The meeting was called to order at 12:50 p.m. Senator Neal in the Chair.

PRESENT: Senator Neal, Chairman
Senator Glaser, Vice-Chairman
Senator Faiss
Senator Jacobsen
Senator Lamb
Senator Sloan

OTHERS PRESENT: Mr. Gordon DePaoli representing several Casino-Hotels at Lake Tahoe
Mr. Gary Sheerin representing Harvey's Wagon Wheel
Mr. Robert Gaynor Berry, Barney's
Mr. Jim Bruner, League to Save Lake Tahoe
Mr. Tom Jacob, Senior Planner, TRPA
Mr. John McClintock Riley of Crystal Bay, Nevada
Senator Thomas Wilson

Senator Neal announced that this special meeting for the purpose of hearing additional testimony on S.B. 323 would commence. He reminded the committee members of the request made at the meeting on March 14th that the gaming industry have a chance to review the bill.

S.B. 323 - Limits licensed gaming in Tahoe Basin.

Mr. Gordon DePaoli testified as spokesman for a group consisting of representatives of Park Tahoe, Harrah's Lake Tahoe, Harvey's Wagon Wheel, the Sahara Tahoe, Barney's Club and the approved Tahoe Palace Hotel and Casino. A copy of his prepared statement, the amendments suggested, and an explanation of the necessity of the amendments is attached as Exhibit A.

Senator Neal asked Mr. DePaoli if the gaming industry holds to the idea that gaming is a privilege and not a right. Mr. DePaoli answered that he believes gaming is a privilege in this state, and that premise has been confirmed by the Supreme Court.

Senator Neal asked Mr. DePaoli if he had any qualms with the fact that the legislature can act to contain gaming where it is presently located. Mr. DePaoli answered that he did not question the power of the legislature as long as it is consistent with the state and federal constitutions. He felt that he has tried to state the gaming industry's position as to existing and approved facilities and whether the legislature should freeze them as they presently exist forever, or whether it ought to leave the Nevada Tahoe Regional Planning Agency (TRPA) the power to someday perhaps, under facts and circumstances as they then exist, allow some changes.

Senator Neal remarked that Mr. DePaoli made no mention of the ecological carrying capacity of the Tahoe area. That troubled him because he felt the industry might not have any concern for trying to resolve some of the problems in Tahoe such as air quality, soil erosion and water quality. Mr. DePaoli answered that the industry has done a great deal to try and resolve some of the problems Senator Neal mentioned. As examples, he cited the construction of storm drains to collect and treat runoff from all impervious surfaces. All casinos at the south end of the Lake are trying to build parking garages which would do a great deal for water quality and air quality by stacking cars and reducing the impervious surfaces and eliminating the oil and grease from running off open parking lots. He stated that a great problem at the Lake has been traffic and the air quality problems related to the traffic problem. Parking garages will help the situation of people driving around trying to find a parking space. Another example of the industry's concern, is the Loop Road. The gaming establishments at the south end of the Lake have essentially contributed all of the land needed to build that road, and but for an obstinate neighbor at the upper end, the road would work much better than it presently is.

Senator Neal asked if the motivation for building the road was more for an increased profit than to try to control what was happening to the environment. Mr. DePaoli stated that he would not put a connotation on it since it is helpful to the casinos and makes the economic situation up there better, but it also helps the environment.

Senator Neal remarked that Mr. DePaoli's statement indicates there should not be a limitation on future growth. He asked if it is the position of the industry that they should house all and whomever comes into the Tahoe area. Mr. DePaoli answered that if someone from the industry came to him and asked his advice as a lawyer on expanding their facility, he would say forget it for now, and forget it for the foreseeable future. However, the industry's position essentially is that they can not predict what the situation will be from an environmental point and a business point of view in 10, 20 or 30 years from now. The industry is asking that the legislature not freeze gaming forever, but give them the ability at least sometime in the future to ask, and if the Nevada TRPA feels the environment could not stand any expansion, they would turn the request down.

Senator Neal commented on the fact that Mr. DePaoli had probably read the other bills relating to TRPA and had noted that those bills tie up any further growth to the ecological carrying capacity of the area. He then stated that it seemed to him that the industry did not want to bother with that. Mr. DePaoli did not feel that is true. He cited the present Nevada TRPA Section of NRS which requires the Nevada TRPA to consider any proposals in light of their effect on the environment. That is essentially its only function -- to consider what effect these establishments will have on the environment of the Lake. He felt that built into the present Nevada TRPA statute is a mandated consideration of the environment.

Senator Neal asked if he understood Mr. DePaoli to say, in addition to the question just asked, that the industry has accepted the fact that there should not be any additional gaming. Mr. DePaoli answered that they have accepted the fact that there would be no additional, new, non-restricted gaming facilities at Lake Tahoe.

Mr. Gary Sheerin, representing Harvey's Wagon Wheel, asked to have incorporated by reference all of the remarks previously made by Gordon DePaoli indicating that Harvey's Wagon Wheel specifically endorses his position on all of the amendments he has put forth today. Mr. Sheerin explained that he wanted to add one thing in particular which affects Harvey's Wagon Wheel. It concerns Page 2, Lines 9 - 11 of the bill. That language says that every structure housing licensed gaming which existed as a licensed gaming establishment on January 1, 1979, or whose construction was approved by the agency before that date, is recognized as a valid license. He stated that what he wanted to leave with the committee today, so that the record is perfectly clear at least as far as Harvey's Wagon Wheel's understanding of the existing bill, is that Harvey's has a master plan that has previously been improved. He delivered to the committee a copy of that master plan for the record. Attached to it is a copy of the minutes of Douglas County, June 20th, 1973, approving the special use permit; a copy of the minutes of the N-TRPA, July 18, 1973, approving the master plan; a copy of the Federal District Court in Reno whereby Judge Thompson ruled that the master plan was in fact approved by the agencies, all agencies that needed to be involved with the application, and that the master plan is in fact a vested right; and a copy of the Ninth Circuit Court of Appeals whereby the judges there affirmed Bruce Thompson's position. He stated that his understanding of the bill is that Harvey's Wagon Wheel can continue phasing in this master plan, assuming that it does not substantially deviate from the master plan as presented in 1973. He asked that the record reflect that the foregoing is their understanding and if there are any differences of opinion he would be happy to know about them. He asked that the exhibits be introduced into the record. They are attached as Exhibit B.

Senator Neal remarked that Mr. Sheerin's reference to the master plan stated another way would mean 700 additional rooms in the Tahoe area. Mr. Sheerin said that is correct.

Mr. Robert Gaynor Berry, owner and chief executive officer of Barney's, asked to make a point of clarification. He stated that there have been instances under the existing Nevada TRPA and TRPA statutory schemes where their approvals are not necessary for certain limited projects. He stated that Barney's is building a room to house employees (restrooms, dressing rooms and so on) which would in effect be a non-public area. That was approved and only required approval of the Douglas County Building Department. It did not require Nevada TRPA approval because it did not go over the 40-foot height limitation and the gaming area is not being expanded. He

stated that his interpretation is that if Nevada TRPA did not need to approve a particular project prior to January 1, 1979, that the change in the law would not affect that project after January 1, 1979. He felt it could not be read to mean anything other than that, but just wanted to make it clear.

Mr. Jim Bruner, representing the League to Save Lake Tahoe, explained the concerns they had which lead to the 3 or 4 minor amendments which they propose to offer. The League to Save Lake Tahoe is in general agreement with the thrust of the bill. It is their understanding following the Ad Hoc committee meetings and meetings with state representatives from each state that the thrust of the majority of opinion in Nevada is to limit the public area of the existing establishments. He cited statistics from a public opinion poll conducted in Nevada which indicated that most Nevadans want no more urban growth at Lake Tahoe, including casinos.

He felt the testimony given previously indicated that there is a desire to have a monopoly situation with no further licenses being granted, but those already established want to expand their own facilities. The League feels that would be out of step with the intent of this legislation, the intent of the Ad Hoc committee and the intent of the people. He offered amendments to this bill which would further define "public space." A copy of his proposed amendments is attached as Exhibit C.

Senator Jacobsen asked Mr. Bruner if he is a resident of Nevada. Mr. Bruner replied that he is not a resident of Nevada and that he lives in the California portion of the Tahoe Basin. Senator Jacobsen then asked how many League people he represents and how many of those are Nevada residents. Mr. Bruner answered that he represents 3,000 people, 1/6th of whom are residents of Nevada.

Senator Jacobsen asked if Mr. Bruner feels that all public space, as referred to in Line 28, is detrimental. Mr. Bruner replied that he would not use the word "detrimental" in terms of whatever services or recreation is offered. The League is trying to work within what appears to be the sentiment in the state as reflected through the Ad Hoc committee, that rather than deal with gaming as the extent of a license, public areas would leave some flexibility within the economic structure and within management decisions which may be acceptable to the industry. Convention space may generate as many trips as gaming space, but they are not sure. The information they have based their decisions on regarding traffic generation are put forth by the Nevada Highway Department and are based on square footage of gaming space.

Senator Sloan asked Mr. Bruner if the League is concerned about Section 4 in that it applies to a restricted license whose gaming is incidental to its primary business. Mr. Bruner stated that they would like to see a set of standards for the Nevada TRPA to apply when permits are presented to it. He felt it would not be ethical to have it apply to restricted or seasonal licenses and not apply to unrestricted licenses. He felt perhaps the committee would draft some reasonable language regarding making findings of fact to meet the standards of the agency and they should be a requirement for any application, regardless of whether it is a shopping center, drug store, or whether it has any gaming or not.

Senator Jacobsen asked Mr. Bruner to provide him with a copy of the public opinion poll mentioned earlier.

Mr. Tom Jacob, Senior Planner with the TRPA, indicated that the agency would make itself available to answer any questions the committee may have. He distributed copies of a resolution, which is the only formal action taken by the agency with respect to any deliberations regarding the Bi-state Compact. That resolution is attached as Exhibit D.

Senator Wilson asked that he be allowed to testify the following day to allow his staff to review the amendments proposed.

Mr. John McClintock Riley of Crystal Bay, the sole owner of the Ward Valley Co. and a realtor on the California side of the Lake, stated that he disagrees 100% with everything Mr. Jim Bruner has said. Mr. Riley feels the League is trying to make the Tahoe Basin a rich man's playground which would put the blacks, chicanos and the orientals out of the market.

Senator Neal announced that the meeting would recess until 2:00 p.m. on Wednesday, March 21st.

The meeting was in recess at 1:54 p.m.

Respectfully submitted,

Eileen Wynkoop
Committee Secretary

APPROVED:

Joe Neal, Chairman

STATEMENT TO SENATE COMMITTEE
ON NATURAL RESOURCES REGARDING SENATE BILL 323

I. INTRODUCTION

Mr. Chairman and members of the Committee - I'm Gordon DePaoli of the law firm of Woodburn, Wedge, Blakey, Folsom and Jeppson. I represent Park Cattle Co., the owner of the Park Tahoe Hotel and Casino. Today I am spokesman for a group consisting of representatives of the Park Tahoe, Harrah's Lake Tahoe, Harvey's Wagon Wheel, the Sahara Tahoe, Barney's Club and the approved Tahoe Palace Hotel and Casino.

Representatives of each of those businesses have met on several occasions. Most recently, the group met to consider the Bill you have before you today, SB 323. My comments today relate only to SB 323 and not to any of the proposed amendments to the Tahoe Regional Planning Compact. Our position on any amendments to the Compact must await a detailed examination of any proposal.

Before considering the specifics of SB 323, I would like to give you a bit of background which I hope will be helpful. The present Tahoe Regional Planning Compact was approved by Nevada and California in 1968 and by Congress and the President in 1969. Then Nevada, California and the United States Congress made it absolutely clear that gaming at Tahoe would be protected. The present Compact states:

> Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state . . . .

The "business or recreational establishment" language translates into gaming establishments.

Not long after 1969 California and others began to do everything they could to have the courts rewrite the Compact, particularly as it dealt with gaming. Gaming businesses at Lake Tahoe, both existing and proposed, have been subjected to an endless stream of harassing and vexatious litigation. I will leave the details of the litigation for a later time and date. However, our experience in that litigation has taught that California and others will not rest until gaming is completely removed from the Tahoe Basin. As written this Bill provides them aid and comfort in that effort.

Gaming is unquestionably this state's most important industry. The segment of the industry that I am speaking for today is located in the Douglas County portion of the Basin. Next to Clark and Washoe Counties, Douglas County is third in total gaming revenue. It is third because of the gaming establishments at Stateline. That revenue is important to Nevada and to Douglas County and their citizens and to a great many California citizens and governments. The Stateline hotel-casinos represent investments of several hundred million dollars made in reliance on the announced policy of Nevada, California and the United States that gaming at Tahoe would be protected. Those investments and the important revenues and jobs they generate must be given reasonable protection now and in the future.

This Bill, SB 323, must be considered with that background in mind. This Committee's and this Legislature's duty is to do what

is best for Nevada and its citizens and not to simply please or appease a vocal and litigious minority of Californians.

II. ANALYSIS OF BILL, SUGGESTED CHANGES AND REASONS FOR CHANGES

A. Introduction

SB 323 would amend Chapter 278 of the Nevada Revised Statutes. That Chapter deals with the Nevada Tahoe Regional Planning Agency (NTRPA) which has limited authority to consider and approve, approve with conditions or disapprove any application for the development of a gaming establishment at Lake Tahoe. Presently the development of a gaming establishment at Lake Tahoe requires approval of at least three governmental agencies. A county, the NTRPA and the TRPA.

As I understand it the provisions of this Bill will be incorporated into any amendments to the Tahoe Regional Planning Compact.

I intend to go through each section of the Bill, give you our understanding of it and state our proposed changes and the reasons for them.

B. Sec. 3.1.(a) and Sec. 3.2

As I mentioned, gaming establishments approved in recent years have been subjected to endless litigation. Section 3.1 recognizes as permitted and conforming uses all establishments existing or approved for construction before January 1, 1979. Those projects approved before January 1, 1979 but not yet built may be built to the extent permitted by court order in lawsuits pending on January 1, 1979. No new lawsuits could be filed challenging those projects after

January 1, 1979. We propose that lines 6-8 on page 2 of the Bill be amended to read as follows:

> Sec. 3.1. Subject to the final order of any court of competent jurisdiction entered in litigation attacking agency approval which is pending on January 1, 1979, the agency shall recognize as a permitted and conforming use:

The agency should not be concerned with litigation attacking approved projects for reasons unrelated to its approval. The addition makes it clear that projects held up by litigation unrelated to agency approval need not go back to the agency for approval regardless of the outcome of that litigation.

Section 3.1.(a) prohibits the NTRPA from approving any new structures to house nonrestricted gaming. The expansion of existing and approved structures housing nonrestricted gaming is prohibited forever. Those who have gaming located within their structures are prohibited forever from expanding rooms, restaurants, bars, and convention facilities, etc. There is no like ban on the expansion of similar businesses anywhere else in the Tahoe Basin. I seriously doubt whether any other business in all of America is faced with such a restriction. Yet here is a Bill in the Nevada Legislature seeking to place such a restriction on a segment of Nevada's most important industry.

Forever is a very very long time. I cannot predict what even the next 10, 20 or 30 years will bring to Nevada or the Tahoe Basin. I'm not going to try to predict what the mode of transportation will be or what strides will have been made in water quality protection or in erosion prevention. I'm not even going to try to predict what

it will take to keep a gaming establishment open at Tahoe or anywhere else in Nevada or America.

It is possible, indeed it is probable, that the means by which Americans travel will be significantly different and that techniques for preservation of water quality and erosion prevention will be improved. It is just as probable that the nature of the gaming business will have changed. Yet, this Bill says it cannot change physically at Tahoe. I submit to you gentlemen that if it cannot change physically it will probably die sooner or later. Nevada's own experience is proof positive. Nevada has gone from small specialized gambling parlors to large resort hotel complexes offering top name entertainment, sporting events, golfing, swimming, tennis, fine gourmet restaurants as well as gambling. Compare the industry in Reno 10 years ago with what it is today.

