BEFORE THE BOARD OF COUNTY COMMISSIONERS

TETON COUNTY, WYOMING

TETON COUNTY PLANNING DIRECTOR,	)	Case No. 10-0005
Contestant,	)	
vs.	)	
ROGER SEHERR-THOSS,	)	
Contestee,	)	

RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER came before the undersigned Hearing Officer for a contested case hearing on June 14, 15, and 16, 2011. A transcript of the testimony presented at the hearing was ordered and received on July 5, 2011 and the record was officially closed on that date. The Claimant, Roger Seherr-Thoss (Seherr-Thoss), appeared in person and by and through counsel, Lea Corrigan and James Lubing of Lubing and Corrigan, LLC. The Teton County Planning Department (County) appeared by and through its Planning Director, Jeff Daugherty and counsel, Deputy County Attorney Nicole G. Kreiger. A joint exhibit notebook containing Exhibits 1 through 121 was received into evidence at the hearing. This Hearing Officer has considered the evidence and argument of the parties, and makes the following recommended findings and conclusions:

I. JURISDICTION

1. The jurisdiction of the Board of County Commissioners to decide this matter has been resolved pursuant to an Order from the District Court of the Ninth Judicial District entered on May 23, 2011 in the matter entitled *Roger Seherr-Thoss vs. Bd of County Commissioners of Teton County, et al.*

II. STATEMENT OF THE CASE

2. Seherr-Thoss owns a 299.76 acre parcel of land located at 4520 South Park Loop Road, Teton County, Wyoming. Seherr-Thoss and his family have owned the property since 1941.

3. On December 6, 1977 the Board of County Commissioner's adopted Teton County Comprehensive Plan and Implementation Program (the Plan) as well as the Teton County Land Use and Development Regulations (LDRs) which became effective January 1, 1978.

4. At the time of the adoption of the LDRs Seherr-Thoss was engaged, at a minimum, in some stockpiling and screening of gravel on his property.

5. As a result of the Plan's adoption, Seherr-Thoss property was included in an area zoned as a Residential-Agricultural (RA). Acceptable uses of the property in that area did not include gravel operations.

6. From 1978 until 1995, no effort was made by the County to enforce the zoning regulations with respect to Seherr-Thoss use of his property.

7. Starting in 1995, the County commenced efforts to determine if Seherr-Thoss had a prior lawful nonconforming or "grandfathered" gravel operation on the property, and if so to what extent.

8. Between 1995 and 2010, the parties engaged in various discussions, disagreements and temporary resolutions, including the issuance of temporary permits, in an effort to resolve the issue of Seherr-Thoss' use of his property for a gravel operation.

9. No permanent or final resolution was reached and on June 7, 2010 the Teton County Planning Director issued a Notice to Abate, to Seherr-Thoss ordering that,

a. All gravel extraction and crushing activities on his property cease.

b. stockpiling and screening activities on his property be reduced to pre 1978 levels or alternatively to levels of a 1998 and 2000 temporary permit issued by Teton County to Seherr-Thoss

10. On February 16, 2011, an Amended Notice of Alleged Violations of Land Development Regulations was served. In addition to the prior order to abate, the Amended Notice contained,

a. a notice of violation of the requirement for reclamation contained in a prior temporary permit and an order to proceed with such reclamation, and

b. that any grandfathered extraction and crushing of gravel be reduced to pre 1978 levels, if any.

11. At the contested case hearing, and after prior briefing and discussions

between the parties, the issues for determination at this point were limited to

a. a determination of whether Seherr-Thoss was in violation of current regulations,

b. a determination of what if any use of Seherr-Thoss' property was grandfathered under the 1978 LDR's , and

c. if there was prior grandfathered use, and there is legal authority to restrict enlargement or expansion of the use, then a decision needed to be made as to whether or not there has been enlargement and expansion and to what extent.

Tr., p. 7.

