

**TRPA
APC
PACKETS**

**AUGUST
1986**

August

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86**

TAHOE REGIONAL PLANNING AGENCY
ADVISORY PLANNING COMMISSION

NOTICE IS HEREBY GIVEN that the Advisory Planning Commission of the Tahoe Regional Planning Agency will conduct its regular meeting at 9:30 a.m. on Wednesday, August 13, 1986, in the TRPA office, 195 U.S. Highway 50, Zephyr Cove, Round Hill, Nevada. The agenda for said meeting is attached hereto and made a part of this notice.

August 4, 1986

By: _____

W.A. Morgan

William A. Morgan
Executive Director
Tahoe Regional Planning Agency

TAHOE REGIONAL PLANNING AGENCY
ADVISORY PLANNING COMMISSION

TRPA Office, 195 U.S. Highway 50,
Round Hill, Zephyr Cove, Nevada

August 13, 1986
9:30 a.m.

MEETING AGENDA

- I CALL TO ORDER AND DETERMINATION OF QUORUM
- II APPROVAL OF AGENDA
- III DISPOSITION OF MINUTES
- IV APPEALS
 - A. Albert G. Pearson, Appeal of Staff Determination of Permit Expiration for Single Family Dwelling, 800 Jennifer, Washoe County APN 125-201-11 (TRPA File #81-1140)
- V PLANNING MATTERS
 - A. Status of Supplement to the EIS for Regional Plan Revisions, Revisions to the Regional Plan Goals and Policies, and Ordinance Adopting Regional Plan Revisions
 - B. Transportation Planning Status Report
 - C. Presentation, Administrative Draft EIS, Ski Incline Master Plan
 - D. Review of Proposed Outline, Code of Ordinances
 - E. Schedule of Ordinance Committee Meetings
 - F. Status of Proposed Residential Foundation Ordinance
- VI REPORTS
 - A. Staff
 - B. Legal Counsel
 - C. Public Interest Comments
 - D. APC Members
- VII RESOLUTIONS
- VIII CORRESPONDENCE
- IX PENDING MATTERS
- X ADJOURNMENT

TAHOE REGIONAL PLANNING AGENCY

P.O. Box 1038
Zephyr Cove, Nevada 89448-1038

(702) 588-4547

195 U.S. Highway 50
Round Hill, Zephyr Cove, NV

MEMORANDUM

August 5, 1986

To: Advisory Planning Commission

From: Susan Scholley, Legal Counsel

Subject: Albert G. Pearson, Appeal of Staff Determination of Permit Expiration for Single Family Dwelling, 800 Jennifer, Washoe County APN 125-201-11 TRPA File #81-1140)

The applicant, Albert G. Pearson, is appealing a staff decision that the approval for his single family residence expired. The staff decision was based on the fact that the approval expired on June 23, 1985, and on the determination that construction has not commenced and been diligently pursued.

Background:

1. Pearson received case-by-case approval for a single family residence at the June 23, 1982 Governing Board meeting.
2. Pearson paid mitigation fees and posted a security in late 1983, and received a TRPA permit which stated that the permit expired on June 23, 1985.
3. In May of 1985 Pearson began work on the project. Materials submitted by the applicant's representative are attached. The materials generally describe the work done on site (Exhibit A), the number of days worked (Exhibit B), and the Pearson permit conditions (Exhibit C).
4. In May of 1986 a TRPA staff person inspected the site. Exhibit D is a copy of his report.
5. After reviewing the materials submitted by Mr. Pearson's representative, Wayne Ford, and researching the interpretation of the phrase "commencement of construction," determination was made that the Pearson permit had expired. A copy of that letter is attached as Exhibit E.

Case Analysis:

The phrase "commencement of construction," is reasonably susceptible of more than two meanings. Arguably, "commencement of construction" could refer to preparation of drawings and financing; it could refer to physical site preparation; or it could refer to starting work on the permitted structure or

SES:mlm
8/5/86

AGENDA ITEM IV A.

structures. "Construction" and "construct" are simple terms, but are potentially so broad that their ordinary meanings give little direction. For example,

"1. the act or art of construction. 2. a structure..."
(Random House Dictionary, 1st ed. 1978.)

"To build; erect; put together; make ready for use. To adjust and join materials, or parts of, so as to form a permanent whole. To put together constituent parts of something in their proper place and order [Citations omitted]. (Blacks Law Dictionary, 4 ed. rev. 1968)

"1. Process or art of constructing; act of building; erection; act of devising and forming; fabrication; composition; also a thing constructed; a structure." (Webster's New International Dictionary, 2nd Ed. 1959)

Therefore, it is appropriate to look to the legislative history and objectives of the 1980 compact amendments which added Article VI(p).