The gaming industry in Nevada has flourished because it has been dynamic. Today, it faces new challenges from Atlantic City to gasoline shortages. No one can predict the precise nature of the challanges of the 21st century. We can be sure that there will be challenges and that gaming must have the flexibility to meet them. Therefore, we propose an amendment to Section 3.1.(a) at lines 11-16 so that it reads as follows:

> the agency shall recognize as a permitted and conforming use:
>
> (a) Every structure housing licensed gaming which existed as a licensed gaming establishment on January 1, 1979 or whose construction was approved by the agency before that date. The agency shall not permit the construction of any new structure to house gaming under a nonrestricted license not so existing or approved. [or] The enlargement in cubic volume of any such existing or approved structure is subject to agency review and approval. [but may permit any alteration, reconstruction or change of location which does not enlarge the cubic volume of the structure.]

The amendments would ban any new structures housing non-restricted gaming. They would allow any existing or approved structures to seek NTRPA approval for enlargement of the cubic volume of the structure. NTRPA would then consider and approve, approve with conditions or disapprove, the enlargement based upon the then known facts concerning its environmental impact, not upon our present speculation on what those facts may or may not be. The amendments would at least give the existing and approved gaming businesses at Tahoe the opportunity, even if it's a one-in-a-million shot, to seek approval to meet the constantly changing gaming business.

The amendments would avoid placing some future Nevada legislature in the dilemma of either withdrawing from what may be an otherwise good Compact or allowing Tahoe gaming to die. That dilemma is possible because once this legislation is incorporated into the Compact it cannot be unilaterally changed by Nevada.

As presently written Section 3.1.(a) seems to require agency approval for reconstruction of existing facilities at the end of their useful life. On the other hand, Section 3.2 states that structures destroyed or damaged may be rebuilt without any approval. Because persons should not be encouraged to destroy structures nearing the end of their useful life and because gaming should not be phased out of the Tahoe Basin entirely, we urge the deletion of the language at line 14 beginning with "but may permit" and ending on line 16 with "the cubic volume of the structure." In addition, we suggest that Section 3.2 be amended to read as follows:

2. [If] Any structure housing licensed gaming [is destroyed or damaged, the structure] may be rebuilt or replaced to a size not to exceed the existing or approved cubic volume and land coverage. [which existed on January 1, 1979.]

With those amendments structures housing licensed gaming may be rebuilt to their existing or approved cubic volume and land coverage. The amendments permit reconstruction or replacement for whatever reason whether it be a natural disaster or simply obsolescence. The date is deleted to correspond to our suggested change in Section 3.1.(a) which would allow NTRPA to approve an enlargement of an existing facility. If such an enlargement was approved and the facility later required replacement or rebuilding it could be rebuilt to its enlarged size.

C. Section 3.1 at lines 24-30

As presently written the first sentence of that portion of the Bill (lines 24-27) places an absolute ban on any expansion of public areas within structures housing licensed gaming, whether the expanded area is to be used for gaming, restaurants, bars, convention centers or restrooms. There is no similar ban anywhere else in the Basin.

The final sentence requires NTRPA approval for any expansion of gaming within the public area of any structure and agency approval for remodeling of such facilities as bars, restaurants, snack bars, restrooms, etc., within that public area. "Expansion of gaming" will be interpreted by our litigious friends from California to mean the addition of a single slot machine or a single gaming table between two others.

Within the area open to public use existing or approved

gaming businesses should be given flexibility. They should be able to move or add slot machines or tables, expand or contract restaurants or bars, etc. without being required to get NTRPA approval and without being exposed to harassing and delaying litigation. For example, a fairly common occurrence is the addition of a few tables during big weekends such as the 4th of July or Labor Day. This Bill would require NTRPA approval to do even that.

We propose amendments to that portion of Section 3.1 so that it will read as follows:

> The area within any such existing or approved structure [housing licensed gaming] which may be open to public use [(as distinct from that devoted to the private use of guests and exclusive of any parking area)] is limited to the area existing or approved for public use on January 1, 1979. Area open to public use is all that area not devoted to or approved for hotel rooms and parking. Gaming shall [must] not be conducted [on any story of the structure not so used or approved for use on that date. Within these limits, the expansion of gaming or remodeling of the structure requires approval from the agency.] in any area of the structure not open to public use as herein defined. The enlargement of the area open to public use of any such existing or approved structure is subject to agency review and approval.

The amendments would limit area which may be open to public use to that existing or approved for public use on January 1, 1979. They would define area open to public use as that area not devoted to or approved for hotel rooms or parking. That definition and the restriction that gaming not be conducted in areas not open to public use should put to rest the irrational fears that the gaming businesses at the Lake will convert some or all of their hotel rooms or parking structures to gaming area. Finally, existing

and approved structures could at least ask for NTRPA approval to enlarge the area open to public use. That change is proper for the same reasons stated for the change in Section 3.1.(a). This Legislature should not prohibit such an enlargement forever.

D. Comment on Sec. 4

This section is not directed toward hotel-casinos. It is aimed at grocery stores, drug stores, small restaurants and bars, etc. A restricted gaming license is a license to operate a maximum of 15 slot machines incidental to some other business. This section would require NTRPA approval for such a license in the Basin and would require an applicant to show that the slot machines "meet appropriate criteria of environmental quality and do not exceed the capability of the ecological system to tolerate human activity," whatever that means. Implicit in that section is the insane assumption that people come to Tahoe to gamble in grocery stores!! That section should be deleted and Section 3.1.(c) should be amended making it clear that restricted gaming may continue in the Tahoe Basin.

III. CONCLUSION

Never before has Nevada sought to impose such burdensome restrictions on any part of its most important industry. The amendments we propose protect the hundreds of millions of dollars invested in reliance on existing law. They protect the economy of Lake Tahoe and the thousands of persons in Nevada and California who rely on it. They provide the flexibility needed for a future that no one in this room can predict.

Absent these changes gaming at Tahoe will probably come to an end, perhaps not in our lifetimes, but eventually. If that is the desired result then let this Legislature face that issue directly and forthrightly by appropriating sufficient funds to pay just compensation as required by our State and Federal constitutions.

PROPOSED AMENDMENTS TO SECTIONS 3 AND 4 OF SENATE BILL 323

Sec. 2. Chapter 278 of NRS is hereby amended by adding thereto the provisions set forth as §§3 and 4 of this Act.

Sec. 3. 1. Subject to the final order of any court of competent jurisdiction entered in litigation attacking agency approval which is pending on January 1, 1979, the agency shall recognize as a permitted and conforming use:

(a) Every structure housing licensed gaming which existed as a licensed gaming establishment on January 1, 1979 or whose construction was approved by the agency before that date. The agency shall not permit the construction of any new structure to house gaming under a nonrestricted license not so existing or approved. [or] The enlargement in cubic volume of any such existing or approved structure is subject to agency review and approval. [but may permit any alteration, reconstruction or change of location which does not enlarge the cubic volume of the structure.]

(b) Every other nonrestricted gaming establishment whose use was seasonal and whose license was issued before January 1, 1979, for the same season and for the number and type of games and slot machines on which taxes or fees were paid in the calendar year 1978.

(c) Gaming conducted pursuant to a restricted gaming license issued before January 1, 1979, to the extent permitted by that license on that date.

The area within any such existing or approved structure [housing licensed gaming] which may be open to public use [(as distinct from that devoted to the private use of guests and exclusive of any parking area)] is limited to the area existing or approved for public use on January 1, 1979. Area open to public use is all that area not devoted to or approved for hotel rooms and parking. Gaming shall [must] not be conducted [on any story of the structure not so used or approved for use on that date. Within these limits, the expansion of gaming or remodeling of the structure requires approval from the agency.] in any area of the structure not open to public use as herein defined. The enlargement of the area open to public use of any such existing or approved structure is subject to agency review and approval.

2. [If] Any structure housing licensed gaming [is destroyed or damaged, the structure] may be rebuilt or replaced to a size not to exceed the existing or approved cubic volume and land coverage. [which existed on January 1, 1979.]

[Sec. 4. Any project housing or proposing to house restricted gaming and not possessing on January 1, 1979, a valid restricted gaming license issued pursuant to Nevada state law, must not be permitted unless it is incidental to the primary business housed with it, meets appropriate criteria of environmental quality and does not exceed the capability of the ecological system to tolerate human activity. This section governs the placement and number of machines, new construction or structural changes, such as construction of an area to house restricted gaming or to house the relocation of the primary business so that restricted gaming can be accommodated.]

Sec. [5] 4. This Act shall become effective upon passage and approval.

PROPOSED AMENDMENTS TO SECTIONS 3 AND 4 OF SENATE BILL 323

(Showing additions only)

Sec. 2. Chapter 278 of NRS is hereby amended by adding thereto the provisions set forth as §§3 and 4 of this Act.

Sec. 3. 1. Subject to the final order of any court of competent jurisdiction entered in litigation attacking agency approval which is pending on January 1, 1979, the agency shall recognize as a permitted and conforming use:

(a) Every structure housing licensed gaming which existed as a licensed gaming establishment on January 1, 1979 or whose construction was approved by the agency before that date. The agency shall not permit the construction of any new structure to house gaming under a nonrestricted license not so existing or approved. The enlargement in cubic volume of any such existing or approved structure is subject to agency review and approval.

(b) Every other nonrestricted gaming establishment whose use was seasonal and whose license was issued before January 1, 1979, for the same season and for the number and type of games and slot machines on which taxes or fees were paid in the calendar year 1978.

(c) Gaming conducted pursuant to a restricted gaming license issued before January 1, 1979, to the extent permitted by that license on that date.

The area within any such existing or approved structure which may be open to public use is limited to the area existing or approved for public use on January 1, 1979. Area open to public use is all that area not devoted to or approved for hotel rooms and parking. Gaming shall not be conducted in any area of the structure not open to public use as herein defined. The enlargement of the area open to public use of any such existing or approved structure is subject to agency review and approval.

2. Any structure housing licensed gaming may be rebuilt or replaced to a size not to exceed the existing or approved cubic volume and land coverage.

Sec. 4. This Act shall become effective upon passage and approval.

EXHIBITS
FOR
TESTIMONY
BEFORE
SENATE NATURAL RESOURCES COMMITTEE

March 20, 1979
BY
HARVEY'S WAGON WHEEL

STATE OF NEVADA
NEVADA TAHOE REGIONAL PLANNING AGENCY
NYE BUILDING, ROOM 216
201 S. FALL STREET
CARSON CITY, NEVADA 89701

MIKE O'CALLAGHAN
GOVERNOR

(702) 882-7482

EXHIBIT B

SUMMARY MINUTES OF MEETING JULY 18, 1973
9:00 a.m. - Room 214, Legislative Building, Carson City

I Call to order and determination of quorum:

Roll Call: NTRPA members present: Elmo J. DeRicco
Walter MacKenzie
John Meder
Chas. Meneley
Ray Knisley

APC Members present: Norman S. Hall, Executive Officer

Richard Hanna, Legal Counsel

II Action on minutes of meeting June 14, 1973:

MOTION MADE BY Mr. DeRicco that minutes of meeting June 14, 1973 be approved. Second by Chas. Meneley. Motion carried.

Ayes: Meder, MacKenzie, Meneley, DeRicco, Knisley
Noes: None
Abstain: None
Absent: None

III HARVEY'S RESORT HOTEL

Dennis Small, Executive Assistant, Harvey's Resort Hotel, introduced Bill Ledbetter, Vice President and General Manager of Harvey's; Peter Laxalt, Attorney at Law, Harvey's Legal Counsel; Ian MacKinlay, Jim Stehr and Frank McCurdy of MacKinlay/Winnaker/McNeil, AIA and Associates, Inc., Architects; Dr. D. Jackson Faustman, Consulting Traffic Engineer; Jere Williams of Creagan and D'Angelo; Angus MacDonald, Statistician of Baxter, MacDonald and Smart, Inc.

Architects, consultants and engineers presented the proposed project covering all aspects of exterior finish, landscaping, pedestrian overpasses, floor area and number of rooms. Transportation and traffic circulation, patron and employee surveys, housing characteristics, travel patterns in the area, and occupancy counts were discussed. Sun studies were shown in an attempt to demonstrate there would be no adverse environmental impact from the proposed exterior finish.

MOTION MADE BY Elmo DeRicco for approval of the project, with Douglas County stipulations, APC stipulations, ~~height of building~~

EXHIBIT B

~~being 193 feet, not including elevator tower on top, from the middle of the building to ground level.~~

Ayes: Meder, Meneley, DeRicco, Knisley
Noes: MacKenzie
Abstain: None
Absent: None Motion carried.

MOTION BY Elmo DeRicco that the ~~Agency reserve decision on exterior finish of the building until a future date~~, at which time, either by demonstration, public hearing, or with further information, in the eyes of the agency, it is determined to be acceptable.

Ayes: Meder, Meneley, DeRicco, Knisley, MacKenzie
Noes: None
Abstain: None
Absent: None Motion carried.

MOTION BY Elmo DeRicco that the structure be approved with present ~~footprint dimensions and height limitation of~~ 193 ~~feet~~.

Ayes: Knisley, DeRicco, Meneley, Meder
Noes: MacKenzie
Abstain: None
Absent: None Motion carried.

MOTION BY Elmo DeRicco that the gaming area of both buildings, including bars, ~~not exceed 88,000 square feet~~.

Ayes: Knisley, DeRicco, Meder
Noes: Meneley, MacKenzie
Abstain: None
Absent: None Motion carried.

MOTION BY Elmo DeRicco that the Master Plan be approved, that as ~~each new phase is scheduled to begin, the applicant come back before the Agency to advise what has been completed and what the plan is for the future~~; subject to all previous motions and Douglas County conditions.

Ayes: Knisley, Meder, Meneley, DeRicco
Noes: MacKenzie
Abstain: None
Absent: None Motion carried.

MOTION BY Elmo DeRicco that the project be approved on the condition Douglas County provide an acceptable transportation solution, which is also acceptable to the TRPA and NTRPA; and that Douglas County will construct necessary

EXHIBIT B

ENTERED

OCT 31 1977

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY DEP.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA

Plaintiffs

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.,; and COUNTY OF DOUGLAS

Defendants.

NO. CIV. R. 77-0158

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

THIS MATTER came before the Court on October 17, 18, and 19, 1977, pursuant to plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, and on various Motions of the defendants, including defendant Harveys' Motion to Dismiss, and the plaintiffs and all defendants having present evidence, and the Court having considered the evidence presented by each party as being available to all parties, and the matter having been argued and briefed and submitted to the Court, and the Fourth Claim for Relief against defendant Harvey's Wagon Wheel Inc., having been dismissed by the Court pursuant to stipulation of counsel, the Court being fully advised in the premises, and

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based on the evidence submitted by plaintiffs and the undisputed evidence and facts submitted by defendants, the Court finds and concludes as follows:

FINDINGS OF FACT

1. That on or about June 20, 1973, the Douglas County Commissioners, the permit-issuing authority pursuant to the TRPA Land Use Ordinance, issued an administrative permit to defendant Harvey's Wagon Wheel, Inc., approving its Master Plan and allowing a new hotel tower with a height greater than 40 feet; that prior to issuing said administrative permit to said defendant, the Douglas County Commissioners required the presentation of extensive evidence in support of such additional height pursuant to §7.13 and §8.33 of the TRPA Land Use Ordinance.

2. That the Douglas County Commissioners, prior to the issuance of said administrative permit, fully complied with all provisions of all applicable ordinances and regulations including §§7.13 and 8.33 of the TRPA Land Use Ordinance.

3. That there was submitted to the Douglas County Commissioners, prior to the issuance of the above referenced administrative permit, substantial evidence pursuant to §§7.13 and 8.33, and upon such substantial evidence the Douglas County Commissioners determined and found, inter alia, that "such greater height will better promote the protection of the environment in the area"; that the administrative record before Douglas County contained substantial evidence to support such finding and determination.

4. That said permit was subsequently submitted to and approved by the Nevada TRPA, and thereafter on July 20, 1973, was submitted to the TRPA for review; that on or about the 25th day of July, 1973, a hearing was held on the Harvey's administrative permit before the TRPA, at which time the governing body did not obtain a dual majority vote to approve, modify or reject the

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project, and that on or about September 20, 1973, the Harvey's administrative permit was deemed approved by operation of law, pursuant to the terms of the TRPA Compact and Land Use Ordinance.

5. That at the time of the adoption of the Land Use Ordinance there existed in the area where defendant Harvey's project is to be constructed several high-rise structures, including structures which were higher than those in the project proposed by defendant Harvey's; at that time, it was common knowledge that under the said Land Use Ordinance, and particularly §7.13, there would be structures many times higher than 40 feet or 45 feet.