12. At the contested case hearing, the County also specifically conceded that it was not pursuing any claim of abandonment of any prior non-conforming use by Seherr-Thoss. *Tr., p. 9.*

III. PREHEARING RULINGS ON ISSUES OF LAW

13. Prior to the contested case hearing the parties raised various issues of law which were addressed as follows,

A. CONCLUSIONS AND APPLICATION OF LAW REGARDING BURDEN OF PROOF

14. The parties argued as to who bore the burden of proof in this matter. The law with respect to that issue is discussed in more detail below, however, this Hearing Officer ruled that is was appropriate in this case to utilize the burden shifting method and require the Planning Director to prove initially a violation of the ordinances, to then shift the burden to the Seherr-Thoss to prove a grandfathered use and then to shift the burden back to the Planning Director to show that the Seherr-Thoss had unlawfully exceeded or enlarged the use.

B. CONCLUSIONS AND APPLICATION OF LAW REGARDING PROHIBITIONS UNDER THE LDRS

15. Prior to the contested case hearing Seherr-Thoss argued that his use of the property was not unlawful under the current LDRs as he contended that there was no specific prohibition against gravel operations in a Residential Agricultural (RA) District. The County responded that the LDRs are permissive regulations meaning that only those uses listed as permissible in a particular district are allowed and any use not specifically

listed is prohibited. *See "Seherr-Thoss' Briefing Regarding Applicability of 1978 Land Use and Development Regulations" dated June 9, 2011 and "Planning Director's Supplemental Memorandum regarding the Teton Count 19778 Comprehensive Plan and Land Use Development Regulations" dated June 9, 2011.*

16. This Hearing Officer reviewed the parties' arguments and agreed with the County that unless a use was specifically listed as permissible or authorized in the LDRs, that it was prohibited. The clear language contained in Chapter II of the LDRs which is entitled "Land Use Districts" states as follows,

> Section 4. **Authorized** Uses. Unless expressly prohibited by the regulations for environmental protection district prescribed in Chapter III, page 41, the following types of **uses shall be authorized**. *Exhibit 1, page 35.*

Each district then has a list of authorized uses. The clear implication is that unless a use is listed, it is not authorized.

C. CONCLUSIONS AND APPLICATION OF LAW REGARDING THE APPLICABLE VERSION OF THE LDRS

17. In further defining the burden of proof in this case, the Hearing Officer was also asked for a determination of what version of the LDRs applied and consequently at what point in time Seherr-Thoss was required to show a grandfathered use. It was noted the Notice to Abate referenced violations of the "current LDRs". The most recent version of the LDRs were passed in 1994.

18. Seherr-Thoss argued therefore that he should only have to show the extent of his use as of 1994, not 1978.

19. The record showed that in 1994 the 1978 LDR's had been repealed and replaced by the current 1994 LDRs. *Exhibit 2, Section 1510.* This Hearing Officer found and concluded that while the notice to abate could only be based upon violations of current regulations as the prior LDR's were repealed, the grandfathered use in this case must be established based upon the use prior to adoption of the 1978 LDRs since Seherr-Thoss use of the property between 1978 and 1994 had to be a "lawful" non conforming use to be grandfathered.

20. Even if Seherr-Thoss could prove he conducted gravel operations on the property between 1978 and 1994, he could not prevail as it would not have been a "lawful

use" given the prohibition under the zoning ordinances in effect during that period. The only way there can be a lawful preexisting use of Seherr-Thoss' property for gravel operations is if it was in existence prior to 1978.

IV. STATEMENT OF THE ISSUES

21. Having disposed then of the various issues of law raised prior to the hearing, the issues for determination at the contested case hearing were as follows,

a. Whether or not Seherr-Thoss was in violation of the current LDR's by conducting gravel operations.

b. Whether or not prior to 1978 Seherr-Thoss was engaged in a lawful non conforming use,

c. Whether or not Seherr-Thoss had unlawfully exceeded or enlarged the use.

