STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Tahoe Tyrol Project for Review of Denial of Request for Exclusion from Order No. 6-77-51, California Regional Water Quality Control Board, Lahontan Region. Our File No. A-182.	Order No. WQ 78-1

BY THE BOARD:

On April 8, 1977 the California Regional Water Quality Control Board, Lahontan Region (Regional Board) adopted Order No. 6-77-51. Order No. 6-77-51 is a cease and desist order for the South Lake Tahoe Public Utility District (Discharger) which contained a prohibition against new sewer connections for those dischargers who were not connected to the system at the time of the order.

On September 8, 1977, the David D. Bohannon Organization, owner of Tahoe Tyrol (Petitioner) filed a petition for review of an order of the Regional Board, which was adopted on August 11, 1977, denying the Petitioner's request for exclusion from the provisions of the prohibition against new sewer connections.

The Petitioner has not at any time contended that Order No. 6-77-51 is improper.

The petition raises legal issues only.

I. BACKGROUND

The Petitioner is the owner and developer of Tahoe Tyrol, which is a planned unit development of a projected 490 building sites situated in South Lake Tahoe within the area served by the South Lake Tahoe Public Utility District.

The Petitioner commenced development of the project on or about September 21, 1971, when the City of South Lake Tahoe approved a tentative map, with a final map with 119 building sites approved by the City Council on September 4, 1973. During the interim the Petitioner obtained additional approvals from the California Tahoe Regional Planning Agency and other agencies, and as of April 8, 1977, when the cease and desist order was adopted, 21 residential units had been completed, with an additional 6 units under construction. Other improvements had been made, including a community meeting hall, swimming pool, parking lots, curbs, gutters, paving and underground utilities. The Petitioner states that since the adoption of the cease and desist order an additional 22 residential units have been under construction.

Prior to April 8, 1977, the date of the cease and desist order, the Petitioner had applied for 48 building permits for undeveloped project home sites and has asked for 15 additional permits since that date. Petitioner's pattern for applying for building permits has been in block lots rather than singly. The Petitioner alleges that it has invested in the project sums of money in excess of $4,300,000.

On April 8, 1977, the Regional Board, following a lengthy public hearing at South Lake Tahoe, adopted a cease and desist

order for violations of waste discharge requirements for the South Lake Tahoe Public Utility District which contained a prohibition against new sewer connections. The Board order contained the provisions for exclusions specified in Section 2244.1, Title 23, California Administrative Code, and further provided as a condition of the prohibition that 1,500 new sewer units (approximately 500 residential single family equivalents) would be allowed to connect to the treatment plant.

The City of South Lake Tahoe, through its City Attorney, Mr. Roy Abrams, working with the Discharger, accepted and implemented the administration of processing new sewer applications within the confines of the condition. Thereafter, when the City rejected the Petitioner's request for building permits, the Petitioner submitted its request to the Regional Board for exclusion from the prohibition as either "(1) a project under construction or (2) that the Petitioner had a 'vested right to connect to the sewer system'".

On August 11, 1977, at North Lake Tahoe, the Regional Board, during a public hearing, considered the Petitioner's request for exclusion from the prohibition. Mr. Ronald L. Campbell, Executive Vice President for the Petitioner testified at length, and presented graphs and documentary material. Counsel for the Petitioner, Mr. Alvin T. Levitt, presented legal and factual arguments and Mr. Roy Abrams, City Attorney for the City of South Lake Tahoe also testified concerning the project. At the conclusion of the hearing, the Regional Board denied the

Petitioner's request, finding that the Petitioner did not meet the requirements for exclusion specified in Section 2244.1 of the California Administrative Code.

Subsequent to the Petitioner's filing of its initial petition, an additional petition containing arguments, attachments and comments was filed with the State Board by the Petitioner on November 9, 1977. Petitioner's addendum petition contains a document of the California Tahoe Regional Planning Agency (CTRPA) dated September 2, 1977, declaring that the Petitioner has attained "vested rights" and a copy of a letter from the City of South Lake Tahoe, City Attorney, Mr. Roy Abrams. All of these documents, as well as the Regional Board record, have been incorporated within the State Board records of this petition.

II. CONTENTIONS AND FINDINGS

The contentions of the Petitioner and our findings relative thereto are as follows:

1. Contention: The Petitioner contends that the Tahoe Tyrol project is a "project under construction" within the language of the cease and desist order and Section 2244.1, Title 23, California Administrative Code, and therefore must be excluded from the prohibition against connection to the sewer system.

Findings: The Regional Board, when adopting Order No. 6-77-51, took into account the regulatory language of Section 2244.1 which reads in part as follows:

"Exclusions from Prohibitions and Restrictions on Additional Discharges to Community Sewer Systems. (a) Orders prohibiting or restricting additional discharges should expressly exclude projects under construction or with building permits already issued at the time the notice of the cease and desist hearing to consider the proposed prohibition or restriction was given unless special circumstances justify inclusion of such projects." (Emphasis added)

Subsection (b)(2) provides further that:

"This is not intended to mean that economic loss to a community as a whole or to any public agency or private person within the community is by itself cause for not prohibiting additional connections because such loss is the rule rather than the exception and cannot outweigh the need to prevent an increase in water quality impairment which is the basic reason for the prohibition."

