is a pre-1972 existence [of the buoy] and not really any sort of authorization. Mr. Bryan submitted some emails that had to do with disputes between individuals of buoys within the area that he has his buoy. From TRPA Staff view, this does not provide the necessary authorization and, indeed, makes clear that there is a certain amount of conflict over individuals regarding the buoys within that area perhaps because they tend to be non-littoral. Finally, Mr. Bryan submitted some receipts from a marine company that demonstrated that he re-attached a float that was stolen but again, this does not provide the authorization that TRPA Code requires. Therefore, staff denied this permit application on remand from the Governing Board and requests that this Committee provide a recommendation to the Governing Board to deny this appeal.

Mr. Marshall concludes his presentation.

Mr. Bryan presents for his appeal and disagrees with Mr. Marshall's presentation. Mr. Bryan believes that staff is trying to "blur the lines" and make the permitting process more complicated than the Code reads. Mr. Bryan believes his buoy is worthy of a TRPA permit for 3 reasons.

Mr. Bryan states that the first way his permit application absolutely meets the Code the way it's written right now. It is non-contested that his buoy was in the water before 1972. Mr. Bryan states that a valid authorization is also required and, importantly, not a "permit". He states that if a "permit" was required, it should say that in the Code. The Code does not require that he have littoral access and states that staff continues to come up with new barriers to him receiving his permit that are not present in the words of the Code.

Mr. Bryan states that the second way his buoy is worthy of a TRPA permit is the fact that his buoy was existing and placed prior to 1972. Mr. Bryan states that Mr. Marshall agreed with this at the December 2019 Governing Board meeting where he stated: "The reason why 1972 is relevant is because what we are trying to do is grandfather buoys that had some legal status. If you're prior to 1972 and you didn't have a permit from anyone, that was a legally existing use. Someone didn't need to have a permit at that point. That buoy, for all intents and purposes, was legally placed at the time."

## LEGAL COMMITTEE

October 27, 2021

Mr. Bryan states that the third way his buoy is legal is that it's existing. TRPA Code of Ordinances 90.2 defines Existing as "Legally present or approved on the effective date of the Regional Plan or subsequently legally constructed, commenced, or approved pursuant to necessary permits." The Corps authorized Mr. Bryan's buoy and used the word "authorized" in their letter, in 2009, long before the Code [the version being discussed today] was adopted.

Mr. Bryan reviews the arguments in the current TRPA staff report for this appeal. He calls into question staffs' assertion that he was provided additional time to provide materials proving ownership of the buoy. Mr. Bryan states that proving ownership of the buoy and providing valid authorization to have placed the buoy are two different things and that the former is not a requirement of the TRPA Code. Mr. Bryan believes that all the materials provided, that staff reviewed, clearly defines Mr. Bryan's use and control of the buoy that was authorized to him [in the U.S. Army Corps letter] in 2009.

Mr. Bryan disagrees with staffs' assertion that the 2009 U.S. Army Corps of Engineers letter is not a valid authorization. Mr. Bryan states that his letter is from 2009 and it is unreasonable for TRPA to ask that he retroactively receive authorization for a buoy that's already been in place. Mr. Bryan refers to the latest email between the U.S. Army Corp and TRPA staff that he believes proves that the buoy in question is authorized (Attachment D).

Mr. Bryan states that the U.S. Army Corps letter provides the necessary link between his parcel on Doe Ave. to the buoy in question because it is addressed to him and lists the address in Placer County, CA. He asserts that this is a tie that the U.S. Government made between himself, his parcel, and the buoy.

Mr. Bryan asserts that the fact that he provided the GPS coordinates of the buoy and that his name is on the maintenance receipts as well as the police reports from when the buoy was stolen, proves his ownership of the buoy. He makes similar arguments that his use and control of the buoy should be sufficient to prove ownership of it.

To say that the evidence that Mr. Bryan has provided to this point does not show ownership of the buoy in question, he states, is not correct. Mr. Bryan provides an example of a buoy ownership being assigned by TRPA because there was a name on the buoy when they examined it. Mr. Bryan states that this method is inconsistent and unenforceable without also granting him a permit for this buoy. Mr. Bryan acknowledges that non-littoral buoy owners are subject to a higher burden of proof to demonstrate that they are entitled to use a mooring on the Lake. Mr. Bryan states that he has met that burden. He states that it may be true that the State Lands agencies of both States do not favor non-littoral buoy ownership but that that's not the law and he's proven that his buoy is legal.

Mr. Bryan states that the issue with access to a buoy from a non-littoral buoy is a non-issue and if it was important enough to be relevant here it should have been written into the Code. He points out that, regardless, he belongs to an HOA that allows him access.

Chair Bruce gives Mr. Marshall time to follow up.