V. PARTIES CONTENTIONS

A. COUNTY'S POSITION

22. The County acknowledges that Seherr-Thoss was engaged in stockpiling and screening of gravel prior to 1978, but contends extraction and crushing was not part of the operation at that time and is not a grandfathered use.

23. The County contends that Seherr-Thoss has exceeded whatever use that existed prior to 1978 and that such enlarged and expanded use is not entitled to grandfathered status and must be abated.

B. SEHERR-THOSS' POSITION

24. Seherr-Thoss contends that the entirety of his gravel mining operation was in existence prior to 1978, including extraction and crushing and these activities are therefore lawful nonconforming uses or grandfathered uses.

25. Seherr-Thoss further contends that all grandfathered uses on his property must be allowed to continue unregulated by the County given the language of W.S.A. § 18-5-207.

26. In addition Seherr-Thoss contends that the County should be estopped from its efforts at enforcement of the LDRs given its failure to take any action to enforce them from 1978 until 2010.

VI. FINDINGS OF FACT

A. SEHERR-THOSS IS IN VIOLATION OF THE CURRENT LDRS

27. The County presented the testimony of current planning director Jeff Daugherty to show that the Seherr-Thoss was in violation of the current LDRs. *Tr., pp. 55-99.* Seherr-Thoss did not present any evidence to the contrary, and conceded that if his operation is not found to be a lawful nonconforming use pursuant to the definition of the 1978 LDRs, then he is in violation of the provisions of the current LDRs regulating gravel extraction and processing. This Hearing Officer finds that the Seherr-Thoss is in violation of the current LDRs.

B. THE NATURE AND EXTENT OF SEHERR-THOSS' PRIOR LAWFUL NON-CONFORMING USE

28. The nature and extent of Seherr-Thoss' prior use was determined primarily from witness testimony regarding their knowledge of Seherr- Thoss' use prior to 1978.[1]

29. The evidence in the case was undisputed that before 1978,

a. The pond from which Seherr-Thoss currently excavates gravel had already been dug as evidenced by an aerial photograph. *Exhibit 13.*

b. Some stockpiling and screening of gravel was already being conducted on the property.

30. The focus then is on whether or not gravel excavation and crushing was conducted on the property prior to 1978. In that regard, as noted below in the Conclusions of Law, a lawful non-conforming use includes not only actual but intended use, however, the intended use must be "established", meaning something more than a plan or thought or an idea. There must be some objective evidence of that intended use.

31. Both parties presented testimony of witnesses who were born and/or raised in the area and claimed to have knowledge of the operations on the Seherr-Thoss property

[1] Note that several additional witness presented by the County testified regarding their knowledge of the operations on the property commencing in 1994 or 1995 and their efforts to determine if Seherr-Thoss use was grandfathered and to what extent. Additionally the witnesses testified regarding the efforts between 1995 and 2010 to resolve the outstanding issues. This testimony was only relevant to the equitable estoppel issue and the expansion and enlargement argument. Consequently, it will not be addressed at this point and then only to the extent necessary to address those arguments, noting that Seherr-Thoss essentially conceded it's argument for equitable estoppel based upon events occurring after 1995 and likewise conceded that there had been an enlargement and expansion of his operations. *Tr., pp. 685,687.*

during the 1970s and prior to 1978. All of these witnesses were deemed credible. In an effort to weigh the testimony and reconcile the seemly inconsistent or conflicting testimony of the witnesses, this Hearing Officer took into consideration: a) the witnesses' relationship if any or bias or prejudice in favor or against either party, b) the witnesses' opportunity to view the property and operations during the relevant time period, and c) whether other evidence supports or impeaches the witnesses testimony.