Legislative History:

Since California does not generally prepare records of its legislative committees or sessions, I have not requested a search of the archives for any stray notes or reports that may have survived. Nevada keeps thorough minutes and records, and since the 1980 Compact was very much a bi-state negotiation effort, the Nevada records include some California correspondence and reports.

However, a review of the Nevada legislative history turns up very little inasmuch as Article VI(p) was not a particularly controversial provision. The only pertinent remarks were made in committee meetings by Senator Joe Neal and Senator Sloan. Those remarks are attached as Exhibits 1 and 2 respectively.

There is no federal legislative history relating to Article VI(p).

About the only conclusion that can be drawn is that the legislature wanted to avoid projects being started ("laying a few bricks") and then discontinued. The addition of a diligent pursuit requirement and the discussion it engendered, seem to imply that "construction" referred to physical work and not to planning or financial commitments, but it is not clear.

Savings Clause:

Although the legislative history does not shed much light on the precise meaning of the term "construction," the language of Article VI(p) reflects a general

intent that Article VI(p) serve as a "savings clause." Saving clauses are legislative exemptions from the provisions of a new zoning ordinance.

The rights granted by an exemption are not, strictly speaking, vested rights. They are only a right to acquire vested rights by subsequent construction in accordance with the terms of the exemption provision. Usually, an exemption provision of this kind is conditioned upon construction being commenced within a specified period after the permit is issued, and its being diligently prosecuted..." (Rathkopf, Law of Planning and Zoning, §50.02.)

The similarity of Article VI(p) to a savings clause is apparent. Article VI(p) "grandfathered" in projects approved by TRPA prior to the effective date of the 1980 Compact amendments. Given the fact that most TRPA approvals, prior to the 1980 compact amendments, had no expiration dates, it is obvious that Article VI(p) was meant to close off old approvals and give them a chance to vest their approvals by commencing construction and diligently pursuing the work. Article VI(p) also clearly extended any pre-amendment approvals which might have had expiration dates and operated a savings clause for that group also.

Thus, in order to interpret "commencement of construction," we may look to the case law interpreting similar language and provisions in other jurisdictions. Since California and Nevada follow the majority rule¹ regarding vested rights, interpretations by courts in states which also follow the majority rule would be most instructive.

A review of state court decisions reveals that the term "construction" in a savings clause has not generally been held to include site preparation (grading), or demolition of existing structures.

Illinois: "Further, we believe that the ordinary and accepted meaning of the words 'construction' or 'to construct' signifies actual activity in erecting or putting up a building...We do not believe the City,..., had in mind plaintiff's idea that any work upon the general construction project would suffice." First National Bank & Trust v. City of Rockford, 361 N.E. 2d 832, 841 (Ill. 1977)

Massachusetts: "This site preparation activity [grading and excavation] would not qualify as construction..." Murphy v. Board of Selectmen of Manchester, 298 N.E. 2d 885, 887 (Mass. 1973)

1. The majority rule is that in order to acquire a vested right, one must obtain a permit and substantially rely thereon.

Memo to APC
Pearson, Appeal of Staff Determination
Page Four

Missouri: "Construction must be distinguished from 'demolition and site preparation'". Geneva Inv. Co. v. City of St. Louis, 87 F 2d 83 (8th Cir. 1937)

Arizona: Citing dictionary definitions of "construction," the court held that...These definitions appear sufficient to indicate that something more than mere preparatory work...is necessary to constitute "construction....Construction implies the building or erection of some object, not the mere planning or developmental work requisite therefor." State of Ariz. v. U.S. Land Co., 412 P. 2d 736 (Ariz 1966)

The majority of the cases involving interpretation of the term "construction" in a savings clause hold construction to be the act of erecting the actual structure permitted and not site preparation.

The proposed Urban Land Institute definition of "commencement of construction" is in accord:

"Commencement of Construction: Actual construction on a parcel of land in accordance with a permit issued by the [applicable jurisdiction] if the cost of the physical improvements completed constitutes at least 25 percent of the projected cost of the development or if all required foundations are completed and are not usable for any other form of development except that authorized by the issued permit." C. Siemon and W. Larsen, VESTED RIGHTS: Balancing Public and Private Development Expectations, 1982, at 76.

