IN THE SUPREME COURT OF THE STATE OF WYOMING

ROGER SEHERR-THOSS, d/b/a RST SAND & GRAVEL and/or RST EXCAVATION AND TRUCKING, Appellant v. TETON COUNTY BOARD OF COUNTY COMMISSIONERS and TETON COUNTY PLANNING DIRECTOR, Appellees	S-13-0086

ANSWER BRIEF OF TETON COUNTY BOARD OF COUNTY COMMISSIONERS and TETON COUNTY PLANNING DIRECTOR

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INTRODUCTION AND STATEMENT OF THE CASE

Petitioner, Roger Seherr-Thoss d/b/a RST Sand & Gravel and/or RST Excavation and Trucking ("RST") owns a 299.76 acre parcel of land[1] located at

[1] RST asserts that the parcel of land at issue is 350 acres. RST Br. at 6. The district court found that the RST parcel is about 300 acres in size, and the County

4520 South Park Loop Road, Teton County, Wyoming. Findings of Fact, Conclusions of Law and Order at ¶2 ("Board's Decision"), R. Admin. Vol. III, p. 581 (Appellees' Appendix at 10).[2] RST conducts a gravel operation that includes

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uses that figure. Order Affirming Administrative Action at Background Facts ¶ 1 ("Dist. Ct. Order"), R. Dist. Vol. II, p. 724 (Appellees' Appendix at 1).

[2] For the sake of consistency, Teton County adopts the citation convention used by RST in its opening brief, *see* RST Br. at 6 n.1. The County refers to the record of proceedings before the County as "R. Admin." and the record of proceedings before the district court as "R. Dist."

The record of proceedings before the County contains seven volumes. The first three volumes contain the pleadings from the administrative proceedings and are consecutively paginated. The fourth volume contains the exhibits filed by the parties and is not paginated, but the exhibits are sequentially numbered. The fifth, sixth, and seventh volumes contain the transcript of the contested case hearing. Although these volumes are consecutively paginated, they are separately paginated from the first three volumes.

extraction, screening, stockpiling, and crushing. R. Admin. Vol. IV, Ex. 7, Ex. 12. It is close to the Melody Ranch subdivision and abuts South Park Loop Road. R. Admin. Vol. IV, Ex. 120.

Since becoming aware of the gravel operation in 1995, the Teton County Planning Department has maintained that RST's operation fails to comply with the Teton County Land Development Regulations (LDRs), which were first enacted in 1978. R. Admin. Vol. VI, trans. pp. 502-03;[3] R. Admin. Vol. IV, Ex. 117. After years of unsuccessfully working with RST to bring the operation into compliance, in 2010 the Planning Director issued a Notice to Abate, recognizing RST's grandfathered right to screen and stockpile gravel at pre-1978 levels, but ordering the company to cease gravel extraction and crushing because these

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The record of proceedings before the district court consists of two consecutively paginated volumes.

[3] There is a discrepancy between the page numbering for R. Admin. Volumes V, VI, and VII and the page numbering for the transcript itself. In the interest of clarity, all pinpoint cites in the County's brief will reference the page numbering of the transcript.

were not lawful nonconforming uses. R. Admin. Vol I, p. 1. In 2011, an Amended Notice to Abate cited RST for unlawful expansion, R. Admin. Vol. I, p. 35, and advised RST that (i) its extraction and crushing were not lawful nonconforming (grandfathered) uses and (ii) any gravel-related activities that were grandfathered had unlawfully expanded. R. Admin. Vol. I, p. 37. RST failed to abate. A three-day contested case hearing ensued.

Following the hearing, the Board held that while RST had met its burden to prove that its gravel operation was a nonconforming use, the operation had unlawfully expanded beyond the levels occurring when the County adopted its LDRs and must be abated. Board's Decision at ¶ 122, R. Admin. Vol. III, pp. 606-07 (Appellees' Appendix at 35-36). Per the Board's abatement order, RST may continue to operate but must comply with the following:

> 1. Any gravel operation located at 4520 South Park Loop Road shall disturb not more than three (3) acres at any one time. This three (3) acre limit shall include gravel extraction, screening, stockpiling and crushing. Ponds not used for excavation shall be excluded from the three (3) acres that can be disturbed for the gravel operation at any one time. The 5.68 acre pond (Ex. 121) that already exists on site shall be excluded from this three (3) acre limit, provided that any expansion or enlargement of this pond for extraction shall count toward the maximum three (3) acres permissible disturbance. In the event extraction resumes from the

1.39 acre pond that exists on site, (Ex. 121) this acreage shall be counted toward the maximum three (3) acres permissible disturbance.

2. Within sixty (60) days of Teton County adopting these *Findings of Fact, Conclusions of Law and Order*, RST or the current property owner shall submit a reclamation plan to the Teton County Planning Department for review and approval which will reduce the size of the gravel operation to three (3) acres as described above. A surety shall be provided to the Planning Department consistent with the LDRs. All terms of the approved reclamation plan shall be completed in a timely manner.

3. To ensure that volumes do not exceed the 15,000 cubic yards or 17,000 tons per year approved by the Board of Commissioners, scale receipts for the gravel operation shall be submitted to the Planning Department no later than January 31 of each year beginning in 2013 for the prior year. Amounts in excess of permitted volumes shall constitute a violation of this Order.

4. Hours of operation on site shall be limited to Monday through Friday, 7:00 am to 5:00 pm.

5. The gravel operation shall comply with all requirements of the Department of Environmental Quality Land Quality and Air Quality Divisions.

Board's Decision at Order to Abate, R. Admin. Vol. III, pp. 608-09 (Appellees' Appendix at 37-38). The district court affirmed the Board. Order Affirming Administrative Action ("Dist. Ct. Order"), R. Dist. Vol. II, pp. 724-731 (Appellees' Appendix at 1-8). RST appealed to this Court.

STATEMENT OF FACTS

Teton County enacted its first zoning regulations (LDRs) in 1978. R. Admin. Vol V., trans. p. 196. Under the LDRs, RST's property was zoned Residential-Agricultural, R. Admin. Vol. V, trans. p. 64, where gravel operations were prohibited. R. Admin. Vol. V, trans. p. 65.

In 1978, RST had a small-scale gravel operation. An aerial photograph from 1978 shows two disturbed areas on the property, one of which included a pond, totaling 1.04 acres of disturbed land. R. Admin. Vol. VII, trans. p. 641; R. Admin. Vol. IV, Ex. 120. Witness testimony, including statements by Seherr-Thoss and his ex-wife, confirmed that in the early 1970s, RST dug a pond to begin "playing in the gravel." R. Admin. Vol. V, trans. pp. 213, 292. The operation extracted and crushed one to eight loads of gravel per day, two to three days a week, during the summer months only. R. Admin. Vol. V, trans. pp. 306-307. RST's equipment in the 1970s was limited to an old backhoe, a dump truck, a small portable crusher without a screener, and a small CAT. R. Admin. Vol. V., trans. pp. 296-97, 306. Even as of 1995 - 1996, the operation was still small in scale, covering three acres with only gravel screening and stockpiling

occurring on site. R. Admin. Vol. VI, trans. pp. 405, 437; R. Admin. Vol. IV., Ex. 6, Ex. 117.

