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7

8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

11 TERESA AVILA-BURNS)
AND RAY BURNS,)

12 Plaintiffs,)

13 v.)

14 TAHOE REGIONAL PLANNING AGENCY,)

15 Defendant.)
16

No. _____

**COMPLAINT
FOR DAMAGES FOR
VIOLATION OF FEDERAL
CIVIL RIGHTS (42 U.S.C. § 1983)
DEMAND FOR JURY TRIAL**

JURISDICTION

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2 1. This is an action through 42 U.S.C. § 1983 against the Tahoe Regional Planning
3 Agency for a violation of the Takings and Due Process Clauses of the United States Constitution.

4 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

5 3. Plaintiffs seek just compensation under the Fifth Amendment to the United States
6 Constitution and damages under the Due Process Clause.

7 4. On or about March 19, 2015, Defendant designated Plaintiffs' property as entirely
8 within a "Stream Environment Zone," thereby preventing the issuance of a building permit by El
9 Dorado County, California. A true and accurate copy of this designation is attached hereto as
10 Exhibit A and hereby incorporated by reference.

11 5. Defendant's designation constitutes a final decision applying the land-use
12 regulations to Plaintiffs' property. An actual controversy therefore exists between the parties.

13 6. Venue in this district is proper under 28 U.S.C. § 1391(e)(1) because a substantial
14 part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

PARTIES

15
16 7. Plaintiffs Teresa Avila-Burns and Ray Burns (the Burns) are the fee simple owners
17 of the parcel located at 889 Lake Tahoe Blvd., South Lake Tahoe, California. The parcel is located
18 in an unincorporated portion of El Dorado County and is under the jurisdiction of Defendant Tahoe
19 Regional Planning Agency.

20 8. Defendant Tahoe Regional Planning Agency (TRPA) is a bi-state agency formed
21 by a compact between the States of California and Nevada and ratified by the United States
22 Congress in 1969. TRPA's stated mission is to preserve Lake Tahoe, which is recognized as one
23 of the most beautiful natural wonders in the United States. To this end, TRPA has authority to
24 establish development standards for the area surrounding the lake, including Plaintiffs' parcel.

GENERAL ALLEGATIONS REGARDING TRPA

25
26 9. In 1969, California and Nevada agreed to form, and Congress ratified, a bi-state
27 compact to create TRPA. Pub. L. No. 91-148, 83 Stat. 360. The compact was amended in 1980
28 to its current operative version (hereinafter referred to as the "Compact"). Pub. L. No. 96-551, 94

1 Stat. 3233. The terms of the Compact are codified in California law. *See* Cal. Gov’t Code
2 § 66801.

3 10. The amended compact declares the finding that “[t]he waters of Lake Tahoe and
4 other resources of the region are threatened with deterioration or degeneration, which endangers
5 the natural beauty and economic productivity of the region.” *Id.* § 66801(I)(a)(1). “The primary
6 purpose behind the compact was the preservation of the unique environmental and ecological
7 values of the Lake Tahoe watershed.” Bradley R. Mozee, *Government Regulation of Ski Resort*
8 *Development in the Lake Tahoe Region*, 11 Stan. Envtl. L.J. 68, 83-84 (1992). As a result, the
9 Compact grants TRPA the power to adopt a regional plan and a code of ordinances to accomplish
10 its mission to protect the waters of Lake Tahoe. Cal. Gov’t Code § 66801(I)(b).

11 11. Specifically, the decrease in water clarity of Lake Tahoe “is caused by an increase
12 in the amounts of nitrogen and phosphorous reaching the lake.” *Tahoe-Sierra Preservation*
13 *Council, Inc. v. TRPA*, 34 F. Supp. 2d 1226, 1231 (D. Nev. 1999). “The concentrations of water
14 running off areas of impervious coverage then flow rapidly over areas of uncovered earth, picking
15 up nutrient-rich topsoil and bits of vegetation and debris as they go. The increase in runoff thus
16 causes more debris and soil—and hence more nitrogen and phosphorous—to reach the lake than
17 under natural conditions.” *Id.*

18 12. Chapter 53 of TRPA’s Code of Ordinances established the Individual Parcel
19 Evaluation System (IPES). IPES assigns each vacant single-family residential parcel a numerical
20 score, with the goal of ranking parcels “from most suitable to least suitable for development.”
21 Code of Ordinances 53.1.

22 13. Each vacant parcel is eligible for evaluation. *Id.* 53.3.3(A). For parcels less than
23 a third of an acre in land area, generally the evaluation team must evaluate the entire parcel,
24 including taking soil samples and slope and gradient readings. *Id.* 53.4.1.