Mr. Marshall states that one of the key differences between staff and Mr. Bryan is focused on the word "authorization" and whether or not the Corps letter provided "authorization" to Mr. Bryan. Mr. Marshall states that the key point for himself and staff is that the Corps could have issued this letter to anyone in similar circumstances as Mr. Bryan because it is not part of their

approval criteria to link together who is applying and whether they own the buoy. They simply would have requested the information regarding the identity of the person [requesting the Grandfather letter] and control of the property that they identified but not that there is any connection that the Corps confirmed or required information for of the actual origination of the buoy and how it came into the control of Mr. Bryan. This is why staff does not view the authorization requirement of TRPA Code 84.3.3.D.3.b(ii) to be satisfied by the Corps letter. MR.

Marshall admits that staff used a different word under 84.3.3.D.3.b(ii) than they did under 84.3.3.D.3.a(i) [requirements for littoral parcel owners]; there is a difference between a “permit” and an “authorization”. Mr. Marshall remembers the negotiation of this item in the Shoreline Plan; the stakeholders wanted to provide a little more leeway with the understanding that there could exist documents other than a permit that could satisfy the “authorization” requirement for non-littoral parcel owners. Still, the word “authorization” for staff conveys this notion of a connection [between the non-littoral parcel and the buoy] that is not present in the Corps letter as part of its function. Mr. Marshall states that the function of the Corps letter simply serves to acknowledge that the buoy in question was in the Lake prior to 1972 and therefore, the applicant does not need a permit *from the Corps* because they weren’t exercising jurisdiction at that time.

#### Committee Comments & Questions

Ms. Novasel does not have any comments and is comfortable with what’s been presented.

Mr. Yeates asks Mr. Marshall if the photo of the buoy existing prior to 1972 has any legal Consequence? Mr. Marshall responds that it does because it’s the evidence that satisfies TRPA Code 84.3.3.D.3.b(i). It is the evidence that the Corps considered to grandfather the buoy as existing prior to 1972 and therefore not requiring any further Corps authorization. It does not in and of itself establish any particular ownership or control of that buoy. Mr. Yeates confirms that the aerial photos shows that there is a buoy in the Lake. Mr. Yeates points out the Corps emails demonstrates that the Corps grandfather letter simply acknowledges the existence of the buoy but no authorization attached that suggests that the Corps authorized this as a legal buoy. Mr. Yeates confirms that he does not see any evidence here to prove authorization of this buoy to be placed in the Lake.

Mr. Rice notes that he had some technical difficulties and missed the presentations so he will be withholding any opinion on the matter.

Ms. Williamson asks about the statement in the staff report on pg. 223 of the packet and reads “According to the Corps, the 2009 Corps grandfathering letter is not authorization for a specific person or property owner to place a buoy in Lake Tahoe. See Attachment E.” Ms. Williamson is not able to find the attachment. Mr. Marshall states that it’s also the attachment in the prior packet. Ms. Williamson states that she has seen it but wants to review it again because she feels that that email is the essential piece of evidence demonstrating the functionality of the Corps grandfather letter. Mr. Marshall cites the May 18, 2021 email from Jennifer Thomason of the U.S. Army Corps on pg. 278 of the October 27, 2021 Governing Board packet: “A grandfather determination does not and cannot make any assignment or transfer of ownership for a grandfathered structure, it simply represents the Corps’ determination that the activity was commenced or completed prior to December 18, 1968 and therefore does not require further permitting from the Corps under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403).” Ms. Williamson states that this satisfies her question.

Public Comments & Questions

None.

Final Committee Comments

Mr. Yeates states that now that the email on pg. 278 has been highlighted, he's even more convinced that the Corps [grandfathering letter] simply states that the buoy exists and has existed since 1978 and that they don't have to issue a permit under their jurisdiction. Mr. Yeates confirms with Mr. Marshall that the fact that the Corps says that the buoy exists what is still missing is any authorization from a federal or state agency that would say that it [the buoy] has been authorizing. The mere presence of a buoy in the Lake prior to 1972 does not satisfy the TRPA Regulations and the Shoreline Plan.

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.**

Mr. Marshall points out to Mr. Bryan that the full Governing Board will hear the appeal later in the day and the Legal Committee just voted on a recommendation.

Presentation can be found at: [https://www.trpa.gov/wp-content/uploads/Legal-Comm-Agenda-Item-No.-3\\_GB-Agenda-Item-No.-VIII.A-Appeal.pdf](https://www.trpa.gov/wp-content/uploads/Legal-Comm-Agenda-Item-No.-3_GB-Agenda-Item-No.-VIII.A-Appeal.pdf)

IV. 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.

**Motion carried** by voice vote.

V. POTENTIAL DIRECTION REGARDING AGENDA ITEM 4

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

LEGAL COMMITTEE

October 27, 2021

VI. COMMITTEE MEMBER COMMENTS

None.

XI. PUBLIC INTEREST COMMENTS

None.

XII. ADJOURNMENT

Mr. Yeates moved to adjourn.

Meeting adjourned at 11:34 a.m.

Respectfully Submitted,



Katherine Hangeland  
Senior Management Assistant  
Legal Department

*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](mailto:virtualmeetinghelp@trpa.gov).*