Although gravel operations were prohibited in RST's zoning district,[4] the Planning Department was unaware of the operation and thus did not take any enforcement action against it between 1978 and 1994. R. Admin. Vol. V, transcripts p. 90; R. Admin. Vol. VI, transcripts pp. 497, 502-03; R. Admin. Vol. IV, Ex. 65. The evidence presented at the hearing revealed that only persons who actually went onto the property or viewed it through binoculars knew of the operation's existence. R. Admin. Vol. V, trans. pp. 256, 273-74, 275; R. Admin. Vol. VI, trans. p. 585. Even the County's main gravel producers during the 1970s, both of whom had a business interest in knowing the local gravel sources, frequently drove by RST's property, they were unaware of the gravel business. R. Admin. Vol. VI, trans. pp. 461-2, 464, 476-78. The Board thus concluded that "[t]hose witnesses who simply drove by and did not have an opportunity to be

[4] In 1994, the 1978 LDRs were repealed and replaced. R. Admin. Vol. V, trans. p. 60. Under the 1994 LDRs, RST's property was re-zoned rural. Gravel mining continued to be a prohibited use. R. Admin. Vol. V, trans. pp. 76-78.

on the property, did not observe the operations most likely because it was a small seasonal operation." Board's Decision at ¶¶ 77-78, R. Admin. Vol. III, p. 595 (Appellees' Appendix at 24). In addition, despite Seherr-Thoss' and his ex-wife's claim of having sold gravel to the County during the 1970s, R. Admin. Vol. V., trans. pp. 230, 309-10, the County Road and Levee Supervisor beginning in 1979 did not recall any such purchase; he hired Seherr-Thoss only to do hauling and trucking for the County.[5] R. Admin. Vol. VI, trans. pp. 482-83, 487.

In the mid-1990s, the Planning Department began to determine what gravel sources existed countywide to better understand supply and demand issues. R. Admin. Vol. VI, trans. pp. 495-96. Former Planning Director Bill Collins stated that during the 1990s, "[i]t was an objective of the County, and an objective of me and my department, to try and locate sources of gravel and make it possible for them to be permitted." R. Admin. Vol. VI, trans. p. 505. *See also* R. Admin. Vol. IV, Ex. 65, Ex. 70; R. Admin. Vol. VI, trans. p. 506.

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[5] RST relies heavily on a 1976 receipt showing a $220 payment from the County. R. Admin. Vol. IV, Ex. 110. Nowhere does this receipt state that the payment was for gravel. R. Admin. Vol. V. transcripts pp. 511-12.

Through its process, the Planning Department discovered RST's gravel operation and diligently commenced efforts to determine whether it was a lawful nonconforming use or was in violation of the LDRs. R. Admin. Vol. VI, trans. pp. 502-03; R. Admin. Vol. IV, Ex. 108. Upon consideration of material submitted by RST, the Planning Department determined that while gravel stockpiling and screening were lawful nonconforming uses, crushing and extraction of gravel were not occurring on the property when the 1978 LDRs went into effect. R. Admin. Vol. IV, Ex. 81.

The Planning Department then contacted RST on numerous occasions to discuss options for coming into compliance. R. Admin. Vol. VI, trans. p. 503; R. Admin. Vol. IV, Ex. 65. RST appealed the Planning Department's initial determination of its non-grandfathered status, and as a temporary resolution, the County issued a two-year permit to RST in 1998. R. Admin. Vol. IV, Ex. 79. This allowed extraction and processing of up to 15,000 cubic yards of gravel annually, but prohibited crushing. R. Admin. Vol. IV, Ex. 79. The permit was renewed for two years and then expired with no option for renewal. R. Admin. Vol. IV, Ex. 80. Despite the permit's clear prohibition on gravel crushing, RST applied for

and received a crusher permit from the Wyoming Department of Environmental Quality ("DEQ") during the pendency of this permit, after misrepresenting to DEQ that the operation was grandfathered under county regulations. R. Admin. Vol. VII, trans. pp. 613-14.

After the County permit expired in 2002, the Planning Director re-advised RST that gravel extraction and crushing were not grandfathered uses on its property and must be immediately discontinued. R. Admin. Vol. VI, trans. p. 518. RST continued to operate its gravel mine on a growing scale and did not comply with the permit's reclamation requirements. R. Admin. Vol. VI, trans. pp. 522-23.

Over the next eight years, the Planning Department discussed various alternatives with RST, including applying for a Special Use Permit which, if approved, would allow it to operate lawfully, and other development options such as an equestrian Planned Unit Development. R. Admin. Vol. V, trans. pp. 146-152. RST did not follow through with any applications, instead maintaining that it was grandfathered and could operate free from any regulation. R. Admin. Vol. VI, trans. pp. 503, 507; R. Admin. Vol. IV, Ex. 66. RST continued to submit

information to the Planning Department regarding its alleged grandfathered status. R. Admin. Vol. VI, trans. pp. 507-08; R. Admin. Vol. IV, Ex. 66. The Department concluded that the inconsistent information presented lacked corroboration such as state permits, tax records, long-term contracts with customers, or other more specifics. R. Admin. Vol. VI, trans. p. 508. Therefore, the Planning Department again concluded that the evidence was insufficient to prove gravel crushing and extraction were grandfathered.[6] R. Admin. Vol. VII, trans. pp. 634, 636-37. RST never formally challenged the Planning Director's decision.

On June 10, 2010, having exhausted all other options, the Planning Director issued a Notice to Abate, and subsequently an Amended Notice to Abate, to RST. R. Admin. Vol. I, pp. 1, 35. In a declaratory judgment action against the Board of

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[6] The Board ultimately determined that gravel crushing and extraction were grandfathered uses. Before the 2011 contested case hearing, however, the detailed information that formed the basis for the Board's decision had never been provided to the Teton County Planning Department. R. Admin. Vol. VII, trans. p. 638.

County Commissioners, the County Planning Director, and the Wyoming Department of Environmental Quality, RST challenged the authority of the Board of Commissioners to conduct such a hearing. Civil Action No. 15684.[7] The district court held that the Board had jurisdiction to hold an abatement hearing and stayed the declaratory judgment action pending the outcome of that hearing.

After a three-day Abatement Hearing in June, 2011, the Board concluded that RST had met its burden to prove that gravel extraction and crushing were nonconforming uses, but that the gravel operation had unlawfully expanded. Board's Decision at ¶ 122, R. Admin. Vol. III, pp. 606-07 (Appellees' Appendix at 35-36). Given the difficulty of determining the precise nature of the nonconforming use in 1978, the Board gave RST the benefit of the doubt and permitted it to continue operating to the extent documented by its 1996 filing

[7] The district court took judicial notice of the filings and orders in the related declaratory judgment action. Order Taking Judicial Notice of Pleadings and Transcript from Civil Action No. 15684, R. Dist. Vol. II, p. 721.

with the Department of Revenue and by its County authorizations in 1998 and 2000.

In considering expansion, the Board conducted a fact-intensive analysis. Aerial photography showed that the operation disturbed only 1.04 acres in 1978, R. Admin. Vol. IV, Ex. 120, with the first on-site measurement showing a three-acre operation in 1995. R. Admin. Vol. IV, Ex. 6. Production volumes pre-1978 were difficult to determine, as RST failed to maintain the DEQ permit that would have required him to report production levels, R. Admin. Vol. VI, trans. pp. 393-95, 398, and likewise failed to report extraction levels to the Department of Revenue as required for payment of severance tax. R. Admin. Vol. VI, trans. pp. 594-95. The earliest levels of production under Department of Revenue records (which are based on self-reports) were 16,200 tons in 1996, 3,877 tons in 1997, and 2,925 tons in 1998. R. Admin. Vol. IV, Ex. 57.[8]

[8] In 2007, production levels reached 77,604 tons. R. Admin. Vol. IV, Ex. 57. In 2009, the operation covered ten acres, R. Admin. Vol. IV, Ex. 12, and production levels were 63,719 tons. R. Admin. Vol. IV, Ex. 57. The equipment used for the operation also expanded from the limited equipment on site in the

Until 1995, RST's gravel operation violated the DEQ-Land Quality Division's requirement that either a DEQ permit or exemption was necessary for any commercial gravel operation. R. Admin. Vol. VI, trans. pp. 393-95, 398. RST did not request any permit from the DEQ-Land Quality Division until 1994, when it submitted an application for a limited mining operation exemption (LMO) for three acres of gravel extraction and processing. R. Admin. Vol. VI, trans. p. 398. The LMO is a specific exemption from EQA permitting requirements for gravel mines. Wyo. Rev. Stat. § 35-11-401(e)(vi). RST's exemption increased to ten acres in 1996 and has remained at that level. R. Admin. Vol. VI, trans. p. 408.