6. That the plaintiffs herein did not appear at the hearing before the Douglas County Commissioners when the Harvey's administrative permit was approved; nor at the NTRPA hearing; nor at the TRPA hearing. At no time in said hearings did the plaintiffs herein raise any issue or contention that the Harvey's project was in violation of §7.13 or §8.33 of the Land Use Ordinance or otherwise was in violation of law.

7. That in processing defendant Harveys' application for administrative permit the provisions of the TRPA Land Use Ordinance were strictly and carefully followed and that the administrative permit is valid and was, when issued, valid and was valid on its face.

8. That after the administrative permit of defendant Harvey's became final on or about September 20, 1973, defendant Harvey's, in good faith, relied on that administrative permit and has expended the sum of approximately $2,795,348.88 in furtherance of its project; that plaintiffs, with full knowledge, allowed defendant Harvey's to proceed in reliance upon its administrative permit which was valid on its face.

9. That on July 22, 1975, defendant Harvey's was issued all necessary excavation, grading and building permits for the

"first addition" of its Master Plan project. Pursuant to these permits, in a course of construction commencing September 10, 1 and continuing until September 15, 1976, Harvey's constructed sa addition, including administrative offices, employee lockers and cafeteria, warehouse and food lockers, all at a cost of approximately $2,795,348.88. Thereafter, pursuant to an excavation, grading and foundation permit issued February 4, 1977, Harvey's commenced construction of its parking garage under said Master Plan, accomplishing physical relocation of all utilities and having a construction company crew ready to commence excavation on September 1, 1977, when all activity was suspended voluntar due to the pendency of this action.

10. On September 20, 1973, the League to Save Lake Tahoe and the Sierra Club brought an action against the TRPA, Harvey's Wagon Wheel, Inc., Park Cattle Company and Tom Raley in the United States District Court for the Eastern District of California. The League to Save Lake Tahoe and Sierra Club did not and have not at any time in said action effectively seek or follow through with injunctive relief against Harvey's i that action.

11. That plaintiff, State of California, on or about August 7, 1974, filed suit in federal District Court entitled State of California ex rel Evelle Younger, Attorney General, versus Tahoe Regional Planning Agency, et al, case number R-74-108 DRT, (hereinafter referred to as the "Younger case"), which action attacked the validity of the administrative permits issu to defendants Jennings and Kahle and alleged, inter alia, that said projects if constructed "will be in violation of the TRPA Ordinance on land use intensity and height limits".

12. That on or about August 16, 1974, plaintiff League to Save Lake Tahoe filed suit number 6566 in Douglas County, Nevada (hereinafter "Douglas County" case), which action

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EXHIBIT B

attacked the administrative permit issued to defendant Harvey's and alleged, inter alia, said permit was issued in violation of §§7.13 and 8.33 of the TRPA Land Use Ordinance; was not supported by substantial evidence; and therefore was arbitrary, capricious and contrary to law.

13. That on or about June 5, 1975, plaintiff California petitioned the Douglas County Court to file an amicus curiae brief in the Douglas County action.

14. That on or about May 3, 1976, the League to Save Lake Tahoe filed a suit in federal District Court under the Clean Air Act, case number R-76-86 BRT, entitled League to Save Lake Tahoe v. Roger S. Trounday, et al (hereinafter referred to as the "Trounday case"), which suit sought to enjoin defendant Jennings' project.

15. That the Younger action was appealed to the Ninth Circuit Court of Appeals and the appellate Court first issued its opinion on April 30, 1975, and amended the same on June 11, 1975.

16. That none of the plaintiffs at any time have effectively sought and followed through with injunctive relief against defendant Harvey's project.

17. That all actions and cliams set forth in the within action were available, apparent, and known to plaintiffs at the time the Eastern District Action was commenced on September 20, 1973; and at the time of the filing of the Younger suit on August 7, 1974, and the within claims could and should have been included therein.

18. That all causes of action and all claims set forth in the within matter were available, apparent and known to plaintiffs at the time of filing the Douglas County case on August 16, 1974.

19. That the plaintiffs delayed an unreasonable per-

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of time in commencing the within action.

20. That any objections that a building higher than 40 feet violated §7.13 of the Land Use Ordinance should have been made by plaintiffs in the permit-issuing procedures and at the hearings before the Douglas County Commissioners, the Nevada Tahoe Regional Planning Agency, and the TRPA.

21. That after the decision of the Ninth Circuit Court of Appeals in the Younger case, plaintiffs made no attempt to amend their Complaint or file another action setting out the claims included in the within action.

22. That the Douglas County action was dismissed against the League to Save Lake Tahoe with prejudice, which dismissal was affirmed by the Nevada Supreme Court on May 3, 1977.

23. That additional delay in the construction of Harvey's project will result in substantial increase in the total cost of construction.

24. That the language of §7.13 of the TRPA Land Use Ordinance is not ambiguous.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331(a).

2. That defendant Harvey's administrative permit was approved by operation of law under the terms of the TRPA Compact on or about September 20, 1973, which approval has the same legal effect as an approval by the unanimous vote of the governing body of the TRPA.

3. That plaintiffs' claims against defendant Harvey's are barred by NRS 278.027.

4. That plaintiffs' claims against defendant Harvey's are barred by the doctrine of laches as a matter of law,

EXHIBIT B

5. That plaintiffs' claims against defendant Harvey's are barred by the doctrines of res judicata and collateral estoppel.

6. That in issuing the administrative permit to defendant Harvey's, Douglas County complied with all applicable local, state and TRPA ordinances, rules and regulations, and said permit was validly issued and is presently valid.

7. That defendant Harvey's has a vested right to complete construction of its project in accordance with the terms of its building and administrative permits.

8. That the Land Use Ordinance §7.13 is not ambiguous and plainly contemplates applications for, and the granting of, heights substantially in excess of 40 feet if the conditions of §7.13 and §8.33 are met.

9. That Douglas County made adequate findings that defendant Harvey's project meets all the conditions of §§7.13 and 8.33 of the Land Use Ordinance, and said determinations and findings are supported by substantial evidence in the record.

10. That the plaintiffs' claims against the defendant Harvey's were not timely raised or asserted before the various administrative bodies that reviewed the Harvey's administrative permit, and that therefore the plaintiffs have failed to preserve said claims for judicial review and the within action is barred for the failure of plaintiffs to exhaust and timely assert available administrative remedies.

11. That the First and Second Causes of Action against defendant Harvey's fail to state a claim for which relief can be granted.

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law set forth above, and good cause appearing, it is hereby

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ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of plaintiffs for Preliminary Injunction be and the same hereby is denied.

2. That the Motion of plaintiffs for Summary Judgment be and the same hereby is denied.

3. That the Motion of defendant Harvey's to Dismiss the First and Second Claims for Relief be and the same hereby is granted.

4. That the First and Second Claims for Relief are dismissed with prejudice and judgment is entered in favor of defendant Harvey's together with costs.

DATED this 5th day of October, 1977.

U.S. DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs-Appellants,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO., and COUNTY OF DOUGLAS,

Defendants-Appellees.

LEAGUE TO SAVE LAKE TAHOE; and THE SIERRA CLUB,

Plaintiffs-Appellants,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS,

Defendants-Appellees.

NOS. 78-1160
78-1224

OPINION

Appeal From the United States District Court for the District of Nevada

Before: MERRILL and SNEED, Circuit Judges, and LINDBERG,* District Judge.

SNEED, Circuit Judge:

Appellants appeal from the district court's grant of appellees' motion to dismiss and denial of appellants' motions for a temporary injunction and for summary judgment in this suit to prevent the construction of four hotel-casinos at the south shore of Lake Tahoe. The appellants are California Tahoe Regional Planning Agency (CTRPA) and the State of California, the League to Save Lake Tahoe (League), and the Sierra Club. The appellees are Douglas County, Nevad

*Hon. William J. Lindberg, Senior United States District Judge for the District of Washington, sitting by designation.

FFI-03-12-6-78

Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc. (Harvey's), and Park Cattle Co. (Park), five in all. In their complaints, all appellants assert that certain administrative action of Douglas County violated the relevant portion of the California-Nevada interstate compact to regulate the Lake Tahoe Basin. The CTRPA and the State of California allege a second cause of action in which they assert a nuisance under federal common law against all appellees except Park. 1/ After a hearing, the district court refused all relief to appellants and granted appellees' motion to dismiss. We affirm.

I.

Factual Background.

A. Facts Directly Relevant To This Case.

This case is only the latest in a series of cases, a sketch of which appears below, in which this court has been called upon to intervene in, interpret, or implement the provisions of the Tahoe Regional Planning Compact (Compact). California and Nevada entered into this Compact in 1968 and Congress gave its consent in December 1969. Public Law 91-148, 83 Stat. 360 (1969). The Compact created a regional agency, the Tahoe Regional Planning Agency (TRPA), with powers to regulate and control development within the Lake Tahoe Basin by adopting a regional plan and adopting all ordinances, rules, regulations and policies necessary to effectuate the plan. See League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517, 518 (9th Cir. 1974), cert. denied, 420 U.S. 974 (1975).

As this court previously noted:

> Pursuant to its mandate, the TRPA adopted various procedural regulations and imposed certain land use, height and density restrictions applicable to developments in the Basin. If a builder wanted to develop more than 200 square

FFI-SS-13-8-78

> feet of land or to erect certain types of structures, he was required first to seek a permit from the local permit-issuing authority (generally, the zoning authority of the county in which the construction was to take place). The permit-issuing authority, according to TRPA regulations, was required to adhere to the policies and land restrictions adopted by the TRPA but was granted the power to issue variance permits under certain circumstances.

California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215, 216 (9th Cir.), cert. denied, 423 U.S. 868 (1975). The TRPA can review variance permits issued by local zoning boards, but must act affirmatively to reverse or modify the permit grant by a dual majority within 60 days or the permit is "deemed approved" and the action of the local authority stands. See California ex rel. Younger v. Tahoe Regional Planning Agency, supra.

The TRPA adopted the ordinance at issue February 1[illegible] 1972. Land Use Ordinance § 7.13 limits the height of buildings in tourist-commercial areas to 40 feet,

> except that the permit-issuing authority, by administrative permit pursuant to Section 8.33, may authorize a greater height to the extent that the permit-issuing authority determines that . . . (4) such greater height will better promote the protection of the environment of the area.

Section 8.33 requires that before issuing an administrative permit, a permit-issuing authority find that the particular use is not detrimental to the general welfare and will not cause substantial environmental consequences.

Each of the four defendant hotel-casino builders received administrative permits issued by the Douglas County Commissioners after hearings and a presentation of evidence. The sizes of the projects ranged in height from 100 feet (Kahle) to 193 feet (Harvey's); in number of hotel rooms from 446 (Park) to 960 (Kahle); and in land coverage from 45% (Kahle) to 75% (Harvey's). Park received the first

permit April 20, 1973; Harvey's received its permit, the last of the four, on June 20, 1973. The Douglas County Board issued written findings for the Jennings and Kahle projects which merely repeat verbatim the findings required by the Land Use Ordinance, but issued no written findings with respect to the Harvey's and Park permits. As the next step, the Nevada Tahoe Regional Planning Agency, a state agency empowered to exercise environmental control over gaming establishments in the Nevada side of the Basin, approved each project. [2/] Finally, as required by TRPA ordinance, each project was presented to the TRPA for review. [3/] In each case the TRPA failed to achieve a dual majority as to the projects, and the projects were "deemed approved." [4/] Measured by sixty days from submittal to the TRPA, on September 20, 1973 Harvey's project, the last of the four projects to be so approved, received its so-called "default approval."

The present appeal springs from two separate actions, both filed in federal district court August 20, 1977 almost four years after the default approvals. One count of each complaint charges that each permit was invalid because not in compliance with the 40 foot height limitation in Land Use Ordinance (L.U.O.) § 7.13. California and the CTRPA also claimed that the building of the projects will result in a common law interstate nuisance adversely affecting California and its citizens. Defendants Jennings, Kahle and Harvey's moved to dismiss on numerous grounds without answering the complaints. Park answered and moved for summary judgment. After hearing oral argument and accepting submitted evidence, the district court issued its opinion on October 20, 1977, dismissing appellants' actions on several grounds. While these cases were on appeal, this court, on September 5, 1978, granted an injunction preventing Harvey's from commencing

FPI-GS-12-6-76

EXHIBIT B

HARVEY'S RESORT HOTEL DESCRIPTION

The proposed expansion of Harveys Resort Hotel will be located on the site of the existing Harveys Hotel and Casino on U.S. Highway 50 at Stateline, Nevada. Presently, about 14 acres of the 18.5 acre site is asphalt paved parking lot serving the existing hotel, casino and restaurant facilities. Approximately eight percent of the present site is unpaved ground with natural tree cover.

The proposed expansion consists of the following elements:

1. A new 22 story hotel tower adding 546 rooms to the existing 194 rooms, for a total of 740 rooms.

2. An expansion and remodeling of the existing casino and supporting areas in a low-rise structure.

3. A new dinner showroom.

4. A multi-level parking garage increasing the parking capacity to about 4,500 cars.

The project will be constructed in several phases. The first phase will consist of the new hotel tower with casino below and approximately 900 additional parking spaces. Future phases will be constructed as required by demand.

The new masterplan for Harveys Resort Hotel will significantly improve the environment of the Stateline area. Adequate parking and onsite circulation that is coordinated with improved access routes from local streets will relieve traffic congestion on U.S. 50. Additional hotel rooms next to the casino will reduce vehicle movements.

The proposed parking garage will place some levels below grade to minimize height and will have its top deck devoted to recreation uses such as tennis courts and a small ice skating rink. This structure will be terraced and landscaped to minimize its mass and preserve views to the Lake and mountains, and improve views of the parking from all hotel towers. Although there will be more cars parked, the visual impression will be far more Alpine than the present sea of cars in the parking lot.

The proposed hotel tower is conceived as a faceted crystaline form that will mirror the surrounding mountains and sky in its surfaces of reflective glass. Rather than a solid mass, the tower will appear to be softened and broken up by clouds, sky and the hills reflected in its surface. The tower is so designed and so placed on the site as to maximize the views of the Lake and not to obstruct the view from other hotel towers.

The proposed masterplan returns a portion of presently paved area to landscaped openspace and landscapes the exterior surfaces of the new parking garage. This will improve the character of the entire Stateline area.

The proposed masterplan includes a terminal for an aerial tramway in a location that is central to all the casinos and will provide direct access to the Heavenly Valley Ski Area. Pedestrian overpasses between the major casinos to the north and east have been planned into this design.