25 14. One exception to the full-parcel evaluation is when the parcel contains a “Stream
26 Environment Zone” (SEZ). A SEZ is “an area that owes its biological and physical characteristics
27 to the presence of surface or ground water.” *Id.* 90.2. The Code provides that the presence of any
28 one of seven “key indicators,” or any three of six “secondary indicators” will trigger a SEZ

1 designation. *Id.* 53.9.1. Two such key indicators are “evidence of surface water flow” and
2 “[p]rimary riparian vegetation.” *Id.* 53.9.1(A).

3 15. An undeveloped parcel in certain areas carrying runoff into the watershed receives
4 an IPES score of zero. A zero score indicates that the parcel is designated as entirely within a SEZ.

5 16. The Code of Ordinances provides that “[n]o additional land coverage or other
6 permanent land disturbance shall be permitted in Land Capability Districts 1a, 1c, 2, 3, and Land
7 Capability District 1b (Stream Environment Zone), except as follows . . .” *Id.* 30.5. For the other
8 (non-SEZ) Districts, the Code allows development “when reviewed and approved pursuant to
9 IPES.” *Id.* 30.5.1(A).

10 17. Narrow exceptions to the prohibition on land coverage in SEZ are: (1) projects that
11 provide access across SEZ to otherwise buildable parcels; (2) public outdoor recreation facilities;
12 (3) public service facilities; (4) water quality control facilities; and (5) revegetation. *Id.* None of
13 these exceptions applies to the Burns nor permits any economic use for the benefit of the property
14 owner. Even temporary land coverage is prohibited by the Code. *See id.* 22.7.

15 18. TRPA has no mechanism to pay just compensation when its regulations cause a
16 taking of private property.

17 19. In summary, where a single-family residential parcel is scored a zero under IPES
18 on account of the presence of SEZ, the owner of the parcel is prohibited from developing it in any
19 way, except for public service projects.

20 **FACTUAL ALLEGATIONS**
21 **RELATED TO THE BURNS’ PARCEL**

22 20. A single-family home was first built on the parcel at 889 Lake Tahoe Blvd., South
23 Lake Tahoe, California (the parcel), in 1977. The construction pre-dated the IPES scoring system,
24 and so the parcel had never been scored under the current system.

25 21. The parcel is located about 5.3 miles from Lake Tahoe. Between the parcel and the
26 lake lies the City of South Lake Tahoe, with substantial urban commercial and residential
27 development. The parcel is located on a major paved street, with concrete curbs, and a driveway
28 curb cut into the property. It has electrical service, public water, public sewer, and telephone

1 services. Most surrounding parcels are developed with existing single family homes. In 2005, the
2 parcel's assessed value with a single-family home was \$284,580.

3 22. On or about June 24, 2007, the Angora Fire started as a result of an illegal campfire.
4 The fire destroyed nearly 250 homes, including the one that had been located at 889 Lake Tahoe
5 Blvd. The now-vacant parcel was subsequently foreclosed upon and acquired by a bank in
6 foreclosure.

7 23. The Burns family, including Teresa's mother and Ray's mother, had enjoyed
8 vacationing in South Lake Tahoe for about 13 years. They had often been able to stay at a friend's
9 house just down the road from the parcel. By 2009, Teresa and Ray had saved up enough money
10 to attempt to purchase their own property in the area.

11 24. Because the Burns wanted a place specifically for both of their mothers, who are
12 both handicapped, it was important that the area had quick access to a fire department and a
13 hospital in case of a health emergency. The Burns wanted to provide their elderly parents with a
14 beautiful, comfortable, and safe place to enjoy in the latter years of their lives.

15 25. To find a suitable property, Ray subscribed to an automatic email list that notified
16 him when parcels in the area became available. The parcel he found was in the desired location
17 for the Burns: it is just a one minute drive from the fire department, 2.5 miles away from a Raley's
18 grocery store that provides delivery service, and 3.5 miles from a hospital.

19 26. The parcel's topography also made it desirable for the family. Its location provides
20 territorial mountain views and meadow views, as well as an attractive boulder outcropping just 80
21 feet from where the house would be built. The parcel is also near Washoe Meadow State Park,
22 where Teresa would often bring her mother to allow her to conveniently enjoy the meadow and
23 creek in the park. Moreover, the parcel itself is mostly flat: the placement of the foundation for
24 the potential home allows easy handicapped access.

25 27. Before purchase, Teresa inquired with TRPA about building a home on the parcel.
26 In a telephone call, a TRPA representative told Teresa that the Burns would be able to build on the
27 parcel because it had previously had a house on it.

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1 28. On or about December 9, 2009, the Burns purchased the parcel out of foreclosure.