RST is also required to maintain permits from the DEQ – Air Quality Division for crushing equipment that will emit air pollution. R. Admin. Vol. VII, trans. p. 608. Despite RST's contention that it has crushed gravel every year since

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1970s. As of 2010, the operation was running five days per week, eight hours per day, with between 20 and 50 truckloads of gravel taken off the property daily. R. Admin. Vol. V, trans. pp. 322-23.

1978, RST only held such a permit from 2001-2002. R. Admin. Vol. VII, trans. p. 612; R. Admin. Vol. IV, Ex. 47.

In 2002, RST applied under Wyo. Rev. Stat. § 35-11-401 for a small mining permit to attempt to expand the affected acreage of its operation. R. Admin. Vol. VI, trans. p. 412; R. Admin. Vol. IV, Ex. 23. Applying its own regulations, the DEQ refused to issue this permit until Teton County can confirm that the operation at that scale would comply with local zoning. R. Admin. Vol. VI, trans. p. 413. RST continues to operate under its LMO exemption. The County defers to DEQ's regulation of the three grandfathered acres but, consistent with the district court's order, has the right to regulate the non-grandfathered operations and aspects of the business, such as hours of operation, not regulated by the DEQ. Dist. Ct. Order at Background Facts ¶¶ 6-7, Analysis ¶ 14, R. Dist. Vol. II, pp. 725, 729 (Appellees' Appendix at 2,6).

STANDARD OF REVIEW

Rule 12(a) of the Wyoming Rules of Appellate Procedure governs appeals from administrative agencies. W.R.A.P. 12.09(a) limits judicial review to a determination of the matters set forth in Wyo. Rev. Stat. § 16-3-114(c) of the

Wyoming Administrative Procedure Act.

A court must review an agency's findings of fact under the substantial evidence standard, whereby the court must:

> …examine the entire record to determine whether there is substantial evidence to support an agency's findings. If the agency's decision is supported by substantial evidence, [the court] cannot properly substitute [its] judgment for that of the agency and must uphold the findings on appeal. Substantial evidence is relevant evidence which a reasonable mind might accept in support of the agency's conclusions. It is more than a scintilla of evidence.

Dale v. S & S Builders, LLC, 2008 WY 84, ¶11, 188 P.3d 554, 558 (Wyo. 2008) (quoting *Newman v. State ex rel. Wyo. Workers' Safety and Comp. Div.*, 2002 WY 91, ¶12, 49 P.3d 163, 168 (Wyo. 2002)). In reviewing the record for substantial evidence, the agency's findings deserve deference, and the agency's decision must be upheld if it is reasonable under the circumstances:

> [T]he deference that normally is accorded the findings of fact by a trial court is extended to the administrative agency, and we do not adjust the decision of the agency unless it is clearly contrary to the overwhelming weight of the evidence on record. This is so because, in such an instance, the administrative body is the trier of fact and has the duty to weigh the evidence and determine the credibility of witnesses.

Id. at ¶ 11, 558-59 (quoting *Newman,* ¶ 26, 49 P.3d at 173). *See also, Straube v. State ex rel. Wyo. Workers' Comp. Div.,* 2009 WY 66, ¶14, 208 P.3d 41, 47 (Wyo. 2009). Thus the Board's decision should not be overturned unless it is "clearly contrary to the overwhelming weight of the evidence on record." *Dale*, ¶ 11, 188 P.3d at 558-59.

The arbitrary and capricious standard is "a 'safety net' to catch agency action which prejudices a party's substantial rights or which may be contrary to the other W.A.P.A. review standards yet is not easily categorized or fit to any one particular standard." *Dale*, ¶ 23, 188 P.3d at 561 (quoting *Newman*, ¶ 23, 49 P.3d at 172). The arbitrary and capricious standard is "more lenient and deferential to the agency than the substantial evidence standard because it requires only that there be a rational basis for the agency's decision." *Northfork Citizens for Responsible Dev. v. Bd. of Cnty. Comm'rs of Park Cnty.*, 2010 WY 41, ¶ 17, 228 P.3d 838, 845 (Wyo. 2010) (quoting *Dale*, ¶ 12, 188 P.3d at 559).

An agency's interpretation of its own statute and regulations deserves deference. *See Wilson Advisory Comm. v. Bd. of Cnty. Comm'rs*, 2012 WY 163, ¶ 22, 292 P.3d 855, 862 (Wyo. 2012) (a reviewing court must defer to a Board's

interpretation of its own regulations "unless that interpretation is clearly erroneous or inconsistent with the plain language" of its own rules).

ARGUMENT

I. WYO. REV. STAT. §18-5-201 AUTHORIZES THE COUNTY TO REASONABLY REGULATE THE NON-GRANDFATHERED ASPECTS OF RST'S GRAVEL OPERATION

A. The County's Authority to "Regulate and Restrict … the Use, Condition of Use or Occupancy of Lands" Under Wyo. Rev. Stat. § 18-5-201 Applies to RST's Expansion of the Gravel Operation. The Limited Exception for Continuing a Nonconforming Use Under Wyo. Rev. Stat. § 18-5-207 Must Be Narrowly Construed and Read *In Pari Materia* with § 18-5-201.

RST argues that the County lacks authority to regulate the non-grandfathered aspects – i.e, the expansion – of the RST gravel operation. RST Brf. at 13 (citing Wyo. Rev. Stat. § 18-5-207). This argument ignores the authority provided by Wyo. Rev. Stat. § 18-5-201 and Wyoming case law. *See Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 723 (Wyo. 1985) (citing *Wasinger v. Miller*, 388 P.2d 250 (Colo. 1964)) ("the general rule [is] that expansion of a legally protected nonconforming use is not allowed"). It also ignores the rules of statutory construction.

Wyo. Rev. Stat. § 18-5-201, **Authority vested in board of county**

commissioners; inapplicability of chapter to incorporated cities and towns and mineral resources, provides in pertinent part:

> To promote the public health, safety, morals and general welfare of the county, each board of county commissioners may regulate and restrict the location and use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes in the unincorporated area of the county.[9]

Thus, § 18-5-201 gives counties in Wyoming what this Court has called "broad power" to regulate land use, *Ford v. Bd. of Cnty. Comm'rs of Converse Cnty.*, 924 P.2d 91, 95 (Wyo. 1996) (citing *Snake River Venture v. Bd. of Cnty. Comm'rs of Teton Cnty.*, 616 P.2d 744, 752 (Wyo. 1980)), and implied power to do those things that

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[9] Wyo. Rev. Stat. § 18-5-201 goes on to preclude regulation of "mineral resources," but this Court held in *River Springs Ltd. Liability Co. v. Bd. of Cnty. Comm'rs of Cnty. of Teton* that gravel is not a mineral, 899 P.2d 1329, 1334 (Wyo. 1995), and RST has not contested this. Had the legislature desired to restrict a county's ability to regulate land uses related to non-mineral extraction, it could have done so directly.

make that express power meaningful. *Snake River Venture,* 616 P.2d at 752 (citing *Schoeller v. Bd. of Cnty. Comm'rs of Park Cnty.*, 568 P.2d 869, 874 (Wyo. 1977)).