HARVEY'S RESORT HOTEL DATA SUMMARY

EXHIBIT B

SITE

TOTAL SITE AREA:	18.5	AC
ZONING: TOURIST COMMERCIAL; MAXIMUM DENSITY	40	DU/AC
HEIGHT LIMIT:	40	FT
LAND CAPABILITY LEVEL:	7	
EXISTING IMPERVIOUS COVER:	92%	
ALLOWABLE IMPERVIOUS COVER:	92%	

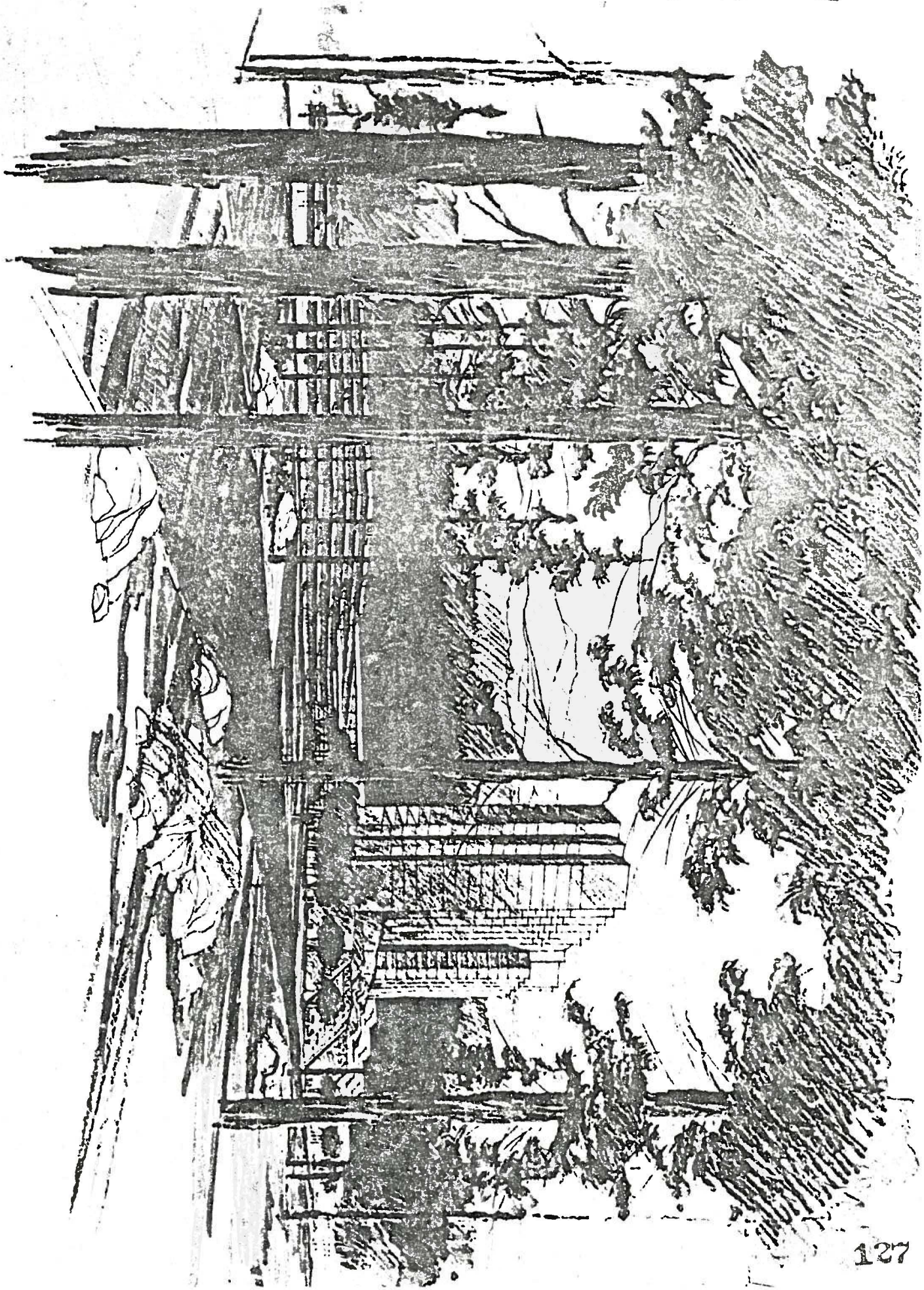
BUILDING

EXISTING TOTAL HOTEL ROOMS:	194	ROOMS
ULTIMATE TOTAL HOTEL ROOMS:	740	ROOMS
EXISTING TOTAL CASINO SPACE:	38,000	SQ. FT.
ULTIMATE TOTAL CASINO SPACE:	98,000	SQ. FT.
EXISTING TOTAL BUILDING AREA:	240,000	SQ. FT.
ULTIMATE TOTAL BUILDING AREA: (Less Garage)	1,070,000	SQ. FT.
ULTIMATE DENSITY:	40	DU/AC
ULTIMATE MAXIMUM BUILDING HEIGHT: No Taller than Harrah's Highest Point		
EXISTING PARKING CAPACITY: (All On Grade)	1,650	CARS
ULTIMATE PARKING CAPACITY: (Most In Garage)	4,500	CARS

IMPACT

EXISTING WATER DEMAND:	82	MG/YR
ULTIMATE WATER DEMAND:	180	MG/YR
EXISTING POWER LOAD:	1,500	KW
ULTIMATE POWER LOAD:	4,000	KW
EXISTING SEWAGE GENERATION:	210,000	GAL/DAY
ULTIMATE SEWAGE GENERATION:	460,000	GAL/DAY
EXISTING AVERAGE DAILY TRAFFIC TO HARVEY'S: (Summer Saturday)	16,230	VPD
ULTIMATE AVERAGE DAILY TRAFFIC TO HARVEY'S: (Summer Saturday)	41,850	VPD
EXISTING YEAR ROUND AVERAGE EMPLOYEES:	2,000	
ULTIMATE YEAR ROUND AVERAGE EMPLOYEES:	4,275	

EXHIBIT B



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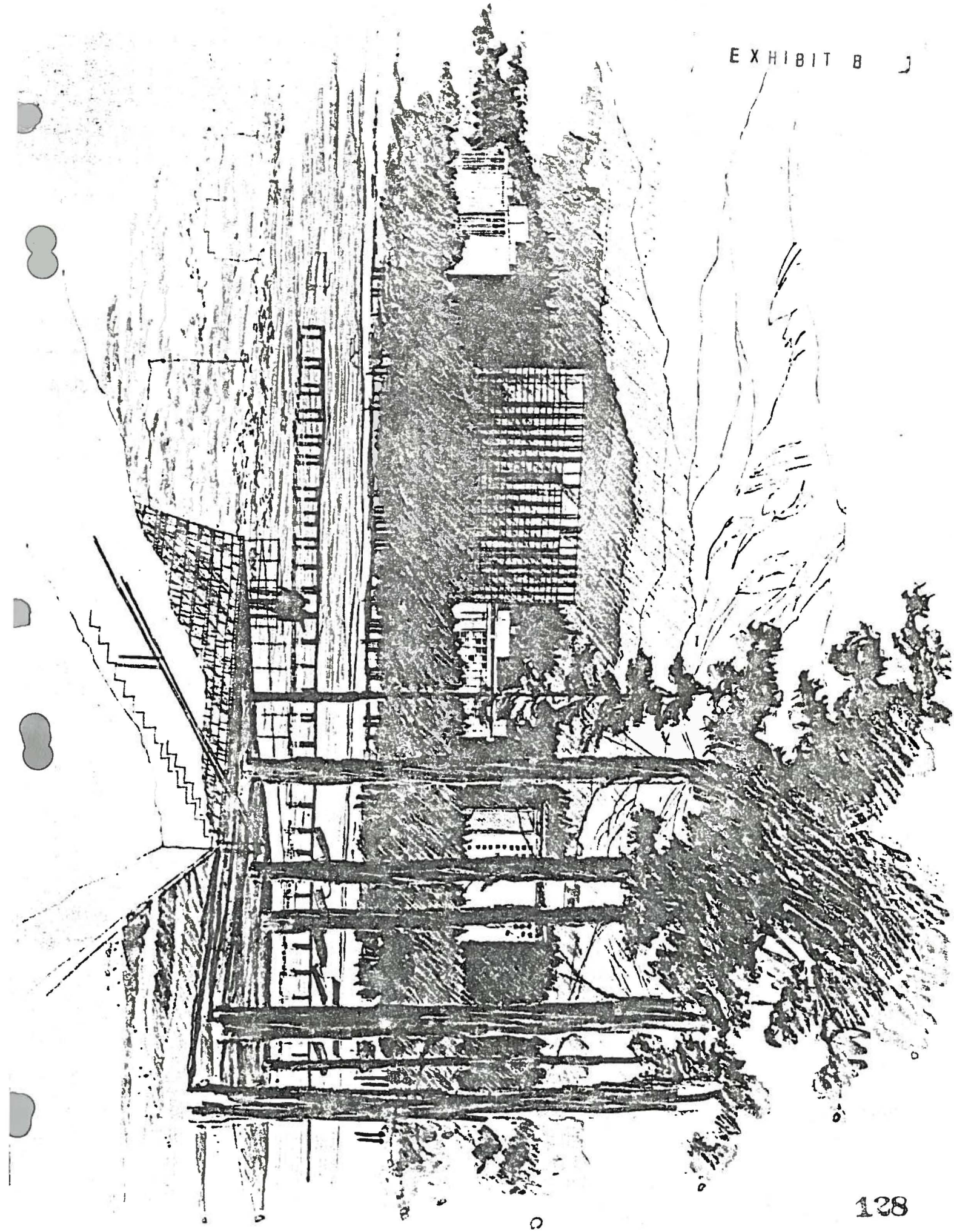

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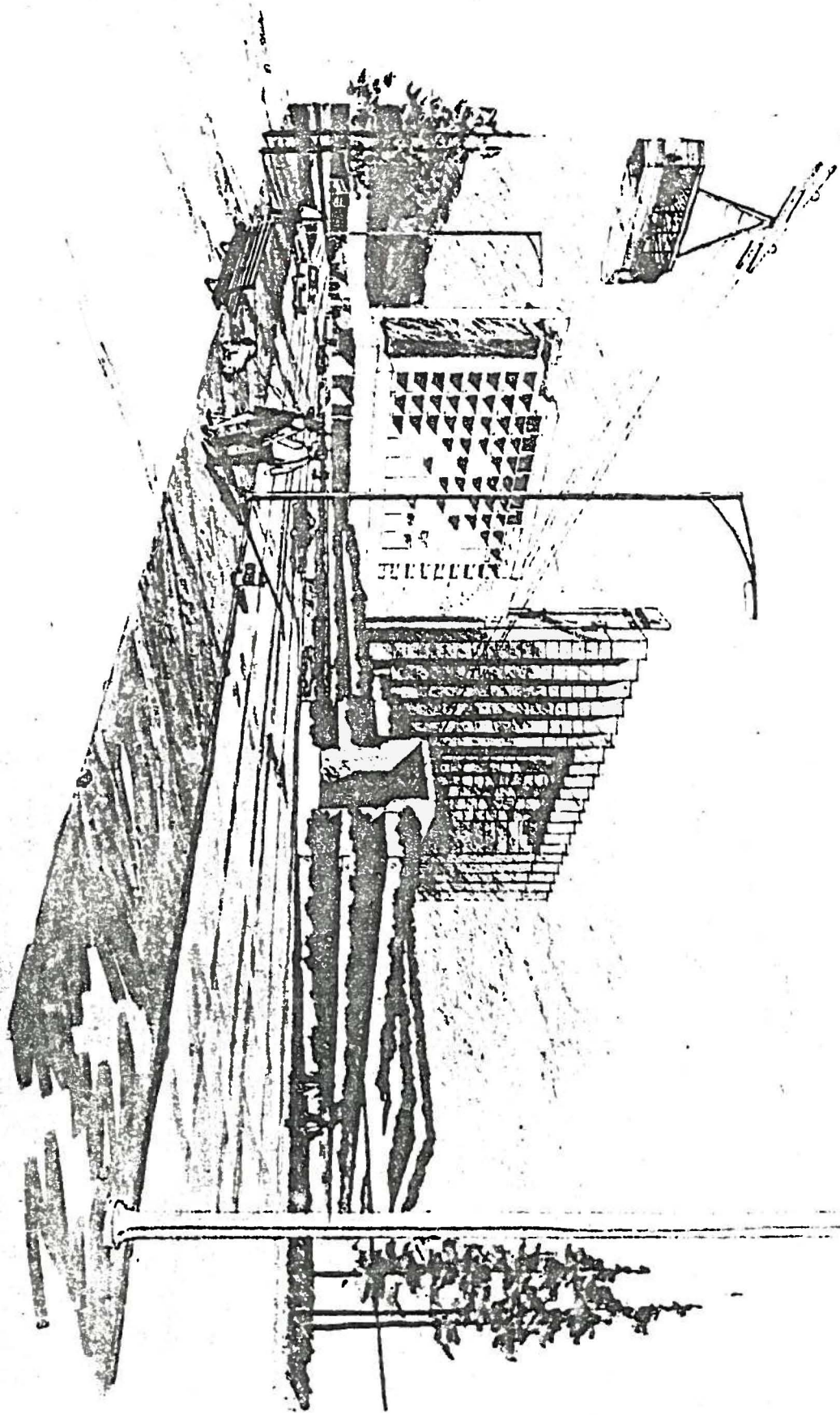

HARVEY'S RE
HOTEL

EXHIBIT B

HARVEY'S RESORT HOTEL

MACKINLAY / WINN / MCNEIL
AIA & ASSOC. INC HITECTS

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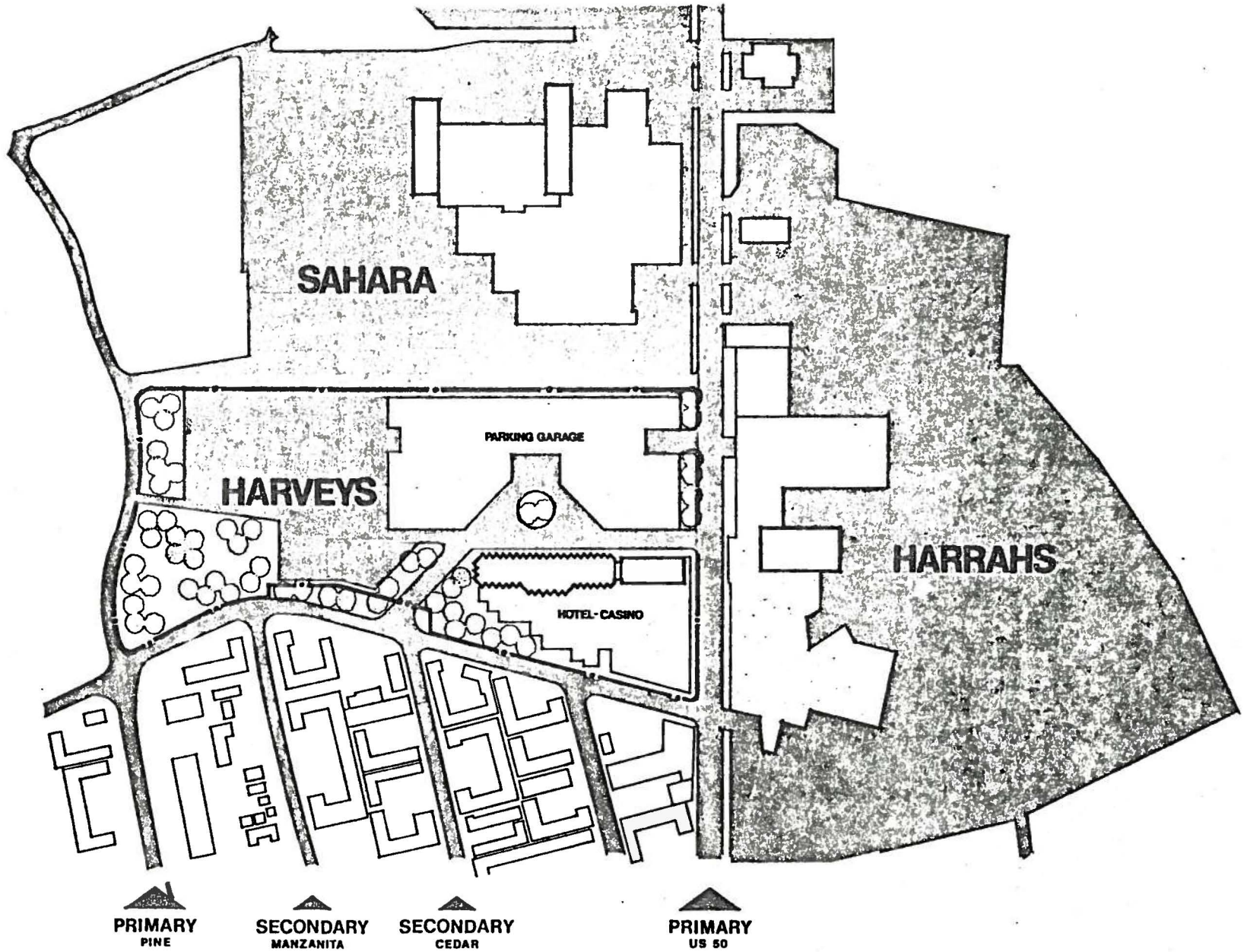
EXHIBIT B



STATELINE
AREA PLAN

HARVEY'S RESORT HOTEL
STATELINE, NEVADA 1973

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
5230 CLAREMONT AVENUE OAKLAND CALIFORNIA 94618

