

# Law Offices of Gregg R. Lien

P.O. Box 7442  
Tahoe City, CA 96145  
530.583.8500  
lakelaw@sierratahoe.net

September 23, 2023

Members: TRPA Governing Board and Legal Committee

Tahoe Regional Planning Agency

P.O. Box 5310

Stateline, NV 89449

Re: Agenda Item VIII.A Thompson, Conversion of Rock Crib Pier to Open Piling, 204 Pine Street, Placer County APN 098-210-012; TRPA File Number ERSP2020-0373

To the Honorable Members of the Governing Board and Legal Committee,

This letter will outline our response to the analysis and recommendations in the Staff Report for this item.

This project involves the conversion of an immense rock crib and concrete pier to an open piled pier. The project will provide undeniable and significant improvements to the environment scenically, to water quality, for fish habitat and remove a major obstruction to littoral drift. This has always been the type of project that has been encouraged. In spite of this, your staff and counsel have 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 in the staff's mind are the definition of an "expansion" and what permissible "modifications" are. Staff is also proposing on your Agenda today to change the rules to even take away any debate over the existing Code (see page 150 in your packet) and create a blanket prohibition on providing the key incentives that enable conversion of rock crib structures to open piling.

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.

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 rock crib piers to move toward conformance and offer environmental improvements will evaporate.

Procedural Background and Policy Issues:

To the best of my knowledge, conversion from rock crib to open piling has always been strongly encouraged by staff and the Board. I cannot recall a time when it was prohibited or discouraged in any way.

I would hope we can all agree that the goal is to continue to provide incentives for the relatively small number of owners of grandfathered non-conforming rock crib piers to move toward conformity and provide environmental improvements. I would also hope that we can agree that all government agencies owe a duty to their constituents of fair dealing, keeping commitments, and standing by representations made to the extent possible. There may be emergencies and exigent circumstances that demand a sudden shift in policy, but no such circumstances exist as to this particular project.

It is troubling that the Staff Report implies strongly that the 2021 Gately appeal is somehow a precedent that forecloses discussion on the issues before you. The Gately appeal was never heard by the full TRPA Board. At the Legal Committee there was a spirited discussion on the narrow issue of whether the removal of a buoy and converting that mooring to a conforming boatlift would constitute an expansion. The staff was strongly opposed, and several of the Legal Committee members agreed with the staff, but others had questions, and several members outwardly seemed to consider endorsing the idea of allowing an accessory boat lift without it being an "expansion" of the pier. There was a consensus, however, that there not be a precedent set that would open a "Pandora's Box" without some clear guidelines. The motion that passed unanimously, therefore, incorporated the recommendation that the matter be referred to the Shoreline Steering Committee for their recommendation on the buoy to boatlift issue.

Further, the reason this recommendation did not go before the full Board was that the applicant withdrew their appeal in a negotiated agreement with the staff that the matter be referred to the Steering Committee for their recommendation. This negotiated agreement was reached just before the full Governing Board was to meet. The only item that ever went to the Steering Committee was the very narrow issue raised by Gately - - a trade out of a buoy for a boatlift. Neither the Legal Committee or the Steering Committee considered the need for incentives to encourage conversion of rock crib structures to open piling. And such a policy would NOT open "Pandora's Box" for the simple reason that there only a relatively small number of private rock crib piers remaining on the Lake.

In view of this, what are we to make of the Staff Report at the top of page 231 in your packet when it says, "Should the Governing Board desire to shift its adopted and affirmed policy choice it may direct staff to bring back a planning item on the matter.?" To the extent this implies that the Board has an "affirmed" a policy choice as to rock crib piers that agrees with the staff's new interpretation is simply untrue. Jan Brisco, a member of the Steering Committee who attended all of the meetings with regard to these provisions, says this was never discussed or considered by the Committee or the Board when they adopted the provisions in question. There is nothing anywhere to indicate that anyone had even thought about rock crib piers and the need to continue to provide incentives to convert to open piling design. Obviously, the staff also believed this as well when they represented to Mr. Thompson and his consultant that his project was approvable before he invested in applying to TRPA and all of the other regulators. (We have never contended this creates a "vested right", but it does create an issue of fundamental fairness. See more detail below in the section on the "Last-Minute Change".)

