



WASHOE COUNTY

Integrity Communication Service

www.washoecounty.gov

STAFF REPORT

BOARD MEETING DATE: March 22, 2022

DATE: February 22, 2022

TO: Board of County Commissioners

FROM: Chris Bronczyk, Planner, Planning and Building Division, Community Services Department, 775-328-3612, cbronczyk@washoecounty.gov

THROUGH: Mojra Hauenstein, Arch., Planner, Division Director, Planning & Building Division, Community Services Department, 328-3619, mhauenstein@washoecounty.gov

SUBJECT: Public hearing: Appeal of the Washoe County Board of Adjustment's approval of:

Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences) to approve a special use permit for major grading of the project site and connector roadways to prepare for the redevelopment of the Tahoe Biltmore property. The applicant is also seeking to vary the following standards from Article 438; Section 110.438.45(a); 110.438.45(b); 110.438.45(c); 110.438.45(f); and 110.438.45(i). The applicant is proposing the excavation of 197,500 cubic yards of material, and 42,000 cubic yards of fill material, and exportation of 155,500 cubic yards of material

The applicant for the special use permit is EKN Development Group, owner of 47 Reservoir Road, 101 Lakeview Avenue, 0 Wassou Road, 5 SR 28 and 0 SR 28. (APN: 123-071-04; 123-054-01; 123-053-04; 123-053-02; 123-052-04; 123-052-02; 123-052-03; 123-071-35; 123-071-36; 123-291-01).

There are three appellants: (1) North Tahoe Preservation Alliance (NTPA), represented by Ann Nichols; (2) Doug Flaherty, a resident of Incline Village; and (3) Granite Place Owners Association, represented by Justin Townsend.

The Board of County Commissioners (Board) may affirm, reverse or modify the decision of the Board of Adjustment. The Board's analysis may also include a finding on the issue of standing to bring the appeal in the first place. If the Board modifies or reverses, it may remand the matter back to the Board of Adjustment with instructions. (Commission District 1.)

AGENDA ITEM # _____

SUMMARY

The applicant, EKN Development Group, applied for approval of a special use permit for major grading of the project site and connector roadways to prepare for the redevelopment of the Tahoe Biltmore property. The applicant also sought to vary the following standards from Article 438; Section 110.438.45(a); 110.438.45(b); 110.438.45(c); 110.438.45(f); and 110.438.45(i). The applicant is proposing the excavation of 197,500 cubic yards of material, and 42,000 cubic yards of fill material, and exportation of 155,500 cubic yards of material.

The special use permit was approved on February 3, 2022, by the Washoe County Board of Adjustment. Appellants North Tahoe Preservation Alliance, Doug Flaherty, and Granite Place Owners Association have appealed that approval based on various concerns.

Washoe County Strategic Objective supported by this item: Safe, Secure and Healthy Communities

PREVIOUS ACTION

On February 3, 2022, the special use permit was considered, in a public hearing, before the Washoe County Board of Adjustment. The Board of Adjustment approved the special use permit unanimously, with four Commissioners voting to approve and none dissenting.

BACKGROUND

The Washoe County Board of Adjustment approved the applicant's request for the special use permit, finding that the following findings required by WCC 110.810.30 were met:

- 1) Consistency. That the proposed use is consistent with the action programs, policies, standards and maps of the Master Plan and the Tahoe Area Plan;
- 2) Improvements. That adequate utilities, roadway improvements, sanitation, water supply, drainage, and other necessary facilities have been provided, the proposed improvements are properly related to existing and proposed roadways, and an adequate public facilities determination has been made in accordance with Division Seven;
- 3) Site Suitability. That the site is physically suitable for major grading, and for the intensity of such a development;
- 4) Issuance Not Detrimental. That issuance of the permit will not be significantly detrimental to the public health, safety or welfare; injurious to the property or improvements of adjacent properties; or detrimental to the character of the surrounding area; and
- 5) Effect on a Military Installation. Issuance of the permit will not have a detrimental effect on the location, purpose or mission of the military installation.