32. Seherr-Thoss first presented the testimony of his ex wife Claudette Higgins. Ms. Higgins testified that she and Seherr-Thoss were married from 1965 to 1985 and that they lived in a trailer house in the southeast corner of the property. Ms. Higgins testified that as of the mid-1970s, Seherr-Thoss was excavating, crushing and stockpiling gravel. They intended to make a living that way because "feeding cattle wasn't good enough'. She testified that more of their income came from the gravel business as feeding cattle is a "pretty skimpy life". *Tr., pp. 220, 225.* Ms. Higgins testified that Seherr-Thoss was extracting and processing between 10 and 20 truckloads of gravel a day however she admittedly could not recall the amount of production with any certainty. *Tr., p 231.*

33. Ms. Higgins testified that a pond was dug on the property in 1973-1974. It was a gravel pond that was later stocked with fish. *Tr., p. 213.* She testified that they extracted gravel from two places on the land – the pond nearer to Seherr-Thoss' father's home and a small pit behind their trailer house. *Tr., pp. 214-215.* It was also noted that Ms. Higgins' testimony was disputed by the testimony of Mr. John Erickson from DEQ who testified that from his inspection in 1995, the area near their trailer house had never having been excavated. *Tr., p. 410.*

34. Ms. Higgins testified that probably around 1976 she remembered the first crusher being set up behind their shop. *Tr., p. 217.* They initially leased a small portable crusher, and ultimately purchased a crusher. Ms. Higgins could not testify with any certainty to the details of the crusher, for example what color it was, and if the photo of the crusher in Exhibit 113 was the original crusher on the property or the one they purchased later. *Tr., pp. 233-235.*

35. Ms. Higgins testified that she did the books for the business and remembers that they sold gravel to Teton County Road, Bridge & Levee Department, through supervisor Corky Moyer. She remembered that Corky Moyer was a customer because she

also worked for Moyer at Road and Bridge for many years in the 1970s. *Tr., pp. 230, 236.*

36. Ms. Higgins obviously had a good opportunity to observe the operations and would have direct and personal knowledge of Seherr-Thoss' intent at the time. The details, such as to the color of the crusher, or who exactly all the customers were, would understandably not stick in a person's mind some 33 years later. In addition, given the estranged relationship between the parties since 1985 she would not appear to have any interest in the matter. Consequently, her testimony was deemed credible and entitled to considerable weight. It was noted however, that even though Ms. Higgins may not have an interest in the outcome that her son's primary business is the current gravel operation. *(Tr., pp. 222-223).* This Hearing Officer also found it somewhat interesting that Ms. Higgins was in attendance for most of the rest of the hearing, returning the day after her testimony was provided.

37. Miles Roice seemed to be a very credible and convincing witness with a good opportunity to observe the operations and without any bias or prejudice in favor or against one party or the other. Mr. Roice testified that his family owned property on the bench overlooking the Seherr-Thoss Ranch. He was certain that the Seherr-Thoss and his father were conducting a gravel operation on their property prior to 1978, because his family was also in the gravel business, and they were paying attention to the operation because they viewed it as competition. Indeed he testified that they used binoculars to view the Seherr-Thoss property to determine what was going on. He specifically remembered that Seherr-Thoss had a crusher on the property. He remembered the type of crusher and that it was located near his shop and the property line. Mr. Roice admitted that he did not know for sure that the crusher was being operated but he was very clear that it was there. Mr. Roice was certain that these memories preceded 1978 because of the timing of his graduation from high school and his own involvement in his family's gravel business starting in the 1960s. It was noted however that Roice did not recall a pond on the property. *Tr., pp. 269-288.* Mr. Roice previously prepared a written statement which was consistent with his testimony. *Exhibit 115.* It was also noted that the witness from the DEQ Land Division, Mr. John Erickson, testified that Roices did hold a mining permit under the 1969 Act as well as the 1973 revisions to the Act. *Tr., p. 397.*

38. Bob Schupman was also a credible witness and without bias or prejudice,

however, his observations were not as certain. He testified that starting in 1977 he was driving atruck for Johnny Curtis of Curtis Excavation. They generally got material from Clark's Ready Mix however if they were on a job in the Rafter J or South Park area, they would get pit run from the Seherr-Thoss pit. *Tr., pp. 260- 268.*