2 29. The Burns family was ecstatic that they were finally able to purchase a parcel for
3 their planned home. The family looked forward to building a home on the property.

4 30. In December 2012, Teresa and Ray began planning for development of the parcel.
5 Teresa contacted Don Knight, the Operations Supervisor of the El Dorado County Building
6 Services Department. On or about December 6, 2012, Mr. Knight told Teresa over the telephone
7 that the parcel was buildable, but the Burns would need a “building allocation” before starting
8 construction.

9 31. On or about October 4, 2013, Teresa and Ray visited the TRPA office with the
10 intention of purchasing a building allocation. They met with TRPA Senior Planner Gary Weigel,
11 who told them that TRPA no longer sold allocations. Instead, Mr. Weigel said the Burns would
12 have to go back to the County Building Services Department to buy one.

13 32. TRPA determines how many building allocations are available to El Dorado County
14 each year. The County then issues allocations accordingly. An allocation allows property owners
15 to go through the permitting process. Obtaining an allocation is the first step to eventually
16 developing a parcel.

17 33. When the Burns returned to the El Dorado County Building Services Department,
18 they were informed that 13 building allocations remained. On or about October 4, 2013, they paid
19 \$1,400 and received an allocation. They also received a document indicating that the parcel had
20 2,435 square feet of available land coverage.

21 34. After receiving the allocation, the Burns hired Eric Sudhausen as their designer and
22 Lumos & Associates Engineering as soil consultants. The consultants were obtained to work with
23 TRPA in an effort to use Best Management Practices and design an environmentally friendly
24 home.

25 35. On or about February 21, 2014, Mr. Sudhausen had a meeting at the El Dorado
26 County Building Department. He then informed Ray via e-mail that he had viewed the County’s
27 and TRPA’s files on the parcel and drawn up a proposed site plan based upon the 2,435 square feet

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1 | of land coverage that the files indicated was available. After considering other options, Burns
2 | planned on building their home on the same footprint as the previous house.

3 | 36. On or about February 26, 2014, Mr. Sudhausen met with Mr. Weigel at TRPA. Mr.
4 | Weigel told Mr. Sudhausen that the parcel should not have been given an allocation in the first
5 | place. Mr. Weigel said that he would ensure the parcel was not developed. Mr. Sudhausen also
6 | went to the El Dorado County Building Department and alerted them to Mr. Weigel’s statement.
7 | All further work on the building plans for the parcel ceased at that point. Mr. Weigel informed
8 | Teresa over the phone that the Burns’ dispute had been referred to TRPA legal counsel.

9 | 37. In March 2014, Teresa spoke with Mr. Knight at the County Building Department
10 | about TRPA’s apparent determination that the parcel was not buildable. Mr. Knight then contacted
11 | TRPA about the parcel. On or about March 12, 2014, Mr. Knight emailed Teresa and informed
12 | her that TRPA had requested some background information on the parcel and had not yet made a
13 | decision on whether the parcel was buildable. But on or about April 23, 2014, Mr. Weigel told Mr.
14 | Knight in an e-mail that the lot was not buildable.

15 | 38. Despite learning about these communications, Teresa did not want to give up her
16 | dream of building a home on the parcel. She contacted Paul Nielsen, a planner at TRPA, to ask
17 | for a meeting to discuss the situation. Eventually, Mr. Nielsen agreed to meet with the Burns. Ray
18 | and Teresa met with Mr. Nielsen at TRPA’s Tahoe office on or about July 21, 2014.

19 | 39. At the meeting, Mr. Nielsen said that the parcel was entirely within a SEZ and could
20 | not be developed under TRPA codes and ordinances. But he further stated that since TRPA
21 | considered the property vacant, it would have to go through the IPES evaluation process and
22 | receive a score.

23 | 40. On or about July 29, 2014, Mr. Nielsen notified Ray and Teresa via e-mail that he
24 | had spoken with TRPA Executive Director Joanne Marchetta and TRPA Counsel John Marshall
25 | and concluded that the Burns must first have their parcel evaluated under IPES.

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1 41. In early September 2014, the IPES and Land Capability Manager for TRPA,
2 Heather Beckman, called Teresa. Ms. Beckman told Teresa that TRPA had conducted its
3 preliminary site visit to the Burns' parcel and found it to be lush with primary riparian vegetation.
4 Ms. Beckman stated her opinion to Teresa that "there is no way it can be developed."

5 42. On or about October 1, 2014, the IPES evaluation process officially began. On or
6 about March 19, 2015, TRPA officially gave the parcel a zero IPES score. The IPES document
7 indicates that TRPA determined that all 13,700 square feet of the parcel is in a SEZ.