Please see the Board of Adjustment Signed Action Order (Attachment D), and the Board of Adjustment Staff Report (Attachment E) for a discussion of these items. The Board of Adjustment staff report (Attachment E) provides more details concerning grading, hillside development, and phasing.

Appellant North Lake Tahoe Preservation Alliance, a nonprofit organization dedicated to preserving the natural beauty and rural character of North Lake Tahoe appeals contending

that the findings of (1) Consistency and (4) Issuance not detrimental cannot be found. The specific language can be found on pages 1 and 2 of the appeal documents submitted by NLTPA, the appeal document can be found as Attachment A.

Appellant Doug Flaherty, a resident of Incline Village, contends that the findings of 1) Consistency and 4) Issuance Not Detrimental cannot be found. The specific language can be found on pages 1, 2, 4, 5, and 6 of the appeal documents submitted by Mr. Flaherty, the appeal document can be found as Attachment B.

Appellant Granite Place Owners Association is a Nevada non-profit association of owners of the 18 condominium units located at 1 Big Water Drive in Crystal Bay contends that the: (1) The original decision to abandon Reservoir Road and replace it with Wellness Way was granted without input from Granite Place or consideration of impact on Granite Place; (2) The physical boundaries of Granite Place have not yet been finalized, and the developer owes a deed to Granite Place outlining the boundaries and the association's common areas; and (3) The original plan for Boulder Bay development was approved more than a decade ago, did not include Wellness Way, and changed circumstances in the housing market, traffic, and other affected realms in the intervening years should be reevaluated. The specific language can be found on pages 1 and 2 of the appeal documents submitted by Granite Place Owners Association, the appeal document can be found as Attachment C.

STANDING TO APPEAL

In analyzing these appeals, the threshold issue of "standing" must be addressed. Standing is the legal right to bring a challenge in the first place. In courts it is treated as part of the analysis of subject matter jurisdiction, meaning that without it, the court has no power to even hear the challenge. It is the burden of the appellant to establish standing. NRS Chapter 278 limits appeals of Board of Adjustment decisions to "aggrieved persons." See NRS 278.310, 278.3195 and 278.328. The statutes do not go on to give a detailed definition of "aggrievement" but rather leave it to the local governments to enact ordinances, which can broaden the scope of standing under NRS Chapter 278, but cannot narrow it. *See City of North Las Vegas v. District Court*, 122 Nev. 1197, 147 P.3d 1109 (2006). The County has enacted such an ordinance. Like NRS Chapter 278, the Development Code limits standing to "aggrieved persons." WCC 110.910.02 gives useful guidance on the definition of an "aggrieved person." That definition provides in pertinent part as follows:

Aggrieved Person. "Aggrieved person" means a person or entity who has suffered a substantial grievance (not merely a party who is dissatisfied with a decision) in the form of either: Washoe County Commission Meeting of April 24, 2018 Page 4 of 6 (a) The denial of or substantial injury to a personal or property right, or (b) The imposition of an illegal, unjust or inequitable burden or obligation by an enforcement official, the Board of Adjustment or an administrative hearing officer.

In the *North Las Vegas* case cited previously, the Nevada Supreme Court determined there was no standing to appeal the Board of Adjustment's approval of a special use permit for a check cashing business. The Court considered both the distance of the property from the proposed project, as well as the stated basis of the appeal. The appellant lived over 900

feet from the project. North Las Vegas' ordinance apparently presumed standing for property owners within 300 feet but required anyone beyond that distance to make a particularized showing by affidavit of the nature of injury or damage to their property a project would cause. The appellant stated the basis of her appeal as an "oversaturation" of similar businesses in the area. According to the Nevada Supreme Court, this was inadequate to give her standing under the North Las Vegas ordinance or NRS Chapter 278. Her appeal was thus invalid.