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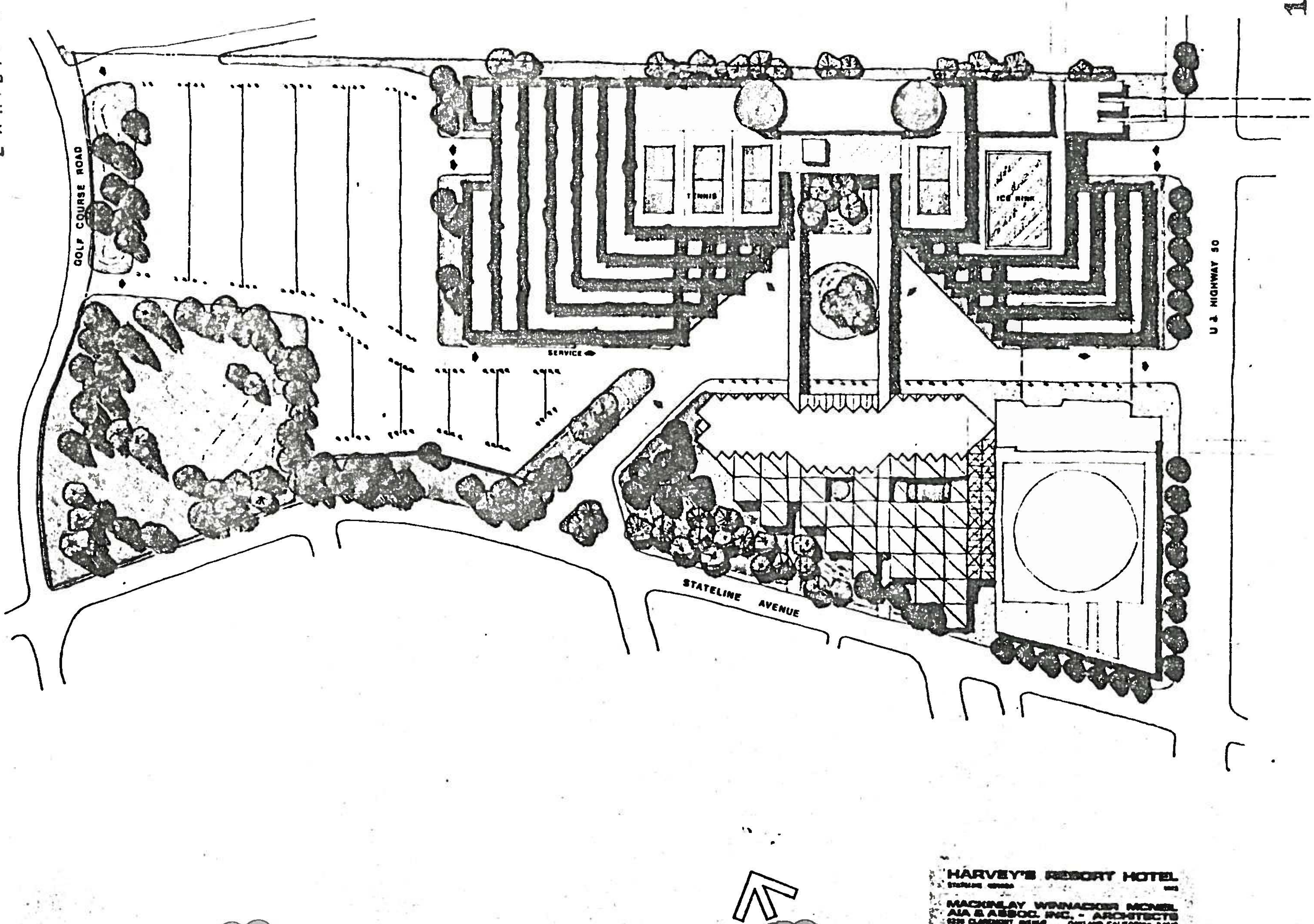
EXHIBIT B

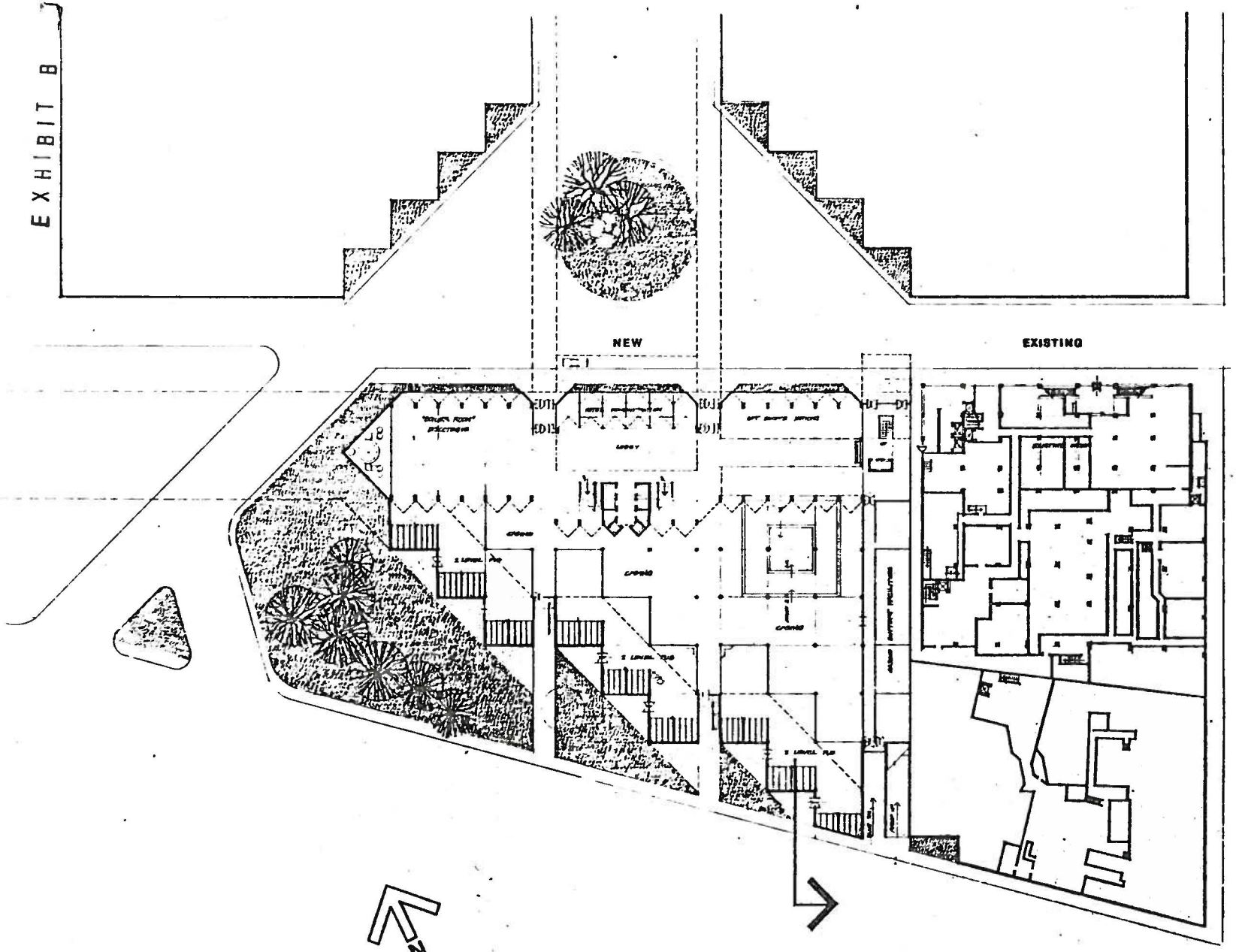


HARVEY'S RESORT HOTEL

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
CLAREMONT OAKLAND CALIFORNIA

SASAKI, WALKER ASSOCIATES INC
SCALE 1" = 50' 4 10 72

EXHIBIT B



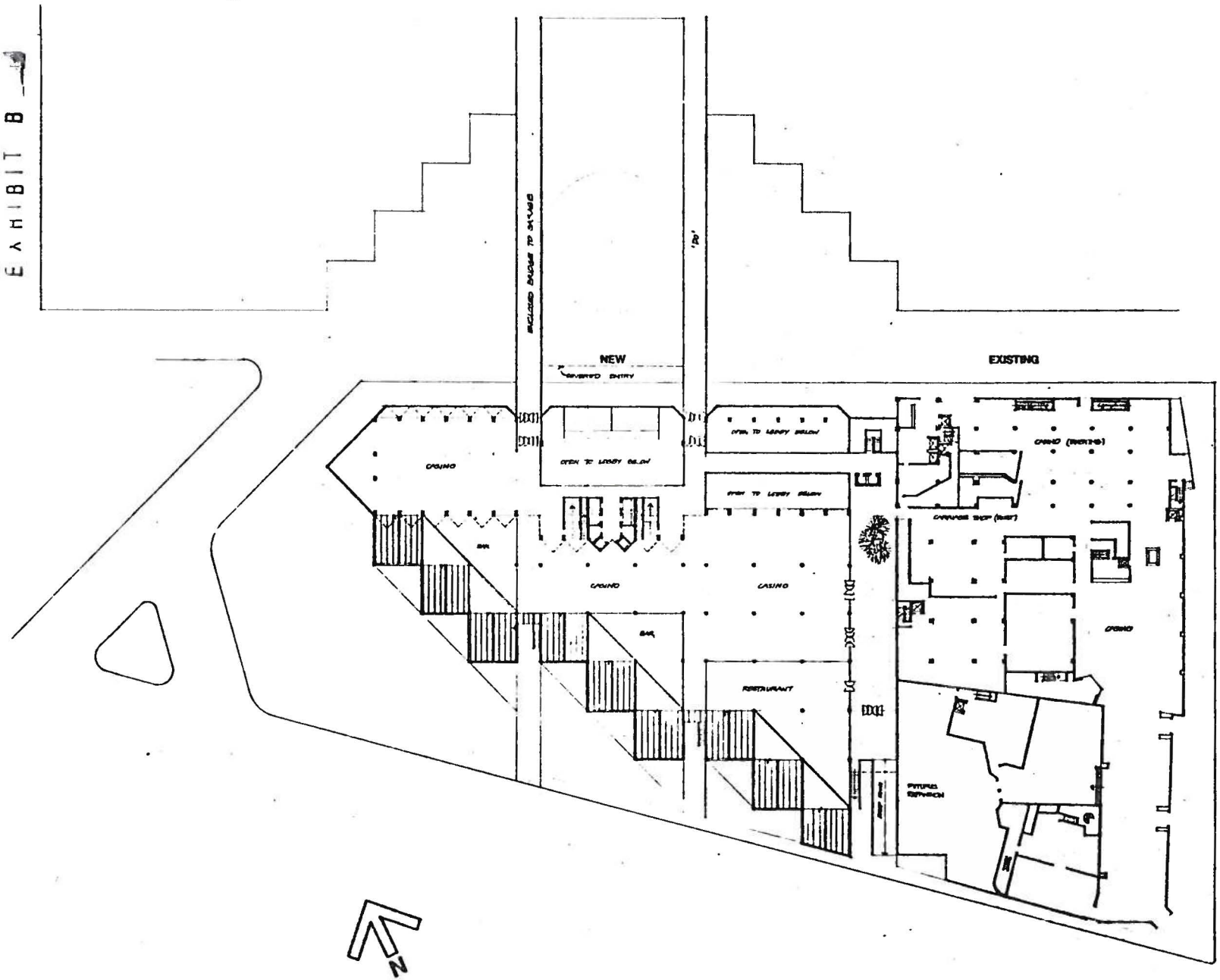
AUTO ENTRY
LOWER CASINO LEVEL

HARVEY'S RESORT HOTEL
STATELINE, NEVADA

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
OAKLAND CALIFORNIA

LEVEL 1

EXHIBIT B



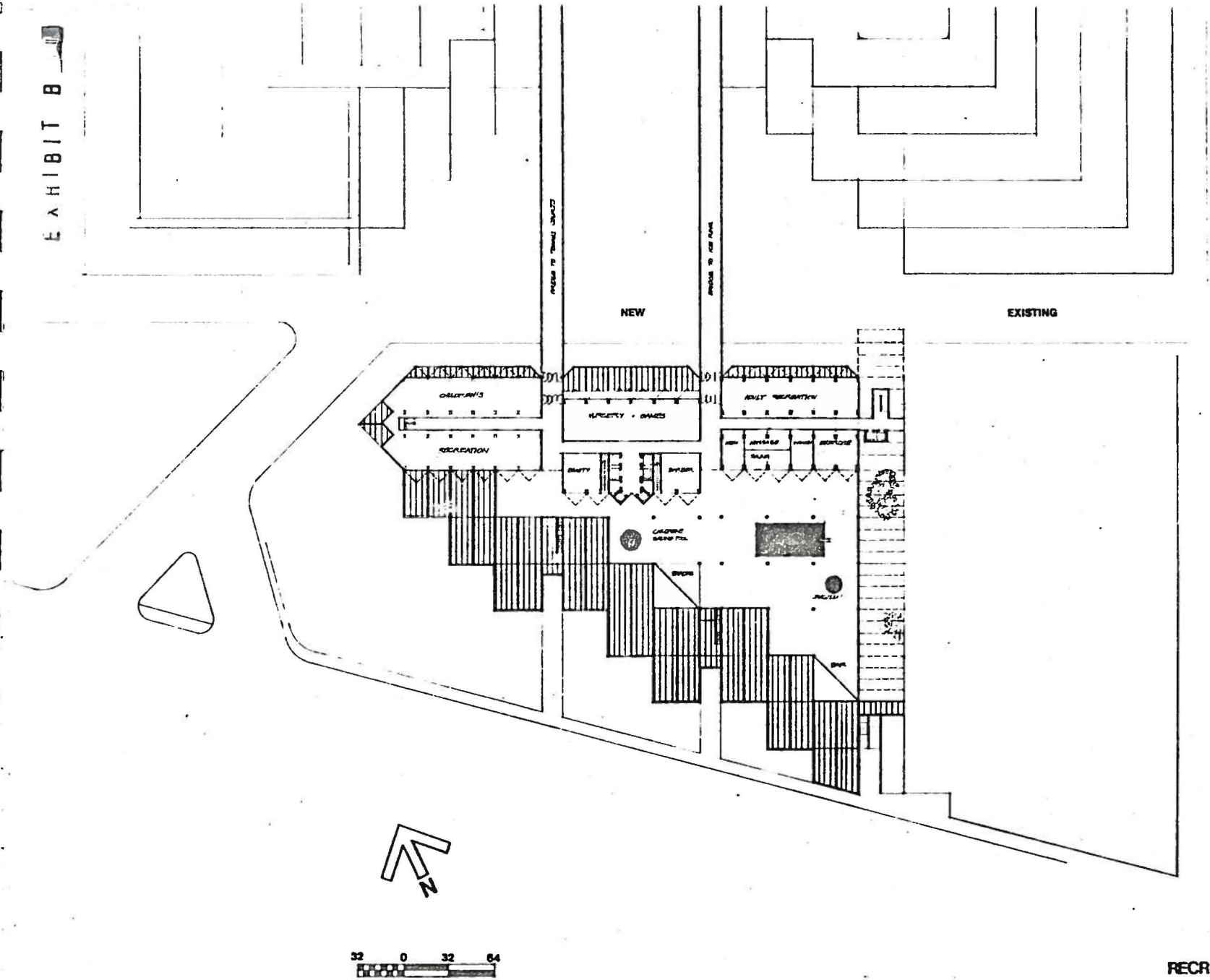
PEDESTRIAN ENTRY
MAIN CASINO LEVEL

HARVEY'S RESORT HOTEL
STATELINE, NEVADA

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
5230 CLAREMONT AVENUE OAKLAND CALIFORNIA 94618

LEVEL 2

EXHIBIT B



RECREATION LEVEL

HARVEY'S RESORT HOTEL
STATELINE, NEVADA

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
5233 CLAREMONT AVENUE OAKLAND CALIFORNIA