In support of its contention that Tahoe Tyrol should be found a "project under construction", petitioner relies heavily on allegations that it had completed a considerable portion of the common facilities (e.g., sewers, curbs, gutters, paving and underground utilities and a swimming pool) at the time the prohibition was adopted and that its work was proceeding under a plan for overall development such that its subdivision should be considered as a whole.

There are several reasons why this argument must fail. It should be noted first that the language of Section 2244 of the State Board's regulations is directed to additional "discharges by dischargers to the sewer system". Tahoe Tyrol is not the potential discharger in this case; the individual homeowners are. Thus the petitioner's argument that the entire subdivision should be considered a "project under construction" is inappropriate.

For the purposes of this particular regulation, project must be read as "project by a discharger". Further, the "projects under construction" exclusion contained in the regulations as an alternative to the "projects with building permits" exclusion was never intended to provide for exclusions such as that sought by the petitioner. The alternative exclusion mechanism was included in the regulations to provide for projects (dischargers) which may legally proceed with construction without the necessity of obtaining a building permit, such as government buildings or buildings in areas where the entitlement to proceed with construction is called something other than a "building permit". In the case of buildings on which construction cannot legally proceed without a building permit (as in the case here) the "project under construction" exception is not applicable.

Petitioner implies in its Points and Authorities that its development should be considered a project under construction even under the interpretation of the Board's regulations set forth above, i.e., that the words "project under construction" refer to a project that can legally proceed to construction without a building permit. Petitioner contends that it had a vested right to complete its project and that, therefore, it could legally have proceeded without obtaining building permits or could have compelled the issuance of building permits from the City of South Lake Tahoe. Petitioner cites a letter from the City Attorney of South Lake Tahoe to Mr. Alvin T. Levitt, dated October 28, 1977, which petitioner contends supports this conclusion. The letter, however,

does not state that petitioner may proceed with construction of buildings without permits. In summary, the letter states that the City considers Tahoe Tyrol "one project", that building sizes and site locations have been approved by the City, that all that remains for the City to do prior to issuance of building permits is "structural review" and that the building permit evaluation does not include an overall evaluation of whether the project is a good one.

Petitioner cites a number of judicial decisions which deal with vested rights in support of its argument that is has a right to construct at Tahoe Tyrol whether or not it has building permits. These cases reveal that historically the courts have held that rights to proceed with construction vest only when a property owner has obtained a building permit and expended substantial sums in reliance on that permit. However, the cases also recognize that there may be instances in which the old building permit test for vested rights ought not to apply due to modern land development practices which involve a number of preliminary approvals by local government prior to the issuance of a building permit.

For example, in Aries Development Company v. California Coastal Zone Conservation Commission the Fourth District Court of Appeals stated:

> "Although the cases speak of vested rights in terms of reliance on a building permit (citations omitted) the Attorney General, both in the court below and in his opening brief on appeal, has argued the case on the assumption that a building permit may no longer be a sine qua non of a vested right . . . [The Attorney General] suggests that a vested right may arise before the issuance of a building permit if the preliminary permits approve a specific project and contain all final discretionary approvals required for completion of the project." (Emphasis in original)[1]

1. 48 Cal. App. 3d 534 at 544, 122 Cal. Rptr. 315 at 322.

However, the court in the Aries case did not find that the plaintiff in that case had obtained a vested right based upon approvals short of building permits and no other judicial decision cited by the petitioners makes such a finding although the cases do indicate (as the discussion in the Aries case set forth above does) that there may in the future be a factual situation which will require a court to find that a property owner has obtained vested rights even though he has not obtained a building permit.

Section 2244.1 of the State Board's regulations was intended to provide some relief from the burden of a connection ban for those who had progressed a substantial way toward completion of buildings within a prohibition area and to provide a clear-cut mechanism for distinction between those who should and those who should not be excluded from such prohibitions.

Petitioner's approach would place the Regional Boards in the position of undertaking a detailed evaluation in each individual case as to whether a particular construction project which normally would require a building permit had progressed to the point at which a vested right to construct had arisen under California case law. As can be seen from the above discussion, these questions are legally complex. Further, in attempting to resolve such questions, Regional Boards would be interposing themselves i what in most instances is appropriately a dispute between local agencies and those seeking to proceed with development of some kind.

In conclusion, when we say the "projects under construction" exclusion was intended to provide for projects which may legally

proceed with construction without the necessity of obtaining a building permit (see page 6, above) we are not intending to open the door to complex argument regarding constitutional and property laws. When a building permit is normally required for a particular building by the local jurisdiction in question, the "projects under construction" exclusion is not applicable and Regional Boards are not obligated to look beyond the possession of or lack of a building permit to decide whether a particular structure falls within or without the prohibition.