8 43. On or about April 1, 2015, Ray and Teresa received the final indication of the
9 parcel's IPES score and confirmation that they would not be able to build their planned home. On
10 the same day, Mr. Knight confirmed in an e-mail to Teresa that El Dorado County could not issue
11 a building permit for the parcel.

12 44. Teresa and Ray elected not to exercise their right to appeal the IPES score
13 determination. They do not dispute TRPA's determination that their property is SEZ, and therefore
14 such an appeal would be futile.

15 **First Cause of Action**
16 **(Regulatory Taking in Violation of the Fifth and**
17 **Fourteenth Amendments, through 42 U.S.C. § 1983)**

18 45. The Burns hereby re-allege each and every allegation contained in Paragraphs 1
19 through 44 as though fully set forth herein.

20 46. The Fifth Amendment to the United States Constitution, applied to the States
21 through the Fourteenth Amendment, provides "nor shall private property be taken for public use,
22 without just compensation." U.S. Const. amend. V.

23 47. The Supreme Court has held that TRPA's actions are "under color of State law"
24 within the meaning of 42 U.S.C. § 1983. *Lake Country Estates, Inc. v. TRPA*, 440 U.S. 391, 399-
25 400 (1979). Therefore, this Court has jurisdiction over a civil action against TRPA for damages
26 alleging a violation of the United States Constitution. 28 U.S.C. § 1343.

27 48. The Supreme Court has also held that a taking categorically occurs when a
28 regulation "denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal*
Council, 505 U.S. 1003, 1015 (1992).

1 49. When a parcel is designated as 100 percent SEZ and receives an IPES score of zero,
2 TRPA “permits no ‘additional land coverage or other permanent land disturbance’ on such a
3 parcel.” *Suitum v. TRPA*, 520 U.S. 725, 729 (1997) (quoting Code of Ordinances 20.4).

4 50. On or about March 19, 2015, TRPA gave the parcel a zero IPES score. On or about
5 April 1, 2015, the Burns received confirmation that they would not be able to develop the parcel.
6 Therefore, TRPA has made a final decision applying its Code of Ordinances to the Burns’ parcel.
7 This case is ripe for adjudication.

8 51. TRPA’s designation of the parcel as 100 percent SEZ with an IPES score of zero
9 constitutes a denial of all economically viable use of the parcel. Therefore, the Burns are entitled
10 to just compensation for a taking of their property under the Fifth Amendment.

11 **Second Cause of Action**
12 **(Violation of Due Process Clause of the Fourteenth Amendment)**

13 52. The Burns hereby re-allege each and every allegation contained in Paragraphs 1
14 through 51 as though fully set forth herein.

15 53. The Fourteenth Amendment provides that no State “shall deprive any person of life,
16 liberty, or property, without due process of law.”

17 54. Because TRPA’s actions are “under color of State law” within the meaning of 42
18 U.S.C. § 1983, this Court has jurisdiction over a civil action for damages alleging a violation of
19 the United States Constitution. 28 U.S.C. § 1343.

20 55. The Supreme Court has recognized that “a regulation that fails to serve any
21 legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due
22 Process Clause.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

23 56. TRPA’s decision to preclude the building of a home on this parcel is arbitrary and
24 irrational. The parcel is approximately five miles from Lake Tahoe, and construction of a single-
25 family home using best management practices (BMPs) would not harm the lake.

26 57. Prohibiting development of a single-family home on a parcel where one previously
27 existed is an arbitrary and irrational restriction on the Burns’ property rights that violates the Due
28 Process Clause. Therefore, they are entitled to damages pursuant to 42 U.S.C. § 1983.

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PRAYER FOR RELIEF

WHEREFORE, the Burns pray for judgment from this Court as follows:

- 1. A judgment awarding just compensation, in an amount to be determined at trial, for a regulatory taking in violation of the Takings Clause of the Fifth Amendment;
- 2. A judgment awarding damages, in an amount to be determined at trial, for a violation of the Due Process Clause of the Fourteenth Amendment;
- 3. An award to the Burns of reasonable attorneys’ fees and expert fees for bringing and maintaining this action, including under 42 U.S.C. § 1988;
- 4. An award to the Burns of costs of suit pursuant to Federal Rule of Civil Procedure 54(d); and
- 5. An award to the Burns of any other and further relief that the Court deems just and proper under the circumstances of this case.

DATED: December 10, 2015.

Respectfully submitted,

JOHN M. GROEN
CHRISTOPHER M. KIESER

By /s/ CHRISTOPHER M. KIESER
CHRISTOPHER M. KIESER

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