LEVEL 3

EXHIBIT B

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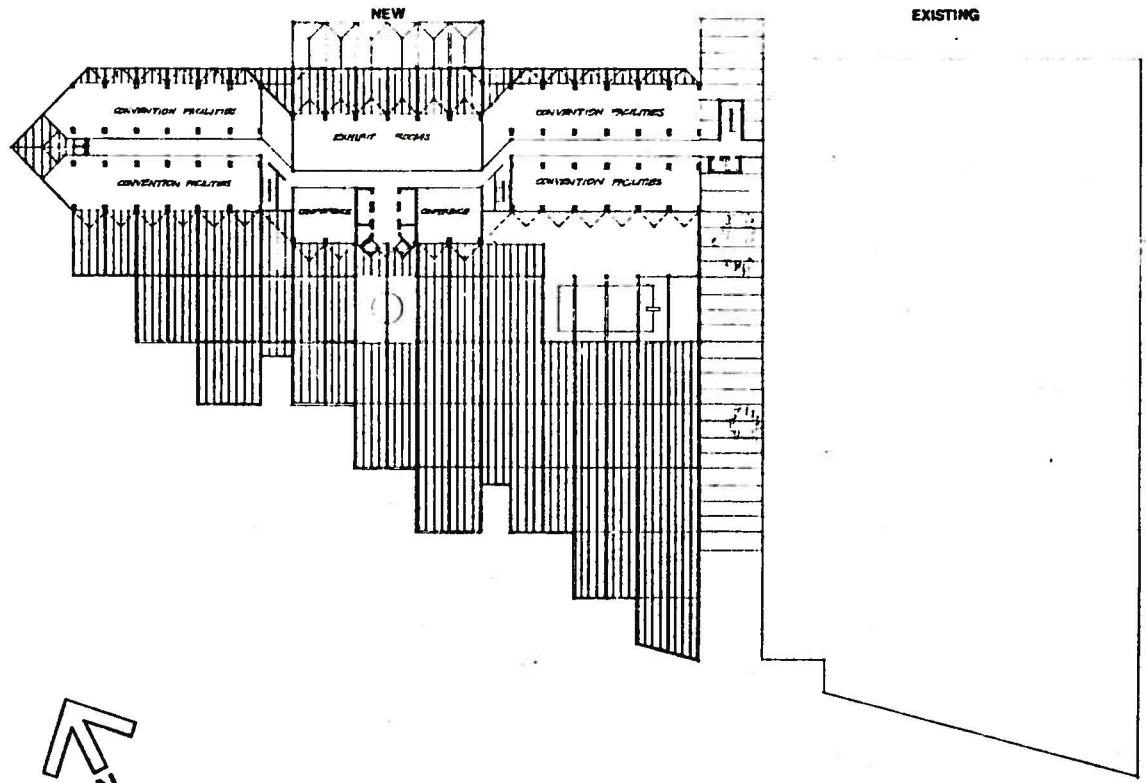

32 0 32 64

CONVENTION LEVEL

HARVEY'S RESORT HOTEL
STATELINE, NEVADA
1973

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
5236 CLAREMONT AVENUE OAKLAND CALIFORNIA 94618

LEVEL 4

EXHIBIT B

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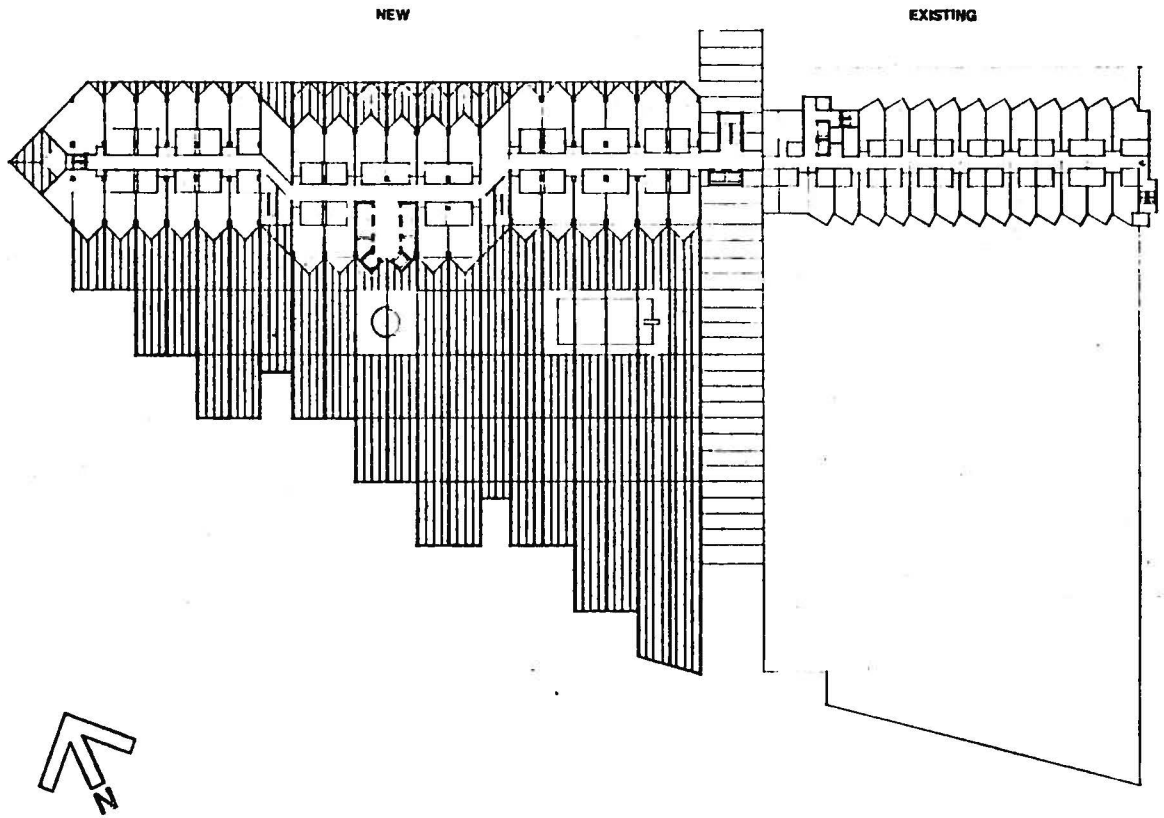

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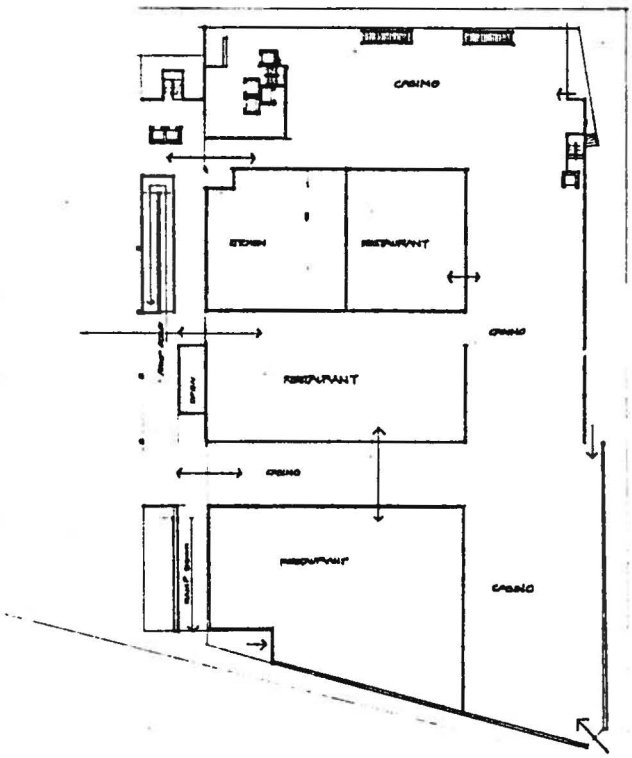
TYPICAL TOWER FLOOR

HARVEY'S RESORT HOTEL
STATELINE NEVADA 1973

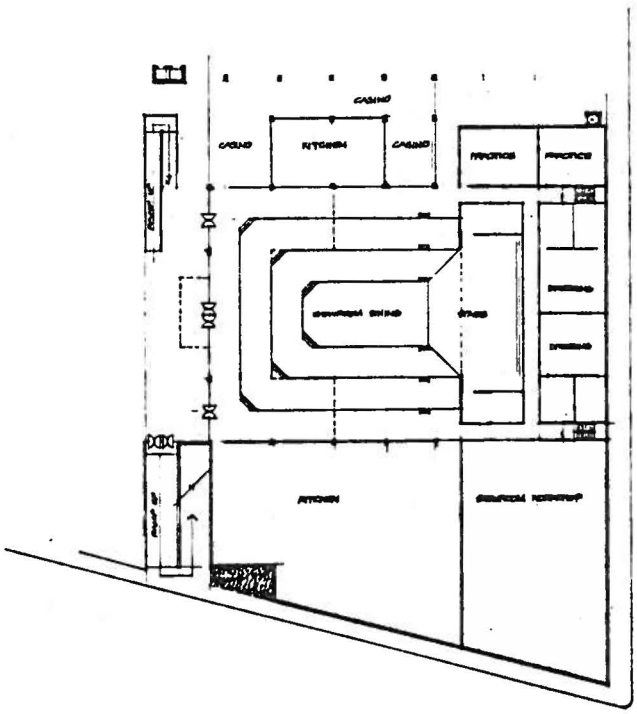
MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
3230 CLAREMONT AVENUE OAKLAND CALIFORNIA 94610

LEVELS 6-21

EXHIBIT B



STREET LEVEL



BASEMENT LEVEL

EXISTING BUILDING
FINAL PHASE

HARVEY'S RESORT HOTEL
STATELINE NEVADA 1973

MACKINLAY WINNACKER MCNEIL
AIA & ASSOC. INC. - ARCHITECTS
5238 CLAREMONT AVENUE OAKLAND CALIFORNIA 94618

EXHIBIT B

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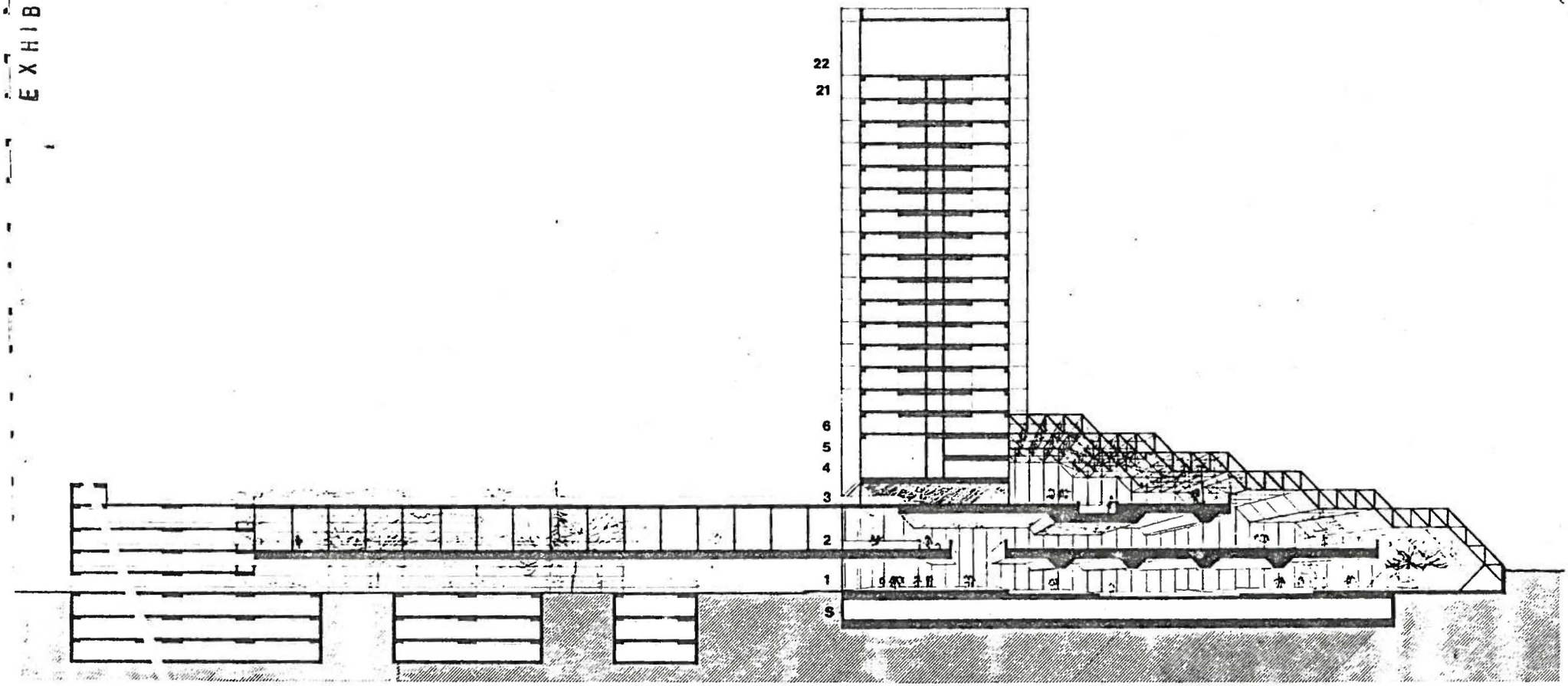

PARKING GARAGE

HOTEL & CASINO

HARVEY'S RESORT HOTEL

MACKINLAY WINNACKER MCNEIL AIA & ASSOC. INC. - ARCHITECTS

SECTION

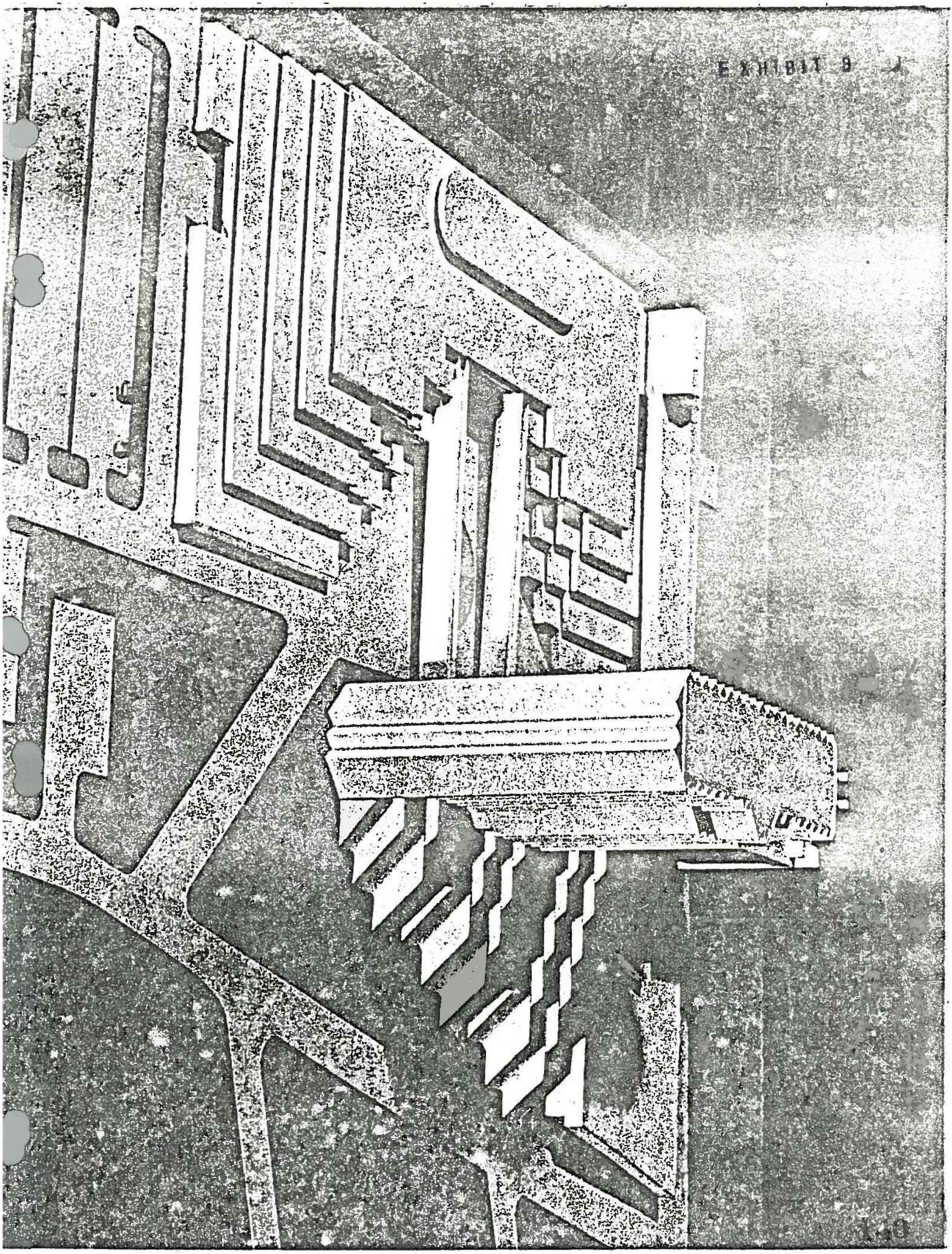
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Exhibit B

IN THE MATTER OF
HARVEY'S
SPECIAL USE PERMIT - PUBLIC HEARING

EXHIBIT B

Mr. Rankin read the Planning Commission recommendations to the Commissioners from the Minutes of the May 26, 1973 meeting. The recommendation was for approval of the Special Use Permit.