Now we find that on your Agenda this month is a proposed amendment to your Code (see your Board Packet at page 150) which as drafted by the staff that would prohibit this project. Again, the Steering Committee was never consulted regarding this, and the Board has never looked at the question of whether or not to continue to stop providing incentives to removal of rock crib since 2018 when the new Shoreline Ordinance was passed. Do you really want to do that? If the amendments are passed, will the staff now contend our appeal is moot after the expenditure of many more thousands of dollars in an attempt to present the opportunity to receive at least consideration of our proposal? Rest assured that had we known the staff was planning to do this we would have insisted on a hearing at an earlier date! We only learned of this in reviewing the Board packet when it was released.

One further factor should be openly discussed. In my prior correspondence with staff you will find that I repeatedly have asked for a meeting with your staff at a decision-maker level to see if we could negotiate a package that could be recommended to you for approval. We have never been afforded that opportunity. It seems that the policy has been to just say “no” for the administrative convenience of the staff and the Board even though the need to encourage removal of rock crib structures seems obvious. Allowing the completely conforming trade of a buoy for a boatlift in to induce the owner to do the conversion to open piling also seems to be an obvious win-win scenario.

#### Conversion of Rock Crib To Open Piling Always Results 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. 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. This will be illustrated in our visual presentation to you at the hearing.
2. 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. Nonetheless it is always a significant impact on water quality as accelerated erosion occurs around a solid rock crib wall. In some years the impacts can be extremely severe, and the current structure will absolutely cause a major shoreline erosion event at some point in the future when the water levels are as high as they are now. This is particularly true on the West Shore, when easterly wind events at high Lake levels 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. Aerial photographs will be shown at the hearing showing the scouring of the shoreline on one side of the pier and accumulation on the other.
3. 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, a very large area of additional fish habitat will be created due to removal of concrete and cribbing

from the lake bottom. We would propose to relocate the rock currently contained in the cribbing into areas agreed upon by staff to enhance fish habitat. This is a common and well accepted practice to improve fish habitat.

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. Denial of this project and adoption of the Code amendment before you would however, reverse a half century of regulatory precedent.

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 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. 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 and other outside experts. Those professionals completed their work in due course and submitted all of the materials to TRPA. TRPA subsequently determined the application to be deemed complete, and then the staff completed all of their own work, analysis, and reports. Not only that, but given the extremely high probability of TRPA approval, 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 additional questions may be raised, additional conditions of approval may be imposed, or perhaps even a requirement for a last minute 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.

TRPA Staff and Counsel Must Defer 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. 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 the opportunities for environmental improvement (inherent in removal of rock crib) 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. 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. Conversion of a rock crib pier provides distinct environmental improvements and is just the kind of project that TRPA should encourage.

### Is the Project Also an “Expansion”?

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. 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 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 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”. The draft ordinance language before you should, at the very least, be modified to allow conversion of rock crib to open piling without having to come into complete compliance with Code standards.

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) 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.

But, no great policy debate is required here. Gately was narrowly focused on the trade of a buoy for a boatlift. This project is narrowly focused on whether you wish to continue the longstanding policy of encouraging conversion of rock crib to open piling.

## Conclusion and Possible Solutions

Your counsel may say that there is only one possible interpretation of your Code, but that recommendation is subject to your review. Under the Compact and Regional Plan only the Board is invested with the final authority to interpret the Code and to make policy.

If you are uncomfortable with going back to your previous policy of longstanding, we have another suggestion in the interests of both administrative convenience and environmental improvement. Simply amend the Code language before you this month to add a new section to the list of modifications that are not an expansion that says:

“G. Conversion of rock crib to open piling piers, including the conforming conversion of a buoy to a boat lift and minor conforming additional length.”

You could even further limit the precedent of the decision on this matter by limiting its scope to those projects which were accepted as complete applications as the date of your counsel’s abrupt change, and which were appealed to the Board. Essentially you would be approving this one project as a “pipeline” project, as it would be unfair to subject it to your new policy after the applicant’s reliance on the staff’s representations that it was approvable at the time of application.

Very truly yours,



Gregg R. Lien

Cc:

Mr. John Marshall, Esq.

Ms. Wendy Jepson

Ms. Julie Regan

Ms. Tiffany Good

Ms. Katherine Huston