On the issue of distance from the proposed land use in this case, Washoe County's ordinances include similar recognition of the presumed effects of development projects on neighboring properties based on proximity. WCC 110.810.25 requires that written notice be given to property owners "within 500 feet" of the property where the special use project is being sought. It follows from this provision and numerous authorities that the farther away someone is from property, the less likely they have standing to challenge it. Conversely, residents living in "close proximity" to a proposed land use unquestionably have standing. See *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630, 218 P.3d 847, 851 (2006). Where the exact line is, however, depends on the facts and circumstances of each particular case.

In deciding the standing issue, the Board may consider the distance of the appellants' properties from the proposed project. The Board may also consider the type of harm alleged in the appeal itself, as well as its likelihood of occurring based on the evidence. Additionally, the Board may also consider the record before it and before the Board of Adjustment.

If the Board finds there is standing, it must then analyze the merits of the appeal. If it finds no standing, the Board is free to deny the appeal without analyzing the merits. Alternatively, in the interest of completing the record in case of any possible future legal challenges, if the Board finds no standing it may nonetheless also indicate what its findings on the merits would be if standing did exist.

REQUIRED FINDINGS RAISED BY APPELLANTS

Consistency Finding

The finding for Consistency as outlined in WCC Section 110.810.30 states the following:

The proposed use is consistent with the action programs, policies, standards and maps of the Master Plan and the applicable area plan;

The finding is not intended to show consistency with a previously approved specific project, but to ensure that discretionary projects coming before the board are consistent with the Master Plan and Area Plan.

The Tahoe Area Plan and the Washoe County Master Plan do not prohibit major grading within the Crystal Bay area.

Issuance Not Detrimental Finding

The finding for Issuance Not Detrimental as outlined in WCC Section 110.810.30 states the following:

Issuance of the permit will not be significantly detrimental to the public health, safety or welfare; injurious to the property or improvements of adjacent properties; or detrimental to the character of the surrounding area; and

As part of the review process, numerous reviewing agencies provided comments and conditions of approval associated with the major grading special use permit. The conditions provided were very specific on retaining emergency vehicle access, and access for the public that utilize Wassou Road and Lakeview Avenue.

Washoe County Engineering and North Lake Tahoe Fire Protection District provided the following conditions to ensure that there was no detriment to the adjacent properties. Engineering's conditions 2(i), and under Traffic and Roadway conditions, 2(e), 2(f), 2(g)

Those conditions can be found in Attachment F: Board of Adjustment Conditions of Approval.

OTHER ISSUES RAISED BY APPELLANTS

Abandonment of the Roadways

Appellants Granite Place and NTPA argue that the BOA acted inappropriately by not reconsidering the abandonment of Wassou Road in making its decision. This is inaccurate. The abandonment of the roadways was heard by and approved by the Washoe County Planning Commission on June 3, 2021. The time to challenge the abandonment has expired. More importantly, the Special Use Permit that is the subject of this appeal was specific to major grading and did not impact the abandonment of the roadways issue.

Additionally, Washoe County Engineering provided conditions of approval related to the abandonment and the phased approach. Those conditions are as follows:

- a. Conditions of approval for abandonment case WAB21-0002 and variance case WPVAR21-0001 shall be satisfied prior to grading permit approval with the following allowance(s):
 1. The application identifies a phased abandonment of Wassou Road (portion between Stateline Road and Reservoir Road). A phased abandonment of Wassou will be permitted prior to meeting all stipulated conditions of approval providing that preliminary construction drawings (30%) shall be prepared for the replacement roadways (Wassou to Lakeview and Lakeview to Stateline) in addition to the following:
 - i. Legal descriptions with exhibits maps of the new road right-of-way shall be prepared and approved by Washoe County Engineering.
 - ii. Irrevocable Offers of Dedication of the new road right-of-way shall be recorded.
 - iii. A financial assurance shall be provided to Washoe County CSD in an amount estimated for full engineering design, construction, testing and inspection, as approved by the County Engineer.
 2. The recordation of the Order of Abandonment for the remaining roadway segments shall only be upon full compliance of said abandonment and variance case Conditions of Approval.