Douglas County Commissioners
June 20, 1973

The following is the recommendation the Planning Commission stated must be met prior to the issuance of any other permits from Douglas County.

1. That the directives pointed out in the Environmental Information Report (and any addendums made a part thereof) shall be met.

2. That an Environmental Information Report in final form shall be supplied to the County for review and approval as outlined by the TRPA.

3. That rights of way and improvements therein shall be constructed prior to the issuance of a certificate of occupancy. Such roads and rights of way described shall be sufficient to meet the traffic and transportation requirements as depicted in the Environmental Information Report dated April 26, 1973 and updated May 25, 1973.

4. That the parking lot shall be redesigned taking into consideration existing topography, tree cover and vegetation and landscaped areas provided throughout in compliance with the objectives of Douglas County and the TRPA regulations and ordinances to the satisfaction of the Public Works Director.

5. That the building exterior, color and type, be precisely determine

6. That signing is not made a part of this Special Use Permit but will be considered independently at a later date upon application for same.

Mr. Dennis Small, representing Harvey's Resort Hotel and Ian MacKinley architect and Mickey Laxalt , attorney for Harvey's were present at this meeting.

Mr. Meneley asked when this project was supposed to be started?

Mr. Small stated they planned on doing some of the work this fall. In the Environmental Report we have proposed a storm water drainage treatment plant and we would like to start the excavation for that before winter.

Mr. Meneley asked if this was in conjunction with the other Clubs?

Mr. Small said this is not firmly tied down yet, and we would like to be prepared to do this on our own in case they decided to do something else, however we are prepared to build this storm water drainage treatment plant in conjunction with the other clubs if they sould decide to go ahead with it.

Mr. Small stated this application for a Special Use Permit is the result of 23 months of study and is the best of six plans that we have reviewed. It will be approximately two years before the first phase of this project is completed and 10 years before the whole project is completed.

Roy Godecke made a motion to approve this Special Use Permit for Harvey's Resort Hotel subject to the restrictions imposed by the Planning Commission as outlined in their minutes and with one other restriction--there will be no building permit issued until the transportation problem plan is agreed to by the County Commissioners. Charles Meneley seconded the motion and motion unanimously carried.

construction pending our decision.

B. A Sketch of Prior Litigation.

The present case is only one of several initiated in response to appellees' four projects. Various combinations of plaintiffs and defendants have skirmished inconclusively in both federal and state court. In the first case, filed September 20, 1973, the League and the Sierra Club initiated a suit in federal district court against the TRPA, Harvey's and Park claiming that the TRPA failed to comply with the Compact's requirements and focusing predominantly on the surface coverage provisions adopted by the TRPA. This suit engendered two opinions by this court; neither reached the substance of the claim. Thus, in League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974), after the district court first dismissed the action for lack of subject-matter jurisdiction, we reversed, holding that interpretation of an interstate compact raised a federal question. After remand, in League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F.2d 914 (9th Cir. 1977), we reversed a second dismissal seemingly premised upon impermissible joinder. Subsequent to these two reversals, the parties voluntarily dismissed a third appeal from a denial of a preliminary injunction.

In a second suit, filed August 7, 1974, the State of California attacked the validity of the Jennings and Kahle permits asserting that the permits could not be considered "deemed approved" because the TRPA's vote had failed to yield a dual majority. This court upheld the district court's interpretation of the Compact to the effect that a dual majority was required before any "action" could be taken, and that therefore the failure of a vote to yield a dual majority means that "the local permit issuing authority in

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effect stands affirmed." California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215, 219 (9th Cir.), cert. denied, 423 U.S. 868 (1975). Afterwards, the district court dismissed the action "pursuant to the opinion and mandate of the United States Court of Appeals for the Ninth Circuit" on October 15, 1975.

The League filed suit against the TRPA and all appellees in Nevada state court on August 16, 1974. It claimed that the permit issuances violated TRPA ordinances and state and local permit requirements. The League asserted the same lack of findings and insubstantial evidence claims raised in the present suit. The trial court dismissed the action in September 1975 because the League failed to qualify to do business as a corporation in Nevada prior to filing the complaint. The Nevada Supreme Court affirmed the lower court, going on to state that refiling would be barred by the Nevada 25-day limitation period (N.R.S. § 278.027) for challenges to local land approvals. League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 563 P.2d 582 (Nev. 1977).

Finally, the League filed suit May 3, 1976 in federal district court contending that air quality certificates for the Jennings and Kahle projects had been issued in violation of the Clean Air Act. Dismissed on jurisdictional grounds by the district court, this suit is presently on appeal to this court. League to Save Lake Tahoe v. Trounday, Ninth Circuit No. 77-2058.

II.

Issues To Be Resolved In This Appeal.

To dispose of this appeal we must confront four clusters of issues. Initially, we must decide whether we have jurisdiction to consider the issues that this appeal

presents. Because we conclude that jurisdiction exists, we then must turn to whether L.U.O. § 7.13 permits projects whose height corresponds to that of the appellees' projects. As we hold that such projects are not unconditionally barred by L.U.O. § 7.13, we then must consider whether the process by which Douglas County approved these permits is subject to attack on any valid grounds. Finally, we shall consider whether California can maintain an action in the circumstances of this case under federal common law for interstate nuisance. To these matters we now turn.

III.

Jurisdiction.

Generally, questions concerning the interpretation and application of TRPA ordinances do present federal questions. League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072, 1075 (9th Cir. 1976). But in B.J.K. Corp. we recognized that questions arising under the TRPA ordinances did not invariably present federal questions; rather we adopted a pragmatic approach to determine "when construction of the Land Use Ordinance itself presents a federal question." 547 F.2d at 1074. The touchstone we fashioned is

> whether interstate conflicts in the interpretation and application of the Ordinance may arise that may substantially affect the effective functioning of the Compact and whether, absent a federal trial forum, existing judicial mechanisms supply a practical means for resolving such conflicts.

Id.

Application of the Ordinance to this case is not difficult. The proper interpretation of L.U.O. § 7.13 lies at the heart of this litigation. Appellants argue that the 40-foot height limitation is mandatory and that significant departures can be approved only in accordance with the principles that govern the granting of a variance from zoning regulations. Appellees view the matter differently.

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Were resolution of this dispute left to the courts of Nevada and California differing interpretations of L.U.O. § 7.13 could result. This would impair the effective functioning of the Compact. This is enough to indicate that we have jurisdiction to decide this case. 5/

IV.

The Proper Interpretation of L.U.O. § 7.13.

Section 7.13 of the Land Use Ordinance specifies height limitations for projects in the Tahoe Basin. 6/ In this case, as already indicated, the applicable limit is 40 feet. The section provides that local permit-issuing authorities can authorize heights in excess of 40 feet to the extent that they determine that four factors have been considered, the final one being that the greater height "will better promote the protection of the environment in the area." It further states that only permits for structures of 45 feet or more are subject to TRPA review. Appellants contend that § 7.13 did not comprehend projects such as appellees'. They argue that the section should be read to establish an absolute height limit, or at least to prohibit the material variations present in "high rise" structures.

We begin our analysis with the recognition that "the Compact and the TRPA are sui generis offsprings of a marriage between sovereign partners. . . ." California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d at 218. Section 7.13 cannot be analyzed merely as a traditional zoning ordinance, subject to limited variances. Nor do we think that characterizing the permit as a "special use" permit rather than a "variance" aids the interpretation of L.U.O. § 7.13. Our duty is to interpret the language of the Ordinance in an unstrained manner and in a way that conforms to the design of the Compact. 7/ Focusing initially on the

Compact, it is clear that it was not designed to stop economic development in the Tahoe Basin. Article I(c) states that the parties sought to create a "regional plan of resource conservation and orderly development." (italics added). The ordinance in question was designed to foster the orderliness of development. Does it do so by prohibiting heights significantly in excess of 40 feet? We think not. In the first place, section 7.13 on its face contemplates heights in excess of 45 feet. Projects in excess of that height are subject to TRPA review. Review would not be necessary if such projects were proscribed. It is not possible to state with certainty that 100 to 200 foot heights were contemplated, but nothing in the ordinance explicitly forbids such heights. At the time the Compact was formed and this Ordinance adopted several structures in the Basin were of a height substantially in excess of 40 feet. This strongly suggests that no maximum height was established in the Ordinance so long as the four conditions set out in § 7.13 are met pursuant to proceedings that conform to L.U.O. § 8.33. 8/

This court previously has recognized that the Compact is not the powerful antigrowth measure that some people would wish it to be. California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d at 220. The process through which section 7.13 was adopted conformed to that required by the Compact. Had it been intended to prohibit all high rise construction that intention surely could have been expressed more clearly. Although many undoubtedly believe that heights in excess of 40 feet cannot possibly "better promote the protection of the environment," the Ordinance does not incorporate that belief. We therefore reject the appellants' interpretation of section 7.13. 9/

/ / / / /

V. EXHIBIT B

Attacks On the Douglas County Permits.

Under the Compact, the TRPA has delegated the initial permit granting function to local authorities. Such action is consistent with the jealous retention of sovereignty by the two parties to the Compact. The Douglas County Commissioners issued these permits, pursuant to authority delegated by the TRPA, after applying standards created by the TRPA. Although the Ordinance does not specify the procedures to be used by local permit-issuing authorities, section 3.00 does define an "Administrative Permit" as "A permit issued by a permit-issuing authority in accordance with its procedures." (italics added). The Ordinance thus clearly intended local administrative procedures to apply to the initial issuance. Once issued, § 4.32 subjects these permits to TRPA review, according to the TRPA's own procedures.

A. Reviewability.

Appellants ask us to reach past the TRPA default approval of these projects and to review the validity of the Douglas County permit issuance. Appellees suggest that default approval immunizes Douglas County's issuance from such review. Therefore, we must decide whether under the circumstances of this case the local permit-issuing authority action is subject to review and, if so, under what standards.

We begin by recognizing that this case would present a different question if the TRPA approval was other than by default. In the Younger decision, analyzing the "dual majority" requirement of § 4.32, this court stated:

> [T]he TRPA has broad discretion to reject or approve on the merits each building permit request. However, the TRPA's power of de novo review is fully exercised only when a dual majority for or against a proposal is reached.

516 F.2d at 219.

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Younger characterized a split vote as no "decision." Although the court stated that the decision of the local authority in effect stands affirmed, this only described the operational effect of the TRPA's failure to reach a final decision. This failure should not provide the immunity from review that full de novo review and dual majority approval by the TRPA might. Younger teaches that under the circumstances of this case TRPA's power of de novo review was not fully exercised. Nothing in the Compact or Ordinance suggests that when that is the case the processes of the permit-issuing authority must be considered as valid whether in conformity with its own rules or not. In the absence of such a provision, the presence of which would be anomolous in any event, we believe the processes employed by Douglas County are subject to judicial review. Therefore, we reject the appellees' contention that default approvals immunize Douglas County's issuance of the permits from judicial review.

B. Limitations.

We immediately confront an additional problem, however. These actions were filed more than three years after the default approvals. We must decide what limitations period, if any, is applicable. The issue is not a simple one but we hold that appellants' attack, to the extent it rests solely on compliance with the procedural requirements applicable to Douglas County's issuance of the permits, is barred by Nevada's limitations provisions.

We recognize that by consenting to the Compact, Congress transformed the agreement of California and Nevada into federal law. League to Save Lake Tahoe v. Tahoe Regional Agency, 507 F.2d 517, 523 n.13 (9th Cir. 1974), cert. denied, 420 U.S. 974 (1975); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977), cert. granted, sub.

nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 943 (1978). Moreover, as already indicated, "questions concerning the interpretation and application of TRPA ordinances present federal questions under 1331(a)." League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072, 1075 (9th Cir. 1976). But by consenting to the Compact, Congress did no more than incorporate the agreement of the two parties into the body of federal law; it did not make applicable to the agreement the entire panoply of federal administrative and substantive standards. It cannot be gainsaid that the understanding of Congress about the meaning of the Compact is important; but the actual agreement of the States is certainly no less so. We believe that the proper balance between the respective sovereigns requires that the intention of the two States, acting through the TRPA, govern the meaning of the L.U.O. to the extent that intention is not in conflict with the Compact itself.

To discover this intent the starting point is that TRPA delegated to local permit-issuing authorities the power to issue administrative permits in accordance with their normal procedures. L.U.O. § 3.00. A "Permit-Issuing Authority" is the local government which has the authority and obligation to enforce the Ordinance. Each State establishes the authority of, and manner in which, permit-issuing authorities operate. By delegating initial permit issuing to units of local government, creatures of the laws of the individual states, the TRPA recognized the importance attributed by the two States to retention of their substantially unimpaired sovereignty. The TRPA did not seek to establish one uniform procedural process, rather it established a single standard to be applied by state entities according to their traditional land use determination procedure. The

TRPA retained, of course, discretionary power to overturn or modify this decision if it so chose.

An integral part of the procedures through which local authorities grant land use permits is the manner for contesting the local administrative decisions. An important component of this is the period within which challenges to an administrative decision can be brought. This period establishes the finality of local land use decisions and thus is part of the "procedures" by which permits are granted. That period should be applicable in this case. Here we do not confront a direct attack on an action of the TRPA or a call for an interpretation of the substance of the Ordinance, for which a stronger argument for a uniform limitations period exists. By leaving intact the normal local land use planning procedures in the case of default approvals, different practices were necessarily foreseen by the draftsmen of the Ordinance. So long as review of local zoning approvals is not barred altogether or unreasonably restricted by the state review provisions, differences in limitations periods cannot be said to disrupt the effectiveness of the Compact.

Appellants, nonetheless, contend that they assert a federally created right for equitable relief, to which state limitations should not apply. Holmberg v. Armbrecht, 327 U.S. 392, 395-98 (1948); Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969). That doctrine has no application in this case. Nor can this case be characterized as a federal action seeking the vindication of a public right. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 366-72 (1977), aff'g 535 F.2d 533, 537 (9th Cir. 1976). Here we sit neither as a court in a diversity action, applying state law, nor as a court interpreting a purely federal statutory right and borrowing an appropriate state limitations period. Rather we sit to

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prevent an impairment of the effective functioning of the Compact. As we see it, this functioning is best promoted by adhering closely to both the letter and the spirit of the Compact and Ordinance.

So inclined, we are convinced that the Ordinance defers issues of local permit issuance validity to state determinations. [10/] Only when the state determination misinterprets the Compact or the ordinances, or its procedure fails to provide adequate review to assure compliance with the local procedures, should we impose a federal limitations period whether that period be borrowed or cast in the form of laches. The distinction between the position we occupy in this proceeding and that when applying a federal statute is underscored when it is remembered that under the Compact each State reserved the power to withdraw from the Compact at any time without federal approval. Compact, Article VIII(c). The states, California and Nevada, are thus the primary source of our charter. It is consistent with this reality ordinarily to allow state procedures to control.

The district court held that these actions were barred by Nevada Revised Statutes § 278.027. [11/] That section requires that an action to review a land use classification or any special use or variance authorized by N.R.S. §§ 278.010 to 278.030, inclusive, must be commenced within 25 days of the filing of final notice of the action. Nevada Revised Statutes § 278.025(1) subordinates the powers of local zoning authorities to those of the TRPA, but provides that such local powers shall be exercised wherever appropriate in furtherance of a plan adopted by the TRPA. Thus, administrative permits issued under the delegated powers of the Land Use Ordinance are authorized by the applicable statutory provisions and subject to the 25-day limitation in N.R.S.

§ 278.027.