Wyo. Rev. Stat. § 18-5-207, **Continuation of existing uses; effect of alteration or addition; future use after discontinuation of nonconforming use,** creates a limited exception from § 201. It provides:

> A zoning resolution enacted under the provisions of W.S. 18-5-201 through 18-5-206 shall not prohibit the continuance of the use of any land, building or structure for the purpose for which the land, building or structure is used at the time the resolution is adopted and it is not necessary to secure any certificate permitting such continuance. However, the alteration or addition to any existing building or structure for the purpose of effecting any change in use may be regulated or prohibited by zoning resolution. If a nonconforming use is discontinued any future use of such land, building or structure shall be in conformity with the provisions of the resolution regulating uses in the area in which the land, building or structure is located.

A lawful nonconforming use, also called a grandfathered use, is "a use which, although it does not conform with existing zoning regulations, existed lawfully prior to the enactment of the zoning regulations." *Snake River Brewing Co. v. Town of Jackson*, 2002 WY 11, ¶9, 39 P.3d 397, 403 (Wyo. 2002) (quoting *River Springs Ltd. Liability Co. v. Bd. of Cnty. Comm'rs of Cnty. of Teton*, 899 P.2d 1329, 1334

(Wyo. 1995)). While zoning ordinances are construed strictly in favor of the property owner, non-conforming uses are construed narrowly because uses that violate zoning regulations thwart the policies behind comprehensive planning. *Snake River Brewing*, ¶11, 39 P.3d at 404.

RST claims that the exclusion of the term "land" from the second sentence of § 207 means that expansion and enlargement of a use of the land may not be regulated by zoning resolution, and that the Court's analysis must end there. This argument disregards the well-established rule for interpreting statutes:

> In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. … Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

Redco Const. v. Profile Properties, LLC, 2012 WY 24, ¶ 26, 271 P.2d 408, 415-16 (Wyo. 2012) (citing *Cheyenne Newspapers, Inc. v. Building Code Bd. of Appeals of City of Cheyenne,* 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010)).

The first sentence of Wyo. Rev. Stat. § 18-5-207 makes clear that a county zoning regulation may not prohibit the continuation of a grandfathered right.

See, e.g., Snake River Brewing, ¶10, 39 P.3d at 403 (Wyo. Rev. Stat. § 18-5-207 "simply forbids counties from enacting zoning regulations that prohibit existing uses"). The second sentence of § 207 allows counties to regulate alterations of existing buildings or structures. The section's omission of a reference to expansion of "land uses" in the second sentence does not, as RST claims, mean that the County cannot regulate expanded land use, but creates ambiguity as to why the word "land" is omitted.

When a statute is ambiguous, this Court must seek to ascertain the intent of the legislature, which includes the purpose and policy behind the enactment and the fact that "the legislature is presumed to have intended a reasonable, just, and constitutional result." *Kunkle v. State ex rel. Wyo. Workers' Safety & Compensation Div.*, 2005 WY 49, ¶ 11, 109 P.3d 887, 890 (Wyo. 2005) (citing 82 C.J.S. *Statutes* §§307-310 (2004); *Petroleum, Inc. v. State ex rel Bd. of Equalization*, 983 P.2d 1237, 1240 (Wyo. 1999)). *See also Snake River Brewing*, ¶ 29, 39 P.3d at 408. Courts must also "avoid construing a statute so as to render a portion of it meaningless." *Kunkle*, ¶ 11, 109 P.3d at 890 (citing *Pedro/Aspen, Ltd. v. Bd. of Cnty. Comm'rs*, 2004 WY 84, ¶ 27, 94 P.3d 412, 420 (Wyo. 2004)). Likewise, courts

should "not interpret a statute in a manner that produces absurd results." *Chevron U.S.A., Inc. v. Dep't of Revenue*, 2007 WY 43, ¶ 18, 154 P.3d 331, 337 (Wyo. 2007) (citing *Stutzman v. Office of the State Eng'r,* 2006 WY 30, ¶¶ 14-16, 130 P.2d 470, 475 (Wyo. 2006)).

Under RST's interpretation, for the County to have authority to regulate RST's expansion, the statute would have to read: "the alteration or addition to any existing **land,** building or structure for the purpose of effecting any change in use may be regulated or prohibited by zoning resolution." As the district court found, however, the addition of the word "land" in this sentence would not be logical. Dist. Ct. Order at Analysis ¶ 11 and p.5 n.2, R. Dist. Vol. II, p. 728 (Appellees' Appendix at 5). One cannot physically "add to" or "alter" land in the same way that one can add to or alter a building or structure. In this sentence, the legislature focuses only on adding to or altering structures. Land is land, not subject to alteration. Likewise, one can acquire more land, but not "add to" land. Board's Decision at ¶ 113, R. Admin. Vol. III, p. 604 (Appellees' Appendix at 33).

Moreover – and perhaps most fundamentally – as the district court held, the County is not in violation of section 207 because it is not "'prohibit[ing] the continuance of the use of any land … for the purpose for which the land … is used at the time the regulation is adopted.'" Dist. Ct. Order at Analysis ¶ 12, R. Dist. Vol. II, p. 728 (Appellees' Appendix at 5) (emphasis in the original). The County is simply regulating those gravel operations that were not in use in 1978, and section 201 authorizes that regulation of non-grandfathered land uses. In this case, the Board determined as a matter of fact, based on extensive testimony and exhibits, that a three-acre gravel operation with limited production and reasonable hours represents the extent of RST's lawful nonconforming use of his land. Board's Decision at ¶ 122, R. Admin. Vol. III, pp. 606-07 (Appellees' Appendix at 35-36). The fact that the second sentence of the statute does not speak to the Board's ability to regulate expansion of that nonconforming land use is irrelevant. The remaining 296 acres of RST's property were not grandfathered as a gravel operation, and therefore can be regulated under the County's LDRs.

1. Prohibiting the County from Regulating Expansion of Land Uses Under Wyo. Rev. Stat. § 18-5-207 Directly Contravenes Wyo. Rev. Stat. § 18-5-201.

Wyo. Rev. Stat. § 18-5-207 cannot reasonably be interpreted to mean that once a land use is recognized as a lawful nonconformity it can thereafter expand, unregulated and unchecked, because this interpretation would render the County's broad zoning authority under Wyo. Rev. Stat. § 18-5-201 meaningless. This Court has emphasized that counties "should have, and do have, broad authority to require compliance with zoning provisions in their efforts to promote orderly development of unincorporated areas." *River Springs*, 899 P.2d at 1334 (citing *Snake River Venture*, 616 P.2d 744).

While RST contends that grandfathered land uses must be allowed unlimited expansion in recognition of Wyoming's history of valuing agriculture, mineral extraction, and exploration, RST Br. at 15, there is no legal authority to support this contention. Rather, reading Wyo. Rev. Stat. §§ 18-5-207 and 18-5-201 *in pari materia*, and in keeping with the concept of vested rights, only zoning resolutions that prohibit the continuance of an existing land use are proscribed.

See, e.g. Snake River Brewing, ¶ 10, 39 P.3d at 403. Regulations on expansion can be imposed so long as they do not prohibit the continuance of a use of the land.[10]

2. Allowing Land Uses to Expand Unrestrained Would Lead to an Absurd Result

Allowing a land use that preexisted the enactment of a zoning regulation to expand unrestrained in all circumstances could lead to an absurd result, contrary to the intent of the statute. Under RST's interpretation, a 20-acre property that used one acre as a small campground with 10 tenting sites could lawfully expand to allow 1,000 tent sites or 1,000 recreational vehicle sites over the entire 20 acres. Likewise, a one-acre dump could become a multi-acre tire disposal site. These are examples of an "absurd result" that this Court has

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[10] Section 7120 of the Teton County LDRs is the authority under which expansion is regulated by the County. Section 7120 states: "A nonconforming use may be enlarged or expanded a cumulative amount of twenty (20) percent in total floor area, or ten (10) percent in land area if the use does not include a structure. The cumulative total is the sum of all expansions from the date the use became nonconforming."

cautioned must be avoided. *See Chevron USA*, ¶ 18, 154 P.3d at 337 (citing *Stutzman*, ¶¶ 14-16, 130 P.2d at 475).