Vested Rights:

The consistency of Article VI(p)'s role as a savings clause with the California/Nevada concept of a vested right is also important. As stated previously, both California and Nevada follow the majority rule which requires substantial reliance on a building permit in order to justify a finding of vested rights.

The case law on what constitutes substantial reliance on a building permit is scattered and no clear rules emerge. But the requirement that the reliance be "substantial" logically restricts the finding to cases where, if only site preparation has occurred, the activity was substantial. Unless the excavation, grading, or other site preparation is unusually extensive or expensive, few single family homes would pass the substantial reliance test on the basis of the cost of grading a driveway, clearing the lot of trees, or excavation for a foundation trench.

Clark County's code definition of "construction" illustrates the basic premise:

Memo to APC
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"actual placing of construction materials in their permanent position fastened in a permanent manner..."

American Law Reports has compiled two separate annotations on the issue of vested rights and construction (89 ALR 3d 1050, 49 ALR 3d 13). The annotations serve to point out the lack of any hard rules on the level of construction required to vest the right to complete. It may be safely said that once one gets past the foundation stage and constructs walls or one or more stories, the establishment of a vested right is generally clear.

Local Ordinances:

Also to be considered is the unusual dictation by the legislature of a three year approval span. The life span of a county permit or approval is usually much shorter. A survey of some local jurisdictions follows:

Washoe County - automatic expiration of building or work authorized by permit if not commenced within 18 months.

Sparks - automatic expiration if work not commenced within 30 days and cannot be suspended or abandoned for more than 30 days.

Douglas - automatic expiration if work authorized is not substantially commenced within 180 days and work cannot be abandoned or suspended for more than 180 days. Renewal is permissible only if events beyond the permittee's control prevented the work or Tahoe grading prohibition intervened.

Carson City - automatic expiration within 1 year. Renewal permissible only if construction has progressed to completed underfloor. If not, permit allocations are automatically cancelled.

Conclusion:

Based on the research, it is believed that Article VI(p) of the Compact would not include site preparation within the term "construction." Moreover, absent some extraordinary circumstances, excavation of a foundation trench would not qualify as substantial reliance on a building permit and justify a vested rights finding. Finally, the facts of this case do not support a finding of diligent pursuit inasmuch as 5½ months after work began on the site, work had yet to commence on the actual structure.

This is apparently a case of first impression as we have not found any previous determinations of a similar nature or Board direction on the question.

8/5/86

AGENDA ITEM IV A.

TAHOE REGIONAL PLANNING AGENCY
P. O. Box 1038
Zephyr Cove, NV 89448

Attention: Jerry Wells

The following represents the construction time line for the Pearson project.

TRPA file number #81-1140

APN 125-201-11

- A. The days that work was performed are divided out from holidays and rainy days. The rainy days are based on data from the contractor's records and NOAA, out of Reno. The records are from data collected by the National Weather Service from their station at Tahoe.
- B. You will find these manuals included (please return, thank you).
- C. Our current building permit is active with Washoe County.
- D. The Webb project is part of this information, for it had the same type of permit. It was allowed to continue after the permit had expired at TRPA. We held doing work through the Winter and finished the next Spring. Please note that it was not a complicated project.
- E. Conditions of the permit for Pearson.
- F. Merl Sawyer's bid and payments made.
- G. Gower's bid to do the foundation (note date done 3/25/85).

RECEIVED
BY _____

MAY 6 - 1986

TAHOE REGIONAL
PLANNING AGENCY

Exhibit A

CAPTIVE CREATIONS

TRPA PERMIT
TO EXPIRE

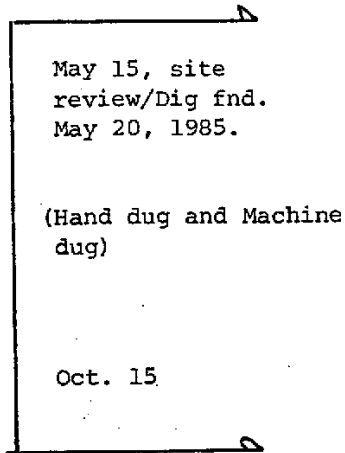
START WORK

STOP WORK
FOR WINTER

START WORK

PEARSON:

June 23, 1985

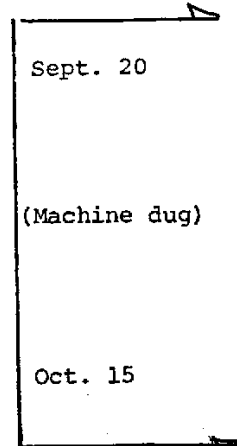


When snow clears.
30 days to form and
pour. Will finish
about Christmas, 1986.