39. Harry Seaton was another witness whom this Hearing Officer found particularly credible and without bias or prejudice. He testified that during the years 1974 through 1978, when he subcontracted for Corky Moyer of the Teton County Road, Bridge & Levee Department, he would truck gravel and pit run from the Seherr-Thoss pit to the Shootin' Iron Dike and other projects. He described "pit run" as sand and gravel 12 inches down. He also remembers a crusher sitting on the property near Seherr-Thoss' house. He said it was like their jaw crusher. Indeed he recalls walking up to the crusher to get a closer look at it. *Tr., pp. 238- 259.*

40. Bill Moyer testified via video deposition which is transcribed at pages 345 through 390 of the transcript. Mr. Moyer had also previously provided a written statement to the County Planning Department. *Exhibit 114.* Mr. Moyer testified that he and the Seherr-Thoss were lifelong friends. He testified that during the years 1974 and 1975, he was working for the Highway Administration on a road project in the Hoback Canyon. During these years he remembered talking with the Seherr-Thoss about his start-up gravel business and also seeing the gravel operation on the Seherr-Thoss' property. He testified that the Seherr-Thoss was initially extracting gravel from a small pit behind the trailer house, and that his first crusher was set up behind the trailer house as well. Mr. Moyer also remembered the pond from which Seherr-Thoss was extracting gravel. *Tr., pp. 355-358.*

41. Mr. Moyer testified that the Seherr-Thoss was excited about the gravel business although Seherr-Thoss' father was not so excited and wanted him to stick to ranching. Mr. Moyer's testimony is somewhat confusing and inconsistent in that he initially stated that Seherr-Thoss wanted to grow his operation as big as Clark's and Evans, but then stated he just wanted to be a small time operation. *Tr., pp. 353-354.*

42. Mr. Moyer obviously had a bias and prejudice in favor of Seherr-Thoss, however, he also had a good opportunity to be on the property and see the operations given his somewhat frequent visits to the property. Despite his conflicting testimony on Seherr-Thoss' intent, he was very clear and definitive about the operations, the locations of the

operations including an area by Seherr-Thoss home and by the pond and that excavation, stockpiling, crushing and screening were part of the operations. *Tr., pp. 355-358.*

43. Seherr-Thoss testified that he and his family had owned the property since 1941 and their main business was ranching. He testified that they found it was getting harder to make a living ranching and in 1972 he dug a pond that was approximately one-half acre to begin "playing in the gravel." *Tr., pp. 291-292.* The pond was dug using Mike Yokel II's CAT. The pond was located by his father's house and is the one depicted in the aerial photographs. He also recalled extracting gravel from a small pit behind the trailer house he lived in with his wife, Claudette.

44. Seherr-Thoss recalled that his first crusher was leased, and set up behind the trailer house. The little crusher could maybe crush 40 tons per hour but would often break down. He testified the crusher was located by the shop because they needed to fix it often He later purchased a bigger crusher. When the construction of Melody Ranch started he moved the crusher over to the pond to "take the pressure off the Melody". *Tr., pp. 297-298, 309, 332.*

45. Seherr-Thoss claimed that in the 1970s most of his income came from the gravel business. He testified that the amount he was extracting and crushing varied depending on the demand. If it was real busy they might haul out between 8 to 10 loads of gravel per day, each of which measured approximately 12 cubic yards. Again depending on demand they would operate two or three days a week, but just during the summer months. *Tr., pp. 306-307.*

46. He further testified that both he and his dad sold his gravel to Corky Moyer in the 1970s. He recalled supplying gravel for the Shootin' Iron Dike project, and other projects for the Teton County Road, Levee & Bridge Department. *Tr., pp. 301-302, 310.*