II. THE WYOMING ENVIRONMENTAL QUALITY ACT DOES NOT PREEMPT THE COUNTY'S REASONABLE REGULATION OF CHANGED USES OR EXPANDED USES OF THE GRANDFATHERED OPERATION

RST argues that the County cannot regulate the extent of its gravel operation because the Environmental Quality Act ("EQA") preempts this. The EQA preserves a role for counties in two ways. First, it allows a county to regulate gravel mines so long as county regulation does not conflict with DEQ regulation or prohibit all mining, as this Court confirmed in *River Springs*. 899 P.2d at 1335. Second, it advises DEQ of the scope and nature of grandfathered rights, should they exist. The DEQ, which might be expected to be protective of its own regulatory authority, concurs with the County as to both roles. State of Wyoming's Memorandum of Law in Support of Motion for Judgment on the Pleadings at 3 ("DEQ Memorandum"), R. Dist. Vol. II, p. 648 (Appellees' Appendix at 74). Teton County's actions in this case fit within these recognized roles.

A. The EQA Does Not Preempt all Local Land Use Regulation

1. River Springs *Upholds County Authority to Determine the Existence and Scope of Lawful Nonconforming Uses and to Regulate Their Expansion*

The Board concluded, based on the evidence in the record, that RST has grandfathered rights to a three-acre gravel operation extracting and processing a specified amount of gravel each year, but that operations beyond three acres at any one time exceed the scope of grandfathered rights and may properly be regulated by the County. Board's Decision at ¶ 122, R. Admin. Vol. III, pp. 606-07 (Appellees' Appendix at 35-36).

The district court likewise upheld the County's authority, based on this Court's decision in *River Springs:*

> Next, Petitioner argues that the County's regulation of Petitioner's land use is preempted by the State Department of Environmental Quality's regulation and licensing of sand and gravel operations. Petitioner's argument fails under the reasoning set forth by the Wyoming Supreme Court in *River Springs, LLC v. Board of County Commissioners of Teton County*, 899 P.2d 1329 (Wyo. 1995). ... The County here is not exceeding the limits upon its regulatory powers noted by *River Springs*; it is not rezoning for a higher use to cut off an existing non-conforming use, and it is not prohibiting a previously permitted (grandfathered) use. *Id.* The County is permitting the grandfathered use for sand and gravel and

> properly employing regulatory authority to deny development beyond the existing non-conforming use.

Dist. Ct. Order at Analysis ¶¶ 13, 16, R. Dist. Vol. II, p. 729 (Appellees' Appendix at 6).

RST argues that DEQ has plenary authority over its entire 299-acre property because the County found that three acres of the property are grandfathered and operated within an exemption from the EQA known as the "limited mining operation" or LMO. RST Br. at 24. Because a part of RST's operation is regulated by DEQ, RST argues that all local regulation is preempted. RST Br. at 24. Nothing in the EQA or case law supports this contention.

RST's argument seems to hinge upon its characterization of the EQA statutory scheme as "complex". Again, *River Springs* contradicts this contention, finding that DEQ's authorization of a limited mining operation is "a decision not to exercise state regulatory authority." 899 P.2d at 1336. This Court characterized the EQA's LMO provision, § 35-11-401(e)(vi), as a regulation of "somewhat limited scope." *Id*.

Nothing in the EQA gives the DEQ regulatory authority over those portions of RST's land on which gravel mining and processing are not

grandfathered uses. This Court has stated that if DEQ "excludes certain instances from its regulation, the local authority may invoke its regulatory power. We recognize the authority of the Board to regulate these activities so long as regulation by the county does not conflict with a regulation by the state." *Id*.

This exemption demonstrates that the EQA manifested "a decision not to exercise state regulatory authority" over small operations.[11] *Id*. Because RST operates pursuant to an exemption under which the State regulates only certain limited aspects of mining, the County may regulate to protect the health, safety, and welfare of the community, so long as its restrictions do not prevent mining

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[11] Under Wyo. Rev. Stat. § 35-11-401(k), an operator with a limited mining exemption need only file an annual report with DEQ containing:

> (i) The name and address of the operator;
> (ii) The location of the mining operations;
> (iii) The number of acres of affected lands at the conclusion of the past year's operation;
> (iv) The number of acres of land that have been reclaimed during the past year;
> (v) The number of yards of overburden or mined mineral removed;
> (vi) The expected remaining life of the mining operation.

or conflict with state regulations. *See* Wyo. Rev. Stat. § 18-5-201. Under the limited mining exemption, DEQ says nothing about issues of great local concern, including hours and days of operation and extraction amounts. Certainly nothing in Wyo. Rev. Stat. § 35-11-401(e)(vi), or the associated DEQ regulations, mandates that an operation be allowed to use all of the acreage that is the upper limit of the exemption scheme.[12]

DEQ has taken the position in this litigation that the County has this regulatory authority. In its *Memorandum,* DEQ paraphrases the holding of *River Springs* that "all Wyoming Counties are authorized to use their zoning authority to regulate sand and gravel operations, unless the operations are non-conforming

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[12] During the proceedings below, Wyo. Rev. Stat. § 35-11-401(e) made 10 acres the upper limit of the LMO exemption. In 2013, the legislature amended the statute to make 15 acres the upper limit. *See* Act of Feb. 19, 2013, 2013 Wyo. Sess. Laws 123 (amending Wyo. Rev. Stat. §§ 35-11-401(e)(vi) and 35-11-417(c)(i-ii)). The effect of this amendment on RST's operation, *see e.g.* RST Brf. at 31, is a question that must be addressed by DEQ in the first instance. It is not properly before this Court.

or 'grandfathered.'" DEQ Memorandum at 4, R. Dist. Vol. II, p. 649 (Appellees' Appendix at 75). In short, DEQ has exclusive regulatory authority over that which is grandfathered, and counties are authorized to use their zoning authority to regulate sand and gravel operations that are not grandfathered.

If this Court were to determine that the Board's decision to grandfather a three-acre gravel operation gave DEQ authority over those other portions of RST's land on which gravel is not a lawful nonconforming use, Wyo. Rev. Stat. §§ 18-5-201 and 207 would be rendered meaningless, as DEQ could then allow a gravel operation over the entire 299-acre parcel, in disregard of the County's zoning authority. As stated above, under the rules of statutory interpretation, this Court should avoid interpretations that render a statute meaningless. *Kunkle*, ¶ 11, 109 P.3d at 890.

Because both RST and the County cite the *River Springs* case, the County summarizes it here. *River Springs* arose from Teton County's denial of conditional use permits for two gravel operations — River Springs and Becho. River Springs appealed to the Court after it was granted a limited mining exemption but denied a Conditional Use Permit by Teton County. The Board had

determined that Becho's quarry was not grandfathered because it had been abandoned. *River Springs*, 899 P.2d at 1332.

The Court first concluded that gravel is not a mineral as that term is used in the statute. *Id.* at 1334. The Court continued: "[t]he activities River Springs and Becho contemplate are industrial, or possibly commercial, and the counties have clear authority to apply their zoning plans in a way that would inhibit such activities. Counties should have, and do have, broad authority to require compliance with zoning provisions in their efforts to promote orderly development of unincorporated areas." *Id*. (Internal cites omitted). The Court upheld the County's denial of River Springs' Conditional Use Permit, finding that the mine did not exist prior to the enactment of zoning regulations and that the County was therefore free to exercise its zoning authority. *Id.* at 1336.