TRPA Memorandum of Understanding/Modifications to the Project

Appellants NTPA and Mr. Flaherty contend that because Washoe County does not have a current and active Memorandum of Understanding (MOU) with TRPA that Washoe County does not have jurisdiction to approve the SUP.

Washoe County has an existing MOU with TRPA that dates back to the 1980's, the MOU is currently suspended and only impacts building permits. Due to the suspension of the MOU, building permits have been delegated back to TRPA for review.

Washoe County and TRPA have parallel approval processes regarding projects within the Lake Tahoe Basin as required by the Bi-State Compact. The site of the proposed Special Use Permit is located within Washoe County and therefore, Washoe County has authority to review a special use permit for major grading, and the Washoe County Board of Adjustment has the authority to make a decision on a special use permit for major grading.

TRPA's subsequent or parallel review of the project or any subsequent changes to the project are not part of this appeal.

FISCAL IMPACT

No fiscal impact.

RECOMMENDATION

There are three appeals for the Board to address. There is also the Board of Adjustment approval of the Special Use Permit to address. With that understanding, it is recommended that the Board of County Commissioners review the record and take one or more of the following actions:

1. Dismiss one, two, or all appeals for a lack of standing.
AND/OR
2. Affirm the decision of the Board of Adjustment and approve Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences); or
3. Reverse the decision of the Board of Adjustment and deny Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences).

POSSIBLE MOTIONS

Standing:

Should the Board find that one, two, or all of the appellants lack standing, staff offers the following motion:

“Move to dismiss and/or deny [X] appeal, having found that the appellant lacks standing.”

Special Use Permit:

Should the Board find that one, two, or all of the appellants have standing, and should the Board agree with the Board of Adjustment's approval of Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences), staff offers the following motion:

“Move to deny the appeals and affirm the decision of the Board of Adjustment to approve Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences). The affirmance is based upon the ability to make the findings required by WCC Sections 110.810.30, Findings.”

or

Should the Board disagree with the Board of Adjustment’s approval of Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences), staff offers the following motion:

“Move to reverse the decision of the Board of Adjustment and deny Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences). The reversal is based on the Board’s inability to make all the findings required by WCC Section 110.810.30, Findings.”

or

Should the Board modify the Board of Adjustment’s approval of Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences), staff offers the following motion:

“Move to modify the decision of the Board of Adjustment and modify Special Use Permit Case Number WSUP21-0035 (Resort at Tahoe and Residences), in the following manner: [include modifications]. The modification is based on the Board’s ability to make all the findings required by WCC Section 110.810.30, Findings.”

All the attachments, which have been included for the Board’s consideration at the request of appellants, constitute the Record on Appeal:

Attachments:

- Attachment A: North Lake Tahoe Preservation Alliance Appeal Application
- Attachment B: Doug Flaherty Appeal Application
- Attachment C: Granite Place Owners Associate Appeal Application
- Attachment D: Board of Adjustment Signed Action Order
- Attachment E: Board of Adjustment Staff Report dated
- Attachment F: Board of Adjustment Conditions of Approval
- Attachment G: Board of Adjustment Minutes dated 02/24/22
- Attachment H: Public Comments
- Attachment I: Public Comments #2
- Attachment J: BOA PowerPoints - Washoe County Staff and Applicant 02/03/22
- Attachment K: Board of Adjustment Recording dated 02/03/22

Cc:

Appellant 1: North Tahoe Preservation Alliance
Box 4, Crystal Bay, NV, 89402
Email: Preserve@ntpac.org

Appellant 2: Doug Flaherty
774 May Blvd, 10-691, Incline Village, NV, 89451
Email: Tahoebblue365@gmail.com

Appellant 3: Granite Place Owners Association

Appellant Counsel: Allison MacKenzie, LTD
402 N. Division St. Carson City, NV 89703
Attn: Justin Townsend
Email: jtownsend@allisonmackenzie.com

Property Owner: EKN Development Group
220 Newport Center Drive, Suite 11-262
Newport Beach, CA 92660
ATTN: Tom Jacobson
Tom@ekndevgroup.com