47. Seherr-Thoss testified that there has never been a single summer since the 1970s that he was not extracting and crushing gravel on his property. *Tr., p. 312.* It was noted however, that a crusher was not listed in the 1990s on his personal property records submitted to the County for tax purposes. *Exhibits 105, 106 and 107. Tr., pp. 318-319.* Seherr–Thoss was not sure why the equipment was not listed but stated it was his accountant who prepared the forms. *Tr., p. 331.*

48. Seherr-Thoss testified that he had serious difficulty locating the documentary

evidence demanded by the County to support his position that he was operating a gravel pit prior to 1978, despite his best efforts to locate the same. *Tr., pp. 327-328.* Seherr-Thoss did not however testify that he specifically took any actions, such as destroying prior records or proceeding to invest in the gravel operation, in reliance upon any actions or failure to act by the county.

49. Obviously Seherr-Thoss' statements with respect to his use and intended use are self serving and his credibility is judged heavily by his interest in a finding of the grandfathered use. Seherr-Thoss' testimony as to his actual operations and his intent is also weighed against the undisputed testimony, set forth in more detail below, that he did not obtain permits or pay taxes on a gravel operation. While he claimed to have no knowledge of the requirements for a permit or to pay taxes, and while that may have been true when he first started the operations, it is hard to believe that he had no knowledge up until the mid-1990's when he did obtain a permit and start paying taxes. Rather, this Hearing Officer believes that Seherr-Thoss' operation was relatively small and more than likely he thought he could operate "under the radar" and not have to obtain permits and pay taxes. In any event, to the extent that Seherr-Thoss testimony was corroborated by other witnesses and objective evidence, it is deemed credible and cannot be disregarded.

50. In addition to his own testimony and the testimony of these witnesses, Seherr-Thoss presented five written statements. *Exhibit 66.* Those statements were written in 1997 and include the following,

a. A handwritten letter from Betty Gardner who indicated she had lived next door to the Seherr-Thoss family since 1953. She stated that to the best of her knowledge Seherr-Thoss started his "excavation and trucking" business in the early 1970's.

b. A typed letter signed by Ethel W. Matheson, stating that Roger Seherr-Thoss DBA RST Excavation & Trucking has been in business extracting & processing topsoil & gravel since 1970.

c. A handwritten letter signed by Ross Kepford, who lived across the road from Seherr-Thoss. He indicated that Seherr-Thoss' "excavation and extraction of gravel started some 20 years of so ago.

d. A handwritten letter from Richard Thoening, stating Seherr-Thoss has been

"taking gravel and top soil etc. off his place in South Park since we have been here which is 1973".

e. A typed letter from C. R. Nuss which stated he had known Seherr-Thoss since 1974 and knew that "he has been in the processing & extraction of topsoil & gravel at the site on south park road since 1972".

51. The probative value of the statements is limited as they are very general and this Hearing Officer was not provided with any foundation or understanding of whom most of these people were unless noted in the statement. Nevertheless, they did support and corroborate the testimony of Seherr-Thoss and the witnesses called by him.

52. In a further attempt to meet his burden of proof, Seherr-Thoss presented meeting minutes from a 1976 meeting of the Teton County Commissioners which shows a $200 payment to the Seherr-Thoss from the Teton County Road, Bridge and Levee Department. The document is of little if any value however as it does not identify the goods or services provided. *Exhibit 110.*

53. The primary piece of documentary evidence relied upon was the aerial photograph from 1978 which shows a small pond with a disturbed area that is light in color on the center/western portion of the Seherr-Thoss property. The photograph also shows a disturbed area on the southeastern portion of the property. *Exhibit 13.*

54. Seherr-Thoss argues that the existence of the pond in and of itself is objective evidence of extraction. Further, Seherr-Thoss argues that the existence of a stockpile of gravel is in and of itself objective evidence of extraction. In that regard, Jeff Daugherty acknowledged the County's admission that there was stockpiling of gravel prior to 1978 and that there was no evidence that in the 1970s Seherr-Thoss was importing the gravel he had stockpiled. *Tr., p 135.*

55. To rebut the testimony of the witnesses called by Seherr-Thoss, the County presented the testimony of three witnesses for the purpose of showing that Seherr-Thoss was not conducting the extraction and crushing aspects of a gravel operation on his property prior to 1978. Those witnesses were also found to be credible and disinterested, however, their opportunities to observe were not as significant as those of Seherr-Thoss' family, friends and neighbors .