Finally, Petitioner has also raised an issue as to whether it is being fairly treated vis a vis other builders. Petitioner has chosen to construct homes on its lots rather than sell lots and allow the buyers to construct on them. Petitioner contends that it has made improvements on individual lots which, if they had been made by the buyer of an individual lot would have qualified the buyer for an exclusion under the "projects under construction" alternative. We cannot agree. In no case in which a building permit is required by the local jurisdiction and has not yet been obtained would such improvements qualify an individual builder's project as "under construction". The individual builder and petitioner are subjected to exactly the same standard.

2. Contention: The petitioner contends that by virtue of the substantial project construction performed pursuant to various governmental approvals and permits, petitioner has acquired a vested right to complete construction in accordance with the final project map and to connect to the South Tahoe Public Utility

District's treatment plant notwithstanding the Regional Board's and the State Board's regulations.

Findings: Petitioner contends that even if it does not qualify for an exclusion pursuant to the State Board's regulations as discussed under Contention 1, above, concepts of vested rights demand that in spite of the regulation it must be allowed to connect to the discharger's system.

The language of Water Code Section 13301 to the effect that a Regional Board may prohibit any discharge to a community sewer system that did not occur prior to the adoption of a cease and desist order makes it clear that under appropriate circumstances even discharges from buildings which were completely constructed at the time a cease and desist order was adopted could be prohibited if these buildings were not already connected and discharging to the treatment plant at the time the order was adopted.

Although it is not the usual practice for the Regional Boards to prohibit discharges from existing buildings and State Board regulations (quoted above) state that such prohibitions should only be imposed under "special circumstances", it is clear from the language of Water Code 13301 that the Legislature intended that the Regional Boards have wide latitude and discretion in implementing cease and desist orders and prohibitions against new connections in appropriate circumstances even where economic interests may be adversely affected. This has been clearly stated in Jeffory Morshead v. California Regional Water Quality Control Board, 45 Cal. App. 3rd 442, 119 Cal. Rptr. 586., a case involving a prohibition of additional connections to a community sewer system which was imposed by the San Francisco Regional Water Quality Control Board.

As the court stated in the Morshead case:

> "In authorizing regional boards to impose a ban on sewer connections, the Legislature surely must have considered the economic consequences of such a prohibition but nonetheless concluded that these consequences are outweighed by the public's right to clean water and a better environment. We find no constitutional right to connect to a community water system if such connection might constitute a menace to health or otherwise threaten to degrade the environment shared by the community as a whole." 2/

The petitioner's contention confuses an exercise of the police power of the Regional Board with exercise of the powers of land use, zoning, eminent domain or other regulatory actions by other agencies. The Regional Board's authority is limited to protection of water quality and does not extend to land use control; and although vested rights may be attained in the latter instances, the legislative intent expressed in the Porter-Cologne Act emphasizes that the protection of the quality of the waters of the State is of paramount importance over private property rights. It is for these reasons that Section 13263(g) Water Code specifically provides that the discharge of waste is a privilege and that there is no vested right to discharge waste. Section 13301 Water Code further implements this intent by making no provisions for vested rights, but to the contrary, grants to the Regional Board the authority to limit the type, volume, or concentration of wastes discharged to particular sewer systems.

We must therefore find that the petitioner does not have a vested right to discharge waste, either through a community sewer system or otherwise, particularly if such discharge is in contravention of an order validly issued by the Regional Board under the jurisdiction vested in it by the State.

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2. 119 Cal. Rptr. at 589

In addition, the case of Morrison Homes Corporation v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196, held that even where a developer has a vested right to receive sewer services from a local government entity such services may not be provided in derogation of a Regional Board order prohibiting additional connections to the community's sewer system.

The petitioner herein has attained no vested rights to connect to the sewer system insofar as the Regional Board's order is concerned.

3. Contention: Petitioner alleges that it was not afforded a fair hearing at the Regional Board meeting on August 11, 1977.

Findings: The petitioner's contentions have no merit. Petitioner first states that it was prepared to make a full oral argument, however it desisted from doing so as a result of "remarks by the chairman". Petitioner then states that it did not object to the proceeding due to the fact there was no indication that the proceedings were being recorded or transcribed.

The records of the Regional Board including a tape recording of the proceeding reveal that the Petitioner's representative, as well as its counsel and the City Attorney of South Lake Tahoe made lengthy presentations before the Regional Board. There is no record that they were inhibited in their remarks or

presentation of both oral and documentary evidence, but to the contrary they were afforded full opportunity to present their case. The records, thus, do not support petitioner's contention.

III. CONCLUSIONS

After review of the record, and for the reasons heretofore expressed we have reached the following conclusion:

The Regional Board's order denying Petitioner's request from exclusion from the prohibition against new sewer connections to the South Tahoe Public Utility District was appropriate and proper.

IV. ORDER

IT IS HEREBY ORDERED, that the Petition of Tahoe Tyrol be denied.

Dated: January 19, 1978

John E. Bryson, Chairman

W. Don Maughan, Vice-Chairman

W. W. Adams, Member