This latter statute was construed in the Nevada state court action which was commenced by the League and filed within the 25-day limitation period. In that action, the Nevada Supreme Court, as indicated above, upheld the trial court's dismissal of the action on the ground that the League had failed to comply with a prerequisite for bringing suit, i.e., that the League had failed to qualify to do business as a corporation prior to filing its complaint. League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 563 P.2d 582 (Nev. 1977). The court also stated, however, that the League could not refile its suit. The court construed N.R.S. § 278.027 to bar actions commenced more than 25 days after a permit is "deemed approved" through TRPA inaction. For the purposes of these proceedings we adopt Nevada's construction of N.R.S. § 278.027. The appellants' challenge of the Douglas County permits in these proceedings are thus barred by N.R.S. § 278.027. 12/

In so holding, we emphasize that effective land use decisions in particular must be reliable. Those who go before administrative agencies with development projects after a certain period should be allowed to rely on a decision rendered by the particular agency. Of course a balance must be struck between the convenience of developers on the one hand and, on the other hand, the public interest in assuring that laws enacted to protect land use planning are not circumvented by cursory administrative action that becomes unreviewable before the public becomes informed. N.R.S. § 278.027, as construed by the Nevada Supreme Court, permits no such circumvention. It bars review of administrative permits granted under TRPA standards unless an action is filed within 25 days of the time that the permit is "deemed

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approved" by TRPA inaction. [13/] A permit is "deemed approved" only if the TRPA takes no action within 60 days of submittal to the agency. When a permit receives a default approval, parties concerned with administrative action of a local permit-issuing authority in Nevada thus have 85 days from the public filing of the permit by the local permit granting authority with the TRPA to investigate the existence of a cause of action. This minimum 85-day period from local permit issuance is not so short a period that concerned parties are barred effectively from assuring compliance with proper procedures. The fact that one such party managed to meet the deadline on this case indicates the manageability of this limit.

Therefore the Douglas County Commissioners' action cannot be challenged because of an alleged deficiency in its administrative discharge. Inasmuch as the permits were thereafter deemed approved by the TRPA and have been found not to violate the substantive terms of the Ordinance, they are valid in all respects.

VI.

Federal Common Law Nuisance Claim.

Finally, we turn to the request by the State of California and the CTRPA that Jennings', Kahle's and Harvey's projects be enjoined on the ground that their development will result in an interstate nuisance. They premise this claim not on any statute, but upon federal common law. The district court dismissed the claim. As we hold that the appellants did not state a claim for common law nuisance under these circumstances, we affirm.

Appellants do not seek to stop an existing activity on the part of appellees that constitutes a nuisance extending across state boundaries. Instead they seek to

enjoin a threatened or apprehended nuisance. Before determining whether appellants' action will be such under these circumstances, we must decide whether this common law remedy has been precluded by Congressional action.

Appellees contend that even if an action for federal common law nuisance exists, such action is precluded either by the Compact itself, the Clean Air Act, or the Federal Water Pollution Control Act (FWPCA). When Congress approved the Compact, it appended Article VIII, § 5 to the Compact specifically providing:

> [N]othing contained in this Act or in the compact consented to shall in any way affect . . . the applicability of any law or regulation of the United States in, over, or to the region or waters which are the subject of this compact. . . .

We believe this provision clearly indicates that the Compact itself does not preclude the application of federal common law nuisance doctrines. However, although the Compact does not affect the applicability of federal common law nuisance principles, the operation of the Compact may influence the factors that should be weighed in applying these principles and doctrines. It is clear, however, that given an appropriate situation, such an action may be maintained.

The federal pollution control laws also do not preclude this action. The Clean Air Act and the FWPCA each have "citizen suits" provisions professing not to "restrict any right which any person . . . may have under any statute or common law . . . ." 42 U.S.C. § 7604(e), 33 U.S.C. § 1365(e). This exclusion is even broader than that present in the Compact. Moreover, the Supreme Court held in 1972 that the FWPCA had not yet occupied the field, Illinois v. City of Milwaukee, 406 U.S. 91 (1972), and courts have continued so to hold even after the enactment of the 1972 amendments.

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Illinois ex rel. Scott v. City of Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973); United States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556, 559 (N.D. Ill. 1973); United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145, 149 (D. Vt. 1972), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974). See United States v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). We decline the invitation to draw a different conclusion.

The Supreme Court has recognized the validity of federal common law nuisance actions instituted by one state to enjoin damaging activities carried on in another. Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 208 (1901). And the equitable powers of the federal courts are not limited to stopping nuisances already in operation. Long ago the Supreme Court noted that courts of equity "can, not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress . . . ." Mugler v. Kansas, 123 U.S. 623, 673 (1887). The exercise of these equitable powers, however, requires great certainty, and the standards for enjoining a threatened nuisance are stricter than those for stopping an existing nuisance. 14/

> [I]t is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which it is apprehended will create a nuisance . . . the proofs must show such a state of facts as will manifest the danger to be real and immediate.

Missouri v. Illinois, 180 U.S. at 248 (emphasis added).

Appellants assert that appellees' projects

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indirectly will create a nuisance -- that they will attract more people and cars to the Basin, and that inevitably a nuisance will result. We cannot agree. Appellants' allegation is insufficient to establish that the danger of a nuisance in this case is real and immediate. Without more, appellants at this preliminary stage have not met the requirements set forth in Missouri v. Illinois, supra. In so holding we must remember that these projects have passed through the gauntlet of approval established by the Compact and the Ordinance. 15/ The record before the district court manifests the conflicting evidence as to the degree of potential injury. This court cannot set its face against these facts merely because we as citizens might prefer that all development be barred from the Tahoe Basin. Much of modern life is distasteful, but the federal common law of nuisance bestows upon us no power to root out that which happens to offend both us and a vigorous plaintiff.

Only two previous federal cases have involved threatened nuisances. Neither provides a precedent for what the appellants seek here. In Missouri v. Illinois, supra, Missouri brought a direct suit in the Supreme Court to enjoin Illinois and the Sanitary District of Chicago from using a channel built to divert 1,500 tons of untreated sewage a day from Lake Michigan to tributaries which joined the Mississippi River 43 miles above St. Louis. The Court stated that the case involved a bill alleging, in explicit terms, that "damage and irreparable injury would naturally and necessarily be occasioned by acts of the defendants . . . ." 180 U.S. at 248. In this case, no such direct and immediate connection exists. Moreover, by the time the Supreme Court decided the case, the channel had been in operation one year and the real and immediate threat of a nuisance had become a

pollutionful reality.

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In a more recent case, Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), the Tenth Circuit recognized that a threatened nuisance could be enjoined. It reversed a district court dismissal for lack of jurisdiction of a federal common law negligence action to enjoin the use, both actual and threatened, of a certain pesticide on lands that drained into a river flowing into Texas. Both the district court and the Tenth Circuit Court initially had denied preliminary injunctions. By the time the circuit court issued its opinion holding that federal jurisdiction existed, actual spraying had occurred. To avoid the defendant's suggestion that the suit was moot, the court characterized the action as one to enjoin further spraying. The opinion does not discuss the problems that normally attend an effort to enjoin a threatened nuisance.

This case is unique. California entered a Compact, later approved by Congress, to help coordinate and control growth and development in the Tahoe Basin. As equal parties in the interstate agency developed under the Compact, California participated in the adoption of a regional plan and ordinances to regulate new construction in the Basin. Pursuant to established procedures the appellants' projects, which do not violate the ordinances' substantive provisions, have been approved. Now California seeks to prevent construction of these projects by invoking the equitable powers of the federal courts to enjoin interstate nuisances. Fundamentally, it contends the projects will harm the environment of the region. This may be so, but not every injury to the environment is a nuisance under the federal common law. A fortiori, not every threatened injury can be enjoined as a potential nuisance. The line is not a bright one, but we

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cannot consider high rise hotels and their occupants as indistinguishable from untreated sewage, noxious gases, and poisonous pesticides.

We therefore affirm the judgment of the district court and lift our injunction preventing Harvey's from commencing construction.

AFFIRMED.

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FOOTNOTES

1/ The State of California and the CTRPA have abandoned their appeal against Park, therefore the federal common law interstate nuisance action remains only against the other appellees.

2/ The Nevada Tahoe Regional Planning Agency (NTRPA) did not come into existence as a functioning legal entity until April 30, 1973, ten days after the Douglas County Commissioners appr the Park permit. Nevertheless, the Park project received approval from NTRPA on June 14, 1973.

3/ Section 4.10 of the Land Use Ordinance specifies two instances in which a permit is required before construction of a project can be commenced: (1) any project that will cover more than 200 square feet; (2) any construction that requires an administrative permit or variance permit under one or more of the substantive requirements of other sections of the Ordinance. Section 4.30 sets out the process for Agency revie of these locally issued permits. Permits issued under § 4.10(1) above do not require TRPA review. (§ 4.31). The local permit-issuing authority must notify TRPA of all applications for and issuances of permits. Section 4.34 requires that permits issued under § 4.10(2), such as those at issue in this case, be screened by the TRPA staff for review. The staff then must make a report with a recommendation to the TRPA for its action. Thus review of the permits at issue was mandatory, and the Douglas County Commission was responsible to notify TRPA that the permits had issued.

4/ The TRPA staff recommended denial of the Jennings and Kahle permits, but on July 25, 1974 the TRPA failed to reach a dual majority. Although all five California representatives voted against the projects, three of the five Nevada representatives voted for approval. The Harvey's project also receive a negative staff recommendation, but four of five Nevada representatives and two of five California representatives voted to approve the project. Park's project had a positive staff recommendation, but a majority of the California representatives voted against the project.

5/ Because this federal question is substantial, pendant jurisdiction supported the district court's treatment of the attack on the procedural aspects of the Douglas County action. We therefore need not decide whether a simple attack on the administrative grant of a local permit-issuing authority under the Ordinance would itself support federal jurisdiction.

6/ Section 7.13 of the Ordinance provides, in part:

> No building or other structure erected in any land use district shall have a height greater than that specified below except that the permit-issuing authority, by administrative permit pursuant to 8.33, may authorize a greater height to the extent that the permit-issuing authority determines that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area. Only those administrative permits that allow a building or other structure of a height of 45 feet or more shall be subject to Agency review pursuant to Section 4.32. . .

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7/ This court previously isolated the task a court must face in approaching the Compact and the Land Use Ordinance:

> California makes a critical error in likening the Compact to ordinary zoning legislation and the TRPA to a typical zoning board. In interpreting the provisions of the unique statutory scheme involved here we must look not to Robert's Rules of Order or decisions dealing with the votes of zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history.

California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d at 218.

8/ Section 8.33 states:

> Administrative permits may be issued for any of the uses or purposes for which such permits are required by the terms of this ordinance. Such permit may be granted only if it is found by the permit-issuing authority that the establishment, maintenance, or operation of the use or purpose in the particular case is not detrimental to health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

9/ Appellants make the argument that this Ordinance provision is violated as a matter of law when no trade-off is established between height and land coverage. Because in this case such a trade-off occurred, we do not reach appellants' contention.

10/ Because whether substantial evidence supported the local determination or whether written findings of the local permit-issuing authority are required also are aspects of the local permit-issuing and challenge process, these are issues of state law and not interpretations of the Ordinance. They can therefore be reviewed only to the extent the state procedures allow review, so long as some opportunity for challenge exists

11/ That section provides:

> 278.027 Judicial relief, review of actions, decisions of governing bodies: Time for commencement. No action or proceeding shall be commenced for the purpose of seeking judicial relief or review from or with respect to any final action, decision or order of any governing body, commission or board granting or changing any land use classification or granting any special use or variance authorized by N.R.S.

§§ 278.010 to 278.030, inclusive, unless such action or proceeding is commenced within 25 days from the date of filing of notice of such final action with the clerk or secretary of such governing body, commission or board.

12/ We reject the State of California's argument that limitations are not applicable to it because it is a sovereign. Irrespective of the validity of this argument otherwise, California is not a sovereign to enforce procedural compliance with Nevada local land use planning decisions.

13/ Appellants also assert that § 278.027 requires the filing of notice of final action with the clerk or secretary of the local permit-issuing authority after the default approval and that no such filing was made with Douglas County in this case. The Nevada Supreme Court, however, construed the statute to preclude actions commenced more than 25 days after an action was "deemed approved." League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 563 P.2d 582 (Nev. 1977). The court did not discuss the filing question. By holding as it did, however, the court appears not to require a filing subsequent to the default approval. We adopt this view.

14/ The standard courts have applied to threatened nuisances has been distilled in 58 Am. Jur. 2d § 147, pp. 724-26:

> [I]t is established that a court of equity may enjoin a threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result from the contemplated act. . . .
>
> A proposed use of land will not be restrained where it will not inevitably constitute a nuisance. If the complainant's right is doubtful, or the thing which it is sought to restrain . . . will not necessarily become a nuisance, but may or may not become such, depending on the use or manner of operation, or other circumstances, equity will not interfere.

Id. (emphasis added, footnotes omitted), citing Missouri v. Illinois, 180 U.S. 208 (1901).

15/ In holding that the Compact approval mechanism affects the viability of an anticipatory federal common law nuisance action, we do not imply that governmental approval of these projects precludes a nuisance action at such time in the future as California can allege that it clearly appears that a nuisance necessarily will result. We hold only that at this time a prospective nuisance cannot necessarily result from this project which does not conflict with the regional plan adopted by both states under the Compact and which has been approved in compliance with the Land Use Ordinance adopted by the TRPA.

FFI-83-12-6-76

EXHIBIT C

SENATE BILL 323 - SUGGESTED AMENDMENTS MARCH 20, 1979

a. Line 12: Between "structure" and "to" add:
or accessory structure

b. Line 27: after 1979. Add new sentence:
Public area shall not be constructed as an accessory facility or as an accessory use.

c. Line 28: between "conducted" and "on" add:
nor may public areas be created

d. A definition of "public area" should be added.

TAHOE REGIONAL PLANNING AGENCY

EXHIBIT D

RESOLUTION 77-1

WHEREAS, the Tahoe Regional Planning Agency has operated since its creation in 1970 under authority granted by the States of California and Nevada, and the United States Congress through the Interstate Compact created by Public Law 91-148; and

WHEREAS, said Compact mandates the Tahoe Regional Planning Agency to insure a balance between "resource conservation and orderly development" within the Lake Tahoe Basin; and

WHEREAS, the rate of growth of the principal industry of any region will exert a major influence upon the ability of that region to maintain equilibrium between resource conservation and orderly development; and

WHEREAS, employment figures for the Tahoe region clearly show the gaming industry to be the principal industry of the region; and

WHEREAS, provisions of the Interstate Compact have severely limited the ability of the Tahoe Regional Planning Agency to influence the rate of growth of the gaming industry in the Tahoe Basin; and

WHEREAS, data developed over the past three years has recently been aggregated and analyzed by the staff of the Tahoe Regional Planning Agency in its report on Impacts of Potential Hotel/Casino Expansion at Lake Tahoe; and

WHEREAS, said report identifies a very high probability of severe transportation, air quality, housing and public facility impacts as a result of gaming industry expansion already approved within the Tahoe Basin; and

WHEREAS, said report also identifies a potential for major expansion of the gaming industry in the Tahoe Basin beyond those existing approvals; and

WHEREAS, the Tahoe Regional Planning Agency remains severely limited in its ability to influence such expansion of the gaming industry in the Basin; and

WHEREAS, there is a high probability of such expansion adversely affecting the use of the public lands in the Basin.

NOW, THEREFORE BE IT RESOLVED by the Governing Body of the Tahoe Regional Planning Agency that said report be formally transmitted to the Legislatures of the States of California and Nevada, and to the United States Congress; and

BE IT FURTHER RESOLVED that said Legislators be urgently requested to review the provisions of the Interstate Compact and to develop such revisions to said Compact as may be necessary to insure that any expansion of the gaming industry in the Tahoe Basin is brought under more adequate control and that the balance between resource conservation and orderly development within the region is thereby maintained.

PASSED AND ADOPTED by the Governing Body of the Tahoe Regional Planning Agency this 11th Day of February, 1977 by the following vote:

Ayes: Mr. Wynn, Mr. Meder, Mr. Bensinger, Mr. Cooke, Mr. Stewart, Mr. Henry, Mr. Scott

Nays: Mr. Burns, Mrs. Onorato

Abstain: None

Absent: Mr. Kjer

DICK SCOTT, Chairman