56. David Owen testified that he is the owner of Owen Construction which has existed in the County since the mid-1950s. He has known Seherr-Thoss all his life. *Tr., p. 457.* Mr. Owen stated that Owen Construction was involved in dirt work and building roads during the 1970s, which required them to purchase and haul gravel. He stated that because of his business needs, it was important that he know all of the available sources of gravel in the County at that time so that he could get the best prices, and he would talk with people in the County about gravel sources. When asked about the sources of gravel in Teton County in the 1970s he referred to Jerry Wilson and Clark's Ready-Mix. *Tr. p. 454-456, 465.* Mr. Owen did not mention Seherr-Thoss but by the same token he did not mention Roice as a source for gravel either. Mr. Owen did however testified that Mr. Roice was a very good friend of his. *Tr., p. 466.* As noted above, Mr. Roice testified that his family was in the business and John Erickson confirmed his family had a permit. Thus, one can conclude that Mr. Owen may not have remembered all of the gravel providers or activities during this period, some 33 years ago.

57. Mr. Owen further testified that in the 1970s, to his knowledge Seherr-Thoss' business consisted of hauling logs, gravel and rip-rap (big rock) down to the dykes. *Tr., p. 458.* He also stated however that he did not know if Seherr-Thoss was conducting any other business. Mr. Owen stated he did not become aware of Seherr-Thoss having a gravel operation and selling gravel until the late 1990s. *Tr., p. 463.* Mr. Owen also testified that he frequently drove by the Seherr-Thoss property in the 1970s, and that he is familiar with gravel processing equipment and did not observe any on the Seherr-Thoss property in the 1970s. *Tr., p. 464.* Mr. Owen did not however testify that he actually drove on to the Seherr-Thoss property.

58. Mr. Monty Evans is the former owner of Evans Construction which was founded in 1968. *Tr., p 471.* Evans Construction began as a dirt and earth moving operation and is located approximately four miles from South Park Loop Road and the Seherr-Thoss property. Mr. Evans testified that Evans Construction had its own gravel pit. He also stated that as part of this business he needed to purchase gravel and needed to know the available sources. He stated that in the 1970s the only two gravel operations in the County were Wilson Construction and Clark's Ready-Mix, both of whom supplied crushed gravel products and that there were no other gravel pits at that time. *Tr., p. 476.* He stated he

purchased crushed gravel from Wilson Construction during the 1970s but was looking for sources closer which could have eliminated the trucking costs and that none were available. *Tr., p. 478.* Again, this witness did not mention Roice's gravel operation. Mr. Evans was very clear and firm in his testimony stating that he did not observe any gravel operations when he drove by the Seherr-Thoss property. Under cross examination, Mr. Evans also testified that there was definitely not a pond on the Seherr-Thoss property at that time, which testimony is refuted by the aerial photography of the property. *Tr., pp. 480.*

59. Francesca Paolucci-Rice testified that she and her husband purchased property to the north of the Seherr-Thoss ranch in September of 1977. She testified that she had a clear view from her home to the Seherr-Thoss property and that in the late 1970's there was mostly open pasture with only some buildings and equipment on the southeast corner of the property. She stated that there was also a small pond, but does not recall seeing any activity on the pond in the late 1970s early 1980s. *Tr., p. 577-578.* It must be remembered however, that Paolucci-Rice did not frequent the area until the last part of 1977, and according to Seherr- Thoss he only operated during the summer months.