With respect to Becho, the Court concluded that the Board could not regulate the Becho quarry because the quarry, <u>in its entirety</u>, was a lawful nonconforming use. *Id*. at 1335. The key distinction here is that less than all of RST's operation was deemed to be a nonconforming use. While the County has conceded to DEQ the regulation of the grandfathered three acres, the County

maintains the authority to regulate the non-grandfathered acreage, as well as those aspects of the operation that are not within the purview of DEQ.

2. The EQA and its Regulations Assign Counties a Regulatory Role in Concert with DEQ

RST also argues that any effort by the County to regulate expansion of RST's operation runs afoul of the DEQ's authority to dictate the terms of RST's permits. RST Br. at 24. In the related declaratory judgment action, *Roger Seherr-Thoss, d/b/a RST Sand & Gravel v. Board of County Commissioners of Teton County, Wyoming; Teton County Planning Director; and Wyoming Department of Environmental Quality,* Civil Action No. 15684, RST challenged DEQ's authority to require evidence that its gravel operation complies with County planning and zoning regulations prior to DEQ issuing a small mining permit.[13] DEQ

[13] As explained above, RST operates under a limited mining operation exemption from the EQA. RST's argument that in the future it should be granted a small mining permit under Wyo. Rev. Stat. § 35-11-401(j) is outside the scope of this appeal. DEQ's position with respect to cooperation between DEQ and local government on issuance of small mining permits, and the district court's ruling

responded that "[a]s a matter of law, the DEQ cannot issue a permit for a gravel operation until it receives evidence from a county that the proposed operation is in compliance or exempt from local planning and zoning regulations." DEQ Memorandum at 2, R. Dist. Vol. II, p. 647 (Appellees' Appendix at 73). Thus, DEQ, the agency that administers the EQA, takes the position that the Act requires DEQ to defer to counties on whether local laws have been met, and DEQ can require an applicant to so demonstrate. DEQ Memorandum at 3, R. Dist. Vol. II, p. 648 (Appellees' Appendix at 74). DEQ's interpretation of its own statute and regulations deserves this Court's deference. *See Wilson Advisory Comm.*, ¶ 22, 292 P.3d at 862.

In support, DEQ emphasized that counties have superior knowledge of the facts, the zoning regulations, and how those facts and zoning regulations apply to a particular area of land. "The DEQ is not in a position to make these determinations without the participation of the counties, and issuing permits

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that it is permissible for DEQ to require approval from local government prior to issuing a small mining permit, illustrate that the state regulatory scheme has carved out areas in which counties may regulate.

without the input of the counties would simply invite conflict between permit holders and the counties. Furthermore, to require such a determination to be made by a district court would unnecessarily delay the permitting process and also clog the court systems." DEQ Memorandum at 4-5, R. Dist. Vol. II, pp. 649-50 (Appellees' Appendix at 75-76).

The air pollution control scheme under Wyo. Rev. Stat. § 35-11-801(c) further supports county authority to work in concert with DEQ in permitting gravel operations. Chapter 6, Section 2(c) of the Air Quality Rules and Regulations states in part:

> No approval to construct or modify shall be granted unless the applicant shows, to the satisfaction of the Administrator of the Division of Air Quality that:
>
> * * *
>
> (iv) The proposed facility will be located in accordance with proper land use planning as determined by the appropriate state or local agency charged with such responsibility.

In summary, DEQ demonstrates that the state agency shares regulation of sand and gravel operations with local government. DEQ Memorandum at 4-5, R. Dist. Vol. II, pp. 649-50 (Appellees' Appendix at 75-76).

Despite RST's contention that DEQ's regulations preempt County authority, the district court granted DEQ's *Motion for Judgment on the Pleadings*. Order Granting State of Wyoming's Motion for Judgment on the Pleadings, R. Dist. Vol. II, p. 670. This order reflects the reality that the EQA preserves a role for counties and likewise preserves county enforcement of local land use regulations.

B. Taken Together, the EQA and Wyo. Rev. Stat. § 18-5-201 Make DEQ the Primary Regulator of Gravel Operations and Allow Counties to Regulate Where Not in Conflict

This Court has applied both preemption analysis and sovereign powers analysis to determine whether state regulations limit local authority. *River Springs,* 899 P.2d at 1335; *KN Energy, Inc. v. City of Casper*, 755 P.2d 207, 210 (Wyo. 1988). Under both approaches, however, the central inquiry is whether state and local regulatory roles can coexist, a standard that the County's actions meet.[14]

[14] *City of Green River v. Debernadi Constr. Co.,* 816 P.2d 1287, 1291 (Wyo. 1991) sets forth the test for whether the state has preempted a field of regulation: (1) where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, the municipal regulation is

River Springs held that both levels of government may regulate gravel mining, provided local regulation does not prohibit the operation or conflict with the EQA. 899 P.2d at 1335.

Under this analysis, the EQA, which grants DEQ's authority, and Wyo. Rev. Stat. § 18-5-201, which grants the County its local zoning authority, can be reconciled in a manner that affords "legitimate effect" to both. *Id.* at 1336-37. The district court's decision accomplishes this reconciliation. RST complains that both DEQ and the County have bonding requirements. See RST Brf. at 22. Because the two agencies have separate regulatory authority over different acres and different aspects of the operation, it would be surprising if each did not have a bond requirement. The district court rejected this argument, as should this Court.

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preempted; (2) preemption of a field of regulation may be implied upon examination of legislative history; (3) the pervasiveness of the state regulatory scheme may support a finding of preemption; and (4) the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

The purpose of the EQA is to prevent, reduce, and eliminate pollution and plan the development of the state's resources. Wyo. Rev. Stat. § 35-11-102. The purpose of Wyo. Rev. Stat. § 18-5-201 is to allow counties to enact zoning regulations that promote public health, safety, and welfare; it has been recognized time and again as granting counties "broad authority" to regulate their lands. *See, e.g. Ford,* 924 P.2d at 95 (citing *Snake River Venture,* 616 P.2d at 752). This Court should rely on *River Springs* to once again find that the County retains authority to regulate gravel operations, where, as here, county regulations do not conflict with those of DEQ.

C. RST's Arguments Based on its Pending Application for a Small Mining Permit, and the Hypothetical Impacts of Having that Permit, Are Irrelevant and Beyond the Scope of this Appeal.

Much of RST's opening brief concerns its pending application for a small mining permit, and much of its argument addresses the hypothetical effects of that permit process and statutory scheme. *See e.g.* RST Brf. at 23-24. The consequences of this pending application played no part in the district court's or Board's decisions and are irrelevant to this appeal.

So, for example, RST argues that there is no room for the County to

regulate the gravel operation in light of the "incredibly detailed and rigorous" statutory scheme *for the small mining permit* – the permit RST does not have. RST Brf. at 24. In effect, RST bases its preemption argument on a contrary-to-fact situation. As shown above, the state exemption and state statutory scheme under which RST *does* operate coexist smoothly with the County scheme.

III. THE DOCTRINE OF DIMINISHING ASSETS DOES NOT APPLY TO RST'S GRAVEL OPERATION BECAUSE RST MANIFESTED NO OBJECTIVE INTENT TO EXPAND BEFORE THE ENACTMENT OF THE COUNTY'S FIRST ZONING REGULATIONS

In the alternative to the contentions RST made in Section II, RST argues that the common law doctrine of diminishing assets, which allows expansion of a nonconforming extractive use in certain circumstances, precludes the County's regulation here.