Attachment A: 24 months
after start to complete
May 20, 1987.

WEBB:

December 9, 1984



May 10 or 20.
1985-Finish project
in remaining season
around December, 1985.

No condition attached
that can be found on
the original permit.

A. MAY

May 13 - 14 Layout project/

May 15 - 17 Erosion Control Fencing, etc.

May 15, site review Find out problem with survey.
TRPA Corners out, not correct.

May 20 - 24 Restake lot after Foster has
reset corners. Reset fence, etc.

May 28 - 31 Line up excavation work. Merl Sawyer.
Get costs to do work.
Sign contracts and set up finances.

B. JUNE

June 4 - 7 Start clearing.
Improve 1/4 mile of road for truck
access.
IVGID installed gates which caused
access problems (no key).

June 10 - 14 Drop trees (hand cut due to slope)
17, 20, 21 Drop trees for road access.
24 - 28 Remove limbs, hand-carry down to
dumpster. 1st dumpster.

C. JULY

July 1 - 3 Begin to remove brush.
Hand-carry down slope to 2nd.
dumpster.

July 8 - 12 Final stump clearing and removal of
brush.

Note: due to nature of soil, many things normally done by
back-hoe were done by hand. See permit condition
requiring hand work where possible.

July 15 - 18 Rake lot and remove excess material.
22 - 25 Chalk out footings and their location.
29 - 31 Transect work required by contractor.
Begin to dig footings. Upper footings
dug by hand due to TRPA conditions.

D.	AUGUST	August	1 - 2	Start to dig in retaining wall.
			5 - 9	Wall 5' high and 3' high.
			12 - 15	Grade drive into garage.
			19 - 23	Ran into problems due to Granet Rock.
			26 - 29	Excavator had to order new case-hardened teeth for hoe bucket. One day delay. Was having tire problems due to rough slope area.

Note: The months of July and August Merl Sawyer had also been hired to do 15 units of foundation work at Northwood and McCourry in Incline Village. The reason for Merl being used at both sites was his experience was needed for the sewer and water systems.

Both projects required a great amount of work. Merl went back and forth between the two locations, trying to keep up work on both sites.

Our hope was to finish the Northwood project (its permits also were to expire) in time to go back to the project and do the foundation at Jennifer. We were to finish the foundation in September.

The month of September found many days where it rained. The total days that we were able to work were 12. Many of those days were spent doing the clearing of areas we had already done in August.

E.	SEPTEMBER	Sept.	3 - 6	Reclear areas of footings and
			13	determine if possible to let forms
			16, 17, 20	
			23-27, 30.	

F. OCTOBER Oct. 1 - 4

Due to the weather and the 15th deadline coming, we made the decision to winterize the project. The foundation contractor, Mr. Gower, did not want to have his forms in the ground all winter. We were also concerned that the concrete truck would not be able to drive on the water influenced soil (due to the excessive rain).

Attached you will find the bid from Gower concrete. You will also find a letter that indicates the discussions we had with Bob about the ability to get the truck in at this late time in the year.

It must be realized that this project does not represent the normal work associated with a home. The building site is 1/4 mile away from the

current developed road. The access has to be managed as TRPA would want it so minimal impacts are realized in the construction process.

The current construction time line is to start forming as soon as the area is stable and the snow is out of the area. The next step will be to pour the concrete, set in place the erosion control (perminante) for the residence and the road areas. The sewer and water lines will be put in connecting the residence only after the foundation is poured. The reason for this is that the concrete trucks will have to drive over the road and to eliminate the possibility of breakage of the lines.

The work started before the three-year period had run out for the permit. We then have two years to complete the work. The work is in the process of being diligently pursued and will be so in the future. There is a very good chance that the home will be near completed by the month of November or December of this year. I know that the foundation will be finished by the end of April.

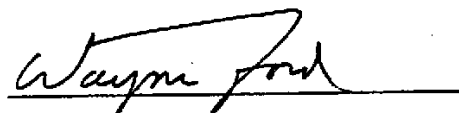
We have the right to continue what was begun. I would benefit no one in the area if left with the present excavation work already started.

Please respond in the next few days, as we would like to start work immediately and complete the project.