A. The Doctrine of Diminishing Assets

The doctrine of diminishing assets holds that when a nonconforming use is extractive in nature, expansion of the use may be allowed to occur provided that the operator meets a three-part test:

1. Excavation activities were actively being pursued when the law became effective;
2. The area that the owner desires to excavate was clearly intended to be excavated, as measured by objective

manifestations and not by subjective intent; and,

3. The continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood.

83 Am. Jur. 2d Zoning and Planning § 601; *see* RST Br. at 26. The parties agree upon this three-part test.

The three-part test underscores that just because a use involves a diminishing asset, like gravel, that alone does not justify its expansion. Expansion of nonconforming uses is disfavored, *Snake River Brewing*, ¶ 11, 39 P.3d at 404, and the doctrine must be applied with caution. *Fred McDowell, Inc. v. Bd. of Adjustment of the Twp. of Wall*, 757 A.2d 822, 832 (N.J. Super. Ct. App. Div. 2000).

> Public concern toward wholesale excavation and its attendant dangers are well founded. Also, neighboring property may be developed for residential or other uses which are incompatible with the mining use in reliance on the perceived dormancy or limitation of the excavation activity at the time it became a nonconforming use. Therefore in such cases the owner must show that the entire tract was 'dedicated' to the mining activity despite the fact that the activity was limited when it was rendered a nonconforming use.

Id. (emphasis added and internal citations omitted). *See also Stephan & Sons, Inc. v. Mun. of Anchorage Zoning Bd. of Exam'rs and Appeals*, 685 P.2d 98, 102 (Alaska 1984) (look to operator's intent with respect to entire property).

Accordingly, a nonconforming use is generally limited to its character and scope at the time the restrictive ordinance was enacted, and may not be expanded. *See Cheyenne Airport Bd.*, 707 P.2d at 723 ("the general rule [is] that expansion of a legally protected nonconforming use is not allowed"). Although the doctrine of diminishing assets is an exception to this general rule, it only applies "[w]hen there is objective evidence of the owner's intent to expand a mining operation, and that intent existed at the time of the zoning change." *Hansen Bros. Enter., Inc. v. Bd. of Supervisors of Nevada Cnty.*, 907 P.2d 1324, 1336 (Cal. 1996). *See also Twp. of Fairfield v. Likanchuk's, Inc.*, 644 A.2d 120, 124 (N.J. Super Ct. App. Div. 1994) (the mere existence of nonconforming extractive use at the time of enactment of a restrictive ordinance does not justify expansion of the use).

Although RST was excavating gravel in 1978 on a small scale, meeting the first part of the test, it fails to pass either of the other two parts, as explained below.

B. Substantial Evidence Supports the Board's Determination that RST Did Not Objectively Manifest an Intent to Expand the Gravel Operation Beyond the Small-Scale, Seasonal Operation that Existed in 1978.[15]

1. The Evidence Reveals No Objective Intent to Expand Operations Beyond Their Minor Scale in 1978.

At the three-day hearing on this matter, the Hearing Officer considered the testimony of numerous witnesses presented by both parties, explicitly evaluated their credibility, and reviewed extensive documentary evidence. The Hearing Officer gave significant weight to the testimony of RST's numerous witnesses where it was consistent, Recommended Findings of Fact, Conclusions of Law

[15] RST contends that the burden belongs to the County, see RST Br. at 30, but the case law places the burden on the operator. *See, e.g.*, *Romero v. Bd. of Cnty. Comm'rs of the Cnty. of Rio Arriba*, 149 P.3d 945, 951 (N.M. 2006). Regardless of who bears the burden, however, substantial evidence supports the Board's decision that as of 1978 RST failed to manifest an intent to expand.

and Order at ¶¶ 74-78 ("Hearing Officer's Recommendation"), R. Admin. Vol. III, pp.564-65 (Appellees' Appendix at 56-57), but, even so, determined that as of 1978, RST intended to engage only in a seasonal, small-scale gravel operation, about three acres in scope. Hearing Officer's Recommendation at ¶ 121, R. Admin. Vol. III, p. 577 (Appellees' Appendix at 69). In fact, the evidence showed that Seherr-Thoss was ranching on the property in the 1970's and conducting other businesses (trucking, and hauling logs and rocks), R. Admin. Vol. V, trans. pp. 223-224, 291, 304, which was consistent with the gravel business being a small, part-time operation on a small portion of the property. *See Romero v. Bd. of Cnty. Comm'rs of the Cnty. of Rio Arriba*, 149 P.3d 945, 953 (N.M. 2006) (evidence that an operator conducted other kinds of business on its property disproves an intent to expand the extractive use parcel-wide).

RST's witness testimony established that RST had extracted gravel from two portions of the property, constituting only 1% of the 300-acre parcel, R. Admin. Vol. V, trans. pp. 214-215; that RST owned a gravel crusher that was located near the Seherr-Thoss house, to make it convenient to repair, because it broke down regularly, R. Admin. Vol. V, trans. pp. 217,252-53, 274, 296-298; and

that RST operated the extraction business only two or three days a week and during the summer months only. R. Admin. Vol. V, trans. p. 307.

Moreover, the Hearing Officer and the County found it significant that RST did not begin securing permits for the operation until 1994, and did not pay any severance tax to the State until 1996. Hearing Officer's Recommendation at ¶ 74, R. Admin. Vol. III, p. 564 (Appellees' Appendix at 56); Board's Decision at ¶ 74, R. Admin. Vol. III, p. 594 (Appellees' Appendix at 23). *See also* R. Admin. Vol. VI, trans. pp. 398-99 and R. Admin. Vol. IV, Ex. 21 (regarding RST's failure to secure permits for his operations); R. Admin. Vol. VI, trans. pp. 594-95; R. Admin. Vol. IV, Ex. 57, Ex. 58 (regarding RST's failure to pay severance taxes).

As the district court held, "substantial evidence" supports the Board's ultimate determination that RST was engaged in a small-scale, seasonal gravel extraction operation as of 1978. Dist. Ct. Order at Analysis ¶ 19, R. Dist. Vol. II, p. 730 (Appellees' Appendix at 7). RST's failure to secure permits or pay taxes until almost 20 years after the enactment of the County's zoning regulations suggests an intent to continue operating on a small scale – "under the radar," as the hearing officer and the County found. Hearing Officer's Recommendation at

¶ 49, R. Admin. Vol. III, p. 558 (Appellees' Appendix at 50), Board's Decision at ¶ 49, R. Admin. Vol. III, p. 589 (Appellees' Appendix at 18).

In effect, RST contends that this Court should reconsider the facts presented to the Board and reevaluate the witnesses and evidence. This Court cannot substitute its judgment for that of the Board. This Court must determine whether the Board could have reasonably concluded as it did based on the evidence presented. *Dale*, ¶ 11, 188 P.3d at 558-59.

RST also argues that the County, and the district court, ignored testimony concerning plans to expand and that "any gravel operation over time would necessarily expand." RST Br. at 28. Such statements, however, are relevant only to the extent they are supported by objective manifestations of intent to expand, and RST presented no evidence of any such objective manifestation of intent. *See Romero*, 149 P.3d at 952; *Stephan & Sons, Inc.*, 685 P.2d at 102 ("The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the present operations"). This aspect of the doctrine is consistent with this Court's holding that although vested rights are protected under Wyoming law, investments that

are merely *contemplated* deserve less protection. *See, e.g.*, *Snake River Venture*, 616 P.2d at 750 (Wyo. 1980). *Compare Fred McDowell, Inc.*, 757 A.2d at 832 ("The mere unexpressed intention or hope of the owner to use the entire tract at the time of the restrictive zoning ordinance is adopted, is not enough") *with Syracuse Aggregate Corp. v. Weise*, 414 N.E.2d 651 (N.Y. Ct. App. 1980) (finding that 54-year history of quarrying, construction of service roads throughout property, and construction of a processing structure strategically erected in the center of the property constituted objective manifestation of intent to expand gravel operation).