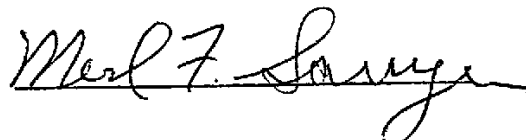
Please review the enclosed photos of the work that has already been done on the project.

Signed:

Wayne Ford
831-3673
P.O Box
4775, EV. NV.
89450



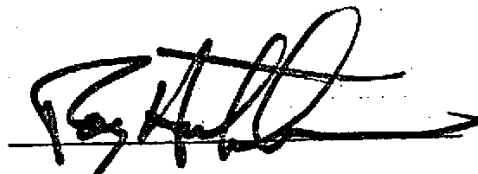
Merl Sawyer
(Excavator)



D. Craig Robinson



Roy Hutchinson



1985 MAY - OCT

MAY START.

MAY.						
SUN	MON	TUES	WED	THURS	FRI	SAT.
			1 SNOW	2 SNOW	3	4 NO WORK
5 NO WORK	6 SNOW	7	8 SNOW	9	10	11
12	13 WORK	14	15	16	17	18
19	20 WORK	21	22	23	24	25
26	27 MEMORIAL DAY	28 WORK	29	30	31	

JUNE						
SUN	MON	TUES	WED	THURS	FRI	SAT.
						1 NO WORK
2 NO WORK	3 RAIN	4 WORK	5	6	7	8
9	10 WORK	11	12	13	14	15
16	17	18 RAIN	19 RAIN	20	21	22
23/30	24 WORK	25	26	27	28	29

1985 MAY - OCT

July						
SUN	MON	TUES	WED	THURS	FRI	SAT.
	1 WORK	2	3	4	5 INDEPENDENCE DAY WK END	6 NO WORK
7 NO WORK	8 WORK	9	10	11	12	13
14	15 WORK	16 2 JOBS	17	18	19 RAIN	20
21	22 WORK	23 2 JOBS	24	25	26 RAIN	27
28	29	30 2 JOBS	31	NOTE: 2 JOBS BEING DUG - NORTHWOOD & MILLHARD - BOO JENNIFER		

AUG.						
SUN	MON	TUES	WED	THURS	FRI	SAT
				1 RAIN	2	3 NO WORK
4 NO WORK	5 WORK	6	7	8	9	10
11	12 WORK	13	14	15	16 RAIN	17
18	19 WORK	20	21	22	23	24
25	26 WORK	27	28	29	30 RAIN	31

NOTE: JULY - AUG - 2 PROJECTS BEING DUG. 15 UNITS OF APTS. AND - BOO JENNIFER (PEARSON)

1985 MAY - OCT

SEPT						
SUN	MON	TUES	WED	THURS	FRI	SAT
1 NO WORK	2 LABOR DAY	3 WORK	4 RAIN	5	6	7 NO WORK
8	9 RAIN	10	11	12	13 ? LOT PROO	14
15	16 WORK	17	18 RAIN	19	20	21
22	23 WORK	24	25	26	27	28 ✓
29	30 WORK					

OCT						
SUN	MON	TUES	WED	THURS	FRI	SAT
		1 WORK	2	3	4	5 NO WORK
6 NO WORK	7 RAIN	8	9	10	11 LOT PRO WET?	12 ✓
13 ✓	14 WINTERIZE LOT	15	16	17	18	19
20	21	22	23 ↑ STOP.	24	25	26
27	28	29	30	31		

CONDITIONS: OF PEABSON PROJECT

Attachment D

COPY

2. a,b,c,. completed.

2. Upon the issuance of building and grading permits, construction shall proceed in the following sequence:

~~the initial phase of the vegetation preservation and protection plan shall be completed.~~

~~b. Installation of temporary erosion protection devices.~~

ATTACHMENT D

(page 1 of 3 pages)

Standard Conditions of Approval
Attachment D - page two

~~Completion of rough grading including installation of mechanical stabilization devices.~~

- d. Completion of structure foundations.
- e. Final grading and installation of base for paved areas.
- f. Completion of structures.
- g. Paving.
- h. Landscaping and revegetation.

Condition 5 we worked between these periods as quick
as possible.

Condition 8 , 11,

~~There shall be no grading or land disturbance performed with respect to the
between October 15 and May 1, unless proper approvals are obtained.~~

~~Material obtained from any excavation work that is not contained within
foundations, retaining walls, or by other approved methods shall be removed
from the subject parcel and disposed of at an approved location.~~

Exhibit A