The district court affirmed the Board, finding that "the Board's decision that [RST] did not produce objective evidence of an intent to expand his sand and gravel operation is supported by substantial evidence and is not arbitrary and capricious." Dist. Ct. Order at Analysis ¶ 19, R. Dist. Vol. II, p. 730 (Appellees' Appendix at 7).

2. *RST Failed to Demonstrate that Expansion of its Nonconforming Use will Have No New Impact on Adjacent Land Uses.*

Finally, with respect to the third part of the three-part test, RST failed to address the impact that expansion of its gravel extraction operation will have on

adjacent land uses. As the district court noted, RST did not present any evidence that the continued use "would not have a substantially different and adverse impact on the neighborhood." Dist. Ct. Order at Analysis ¶ 19, R. Dist. Vol. II, p. 730 (Appellees' Appendix at 7). On the contrary, the evidence presented showed that expansion of the gravel operation had resulted in numerous complaints by citizens. *See* R. Admin. Vol. VII, trans. pp. 637-38; R. Admin. Vol. IV, Ex. 7. Because RST completely failed to address this issue, and the evidence presented showed that expansion of RST's operation resulted in negative impacts on adjacent land users, the district court properly found that the Board's determination was supported by substantial evidence on this point as well.

IV. THE COUNTY IS NOT EQUITABLY ESTOPPED FROM LIMITING RST'S GRAVEL OPERATION

Finally, RST contends that the County should be equitably estopped from regulating its nonconforming gravel extraction operation. RST first raised this argument before the Hearing Officer, who determined that RST failed to meet the high burden of proof required to establish equitable estoppel or laches

against a governmental entity.[16] Specifically, the Hearing Officer found that RST did not produce any evidence of affirmative misconduct. Hearing Officer's Recommendation at ¶ 89, R. Admin. Vol. III, p. 568 (Appellees' Appendix at 60). The Board adopted that conclusion in its Findings of Fact, Conclusions of Law, and Order. Board's Decision at ¶ 90, R. Admin. Vol. III, p. 598 (Appellees' Appendix at 27). The district court affirmed. Dist. Ct. Order at Analysis ¶ 22, R. Dist. Vol. II, p. 731 (Appellees' Appendix at 8).

The district court properly determined that RST bore the burden of establishing affirmative misconduct on the part of the County and that RST failed to produce any such evidence. Therefore, this Court should affirm the

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[16] RST argues for the first time on appeal that the determination of whether the County's enforcement should be barred by equitable estoppel or laches was outside the County's delegated authority. RST Br. at 32. However, the cases cited do not stand for the proposition that an administrative agency, acting in a quasi-judicial capacity, cannot consider equitable arguments. This argument should be disregarded. *See Nelson v. Sheridan Manor*, 939 P.2d 252, 255 (Wyo. 1997) (issues cannot be raised for the first time on appeal).

district court's determination that the County is not equitably estopped from regulating RST's nonconforming operation.

A. Equitable Estoppel and Laches Rarely Apply Against a Governmental Entity

Equitable estoppel may be invoked against a governmental entity only "in rare and unusual circumstances." *Thompson v. Bd. of Cnty. Comm'rs of the Cnty. of Sublette*, 2001 WY 108, ¶ 11, 34 P.3d 278, 281 (Wyo. 2001) (citing *Sare v. Sheridan Cnty. Bd. of Cnty. Comm'rs*, 784 P.2d 593, 595 (Wyo. 1999); *Big Piney Oil & Gas Co. v. Wyo. Oil & Gas Conservation Comm'n*, 715 P.2d 557, 560 (Wyo. 1986)). Equitable estoppel "may not be invoked where it would serve to defeat the effective operation of a policy adopted to protect the public." *Id*. Accordingly, "[i]n order to invoke the doctrine against a government or public agency functioning in its official capacity, there must be a showing of affirmative misconduct," i.e., evidence of agency "acts, representations, or admissions" that have induced a belief that certain facts exist, that RST relied on that belief, and that RST will be prejudiced if the agency is permitted to deny the existence of those facts. *Id*. (citing *In re General Adjudication of All Right to Use Water in the Big Horn River System*, 753 P.2d 76, 89-90 (Wyo. 1988)).

Similarly, "[g]overnments and their agencies generally are not barred by laches when enforcing a public or governmental right." *Id*. at ¶ 17, 282 (quoting *Big Piney Oil & Gas Co.*, 715 P.2d at 561). "Mere nonaction of government officers does not support a claim of laches." 30A C.J.S. *Equity* § 141 (2013). A party asserting laches against a governmental body must establish that the body has taken a "positive act," inducing action by the party and "making it inequitable to permit the governmental entity to retract what its officers had done." *Id*.

B. <u>RST Did Not Prove any Affirmative Act of Misconduct by the County. Instead, the County Gave RST the Benefit of Several Extensions and Made Every Attempt to Resolve the Matter Informally.</u>

RST offers no evidence of affirmative misconduct by the County or its agents. Instead, RST argues that the County's enforcement of its zoning regulations should be barred because the County knew, or should have known, that RST was conducting a gravel operation on the property. RST Br. at 34-35. The Board found that it was not possible to know of the gravel operation due to topography. Board's Decision at ¶¶ 77-78, R. Admin. Vol. III, p. 595 (Appellees' Appendix at 24). Even if the County had knowledge of RST's gravel operation, knowledge is not an "act, representation, or admission." On the contrary, the

only evidence of affirmative action by the County is the County's efforts to enforce its zoning regulations.

Moreover, RST fails to prove that it relied on any alleged misconduct to change position, resulting in prejudice, or that it was injured or disadvantaged by any delay. The County's inaction pre-1995 did not disadvantage RST — rather, RST benefitted. The delay allowed RST to continue to operate and to profit from the operation. The fact that RST continued to operate after 1995 knowing that the County considered the operation unlawful (with the exception of the four years it maintained a permit) undermines RST's claim that it relied on the County's inaction to its prejudice.[17]

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[17] Notably, this Court has held that laches did not prevent a Board of Commissioners from enforcing its local zoning resolutions where the landowner, in reliance on statements by county officials, began remodeling and "the board of county commissioners stood by for eight years while [the property owner] expended considerable sums of money improving their property." *Thompson*, ¶16, 34 P.3d at 282.

Finally, "[o]ne who consciously disregards the law cannot invoke laches as a defense against its proper enforcement." *Town of Seabrook v. Vachon Mgmt., Inc.*, 745 A.2d 1155, 1161 (N.H. 2000). RST claims it was induced to rely on the County's inaction. Yet, during this period RST was operating a gravel operation without the requisite permits and without paying severance taxes. RST should not now be permitted to benefit by alleging "misconduct" on the part of the County when its own hands are unclean. *See Harsha v. Anastos*, 693 P.2d 760, 762 (Wyo. 1985) (quoting *Dutch Maid Bakeries, Inc. v. Schleicher*, 131 P.2d 630, 634 (Wyo. 1942)) ("He who comes into equity must come with clean hands").

CONCLUSION

Appellees, Teton County Board of County Commissioners and Teton County Planning Director, respectfully request this Court to affirm the decision of the district court.

DATED this 2nd day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of October, 2013, at Jackson, Wyoming, I electronically served the within Answer Brief of Teton County Board of County Commissioners and Teton County Planning Director via the Wyoming Supreme Court C-Track Electronic Filing System and that I have caused a true and correct copy of the same to be served on the following person on the date and by all on the same date by U.S. Mail, postage prepaid, and via email, addressed as follows:

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The original, plus six copies of this document, was sent to the Wyoming Supreme Court by Federal Express this 2nd day of October, 2013. I have accepted the terms for e-filing and this document is an exact copy of the written document filed with the Clerk. This document is free of viruses. I hereby certify that all required privacy redactions have been made.

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Keith Gingery