60. She stated that she did not notice much noise coming from the Seherr-Thoss property and when shown a photograph of the 1952 crusher *(Exh. 113)* stated that she did not see that piece of equipment on the Seherr-Thoss property during the late 1970s. *Tr., p. 579.* She however also stated that she could not describe or identify with any specificity the equipment in the southeast corner but she knew there was some there. *Tr. pp. 577.*

61. Ms. Paolucci-Rice acknowledged under cross examination that there was some activity on the property when she first moved to the area but that it was minimal. *Tr., p. 584.* There is a memorandum in the exhibits dated May of 1997 from former Planning Director, Bill Collins. Evidently he was investigating a complaint from Paolucci-Rice that Seherr-Thoss was "expanding his pond". In that memorandum it is noted Paolucci-Rice stated that he "always had some type of small yard along the road, but hadn't noticed anything from her house." She had noticed expansion since Seherr-Thoss' father died. *Exhibit 68.*

62. It is noted that Ms. Paolucci-Rice's testimony was credible and was more relevant to the enlargement and expansion of the business. It was also noted that as a neighbor disturbed by the expansion and enlargement of the property, she certainly has an

interest in the outcome.

63. Mr. Don Varney, former Road and Levee supervisor for Teton County, testified that he began working for the County in 1979. His involvement with Seherr-Thoss was to contract with him with respect to his trucking business. According to Mr. Varney, the County hired Seherr-Thoss to haul rocks during a flood in 1979 and would hire out his dump truck. *Tr., p. 483.* Mr. Varney was asked if Seherr-Thoss ever submitted a bid for gravel on any County projects, however, he stated that the County had their own pit and crusher and really didn't need to solicit bids. Clark's Ready-Mix, Evans Construction and Wilson Construction would bid on projects and include gravel, pit run, crushed rock, etc., but it did not appear that the County was actually soliciting bids for gravel. In any event, Seherr-Thoss never submitted any bids and to his knowledge never supplied any gravel to the County in the 1980s. *Tr., p. 486-487.* In the memorandum from Bill Collins dated May 1997, it was noted he also talked to Don Varney and it is stated "Roger worked for the County as a trucker. He had trucks and a backhoe. Don does not know if Roger screened/excavated on site." *Exhibit 68.* Mr. Varney's testimony was deemed credible and he was careful to confine his testimony to his personal knowledge.

64. In addition to these witnesses, the County presented the testimony of several government officials establishing that Seherr-Thoss did not obtain permits or pay taxes on any gravel extracted until sometime in the 1990s.

65. John Erickson is the Assistant District Supervisor for the Department of Environmental Quality (DEQ) – Land Quality Division in Lander, Wyoming. Mr. Erickson has worked for DEQ for 32 years. He is responsible for permitting mining operation, inspecting mining operations and enforcing DEQ regulations in the western half of Wyoming. *Tr., p. 391.*

66. Mr. Erickson testified that beginning in 1969, under the newly enacted Open Cut Land Reclamation Act, any person in Wyoming who was extracting gravel from the ground was required to obtain a permit from the State Land Commission and to subsequently reclaim. *Tr., p. 393, 394.* Beginning in 1973, under the Environmental Quality Act (EQA), every person extracting gravel from the ground who had a permit under the 1969 law had to obtain a new permit or convert their existing permit within one year. Under the EQA, any new mining operation also was required to maintain a permit. Gravel

operations are included in the definition of mining operations. *Tr., p. 393-394.* In sum, beginning in 1969, either a permit or notification was required for any commercial gravel mining/extraction. *Tr. p. 395.*

67. Mr. Erickson testified that he had checked the records and Seherr-Thoss did not have any permit from or notification to DEQ prior to 1978 allowing him extract gravel. *(Tr., p. 398)* Likewise, no paperwork or correspondence regarding any gravel extraction on the Seherr-Thoss property exists in the DEQ file which dates back to the 1970s. *Tr., p. 398.*

68. The first time Seherr-Thoss requested a permit from DEQ-Land Quality Division was in 1994, when an application for a limited mining operation to allow for three (3) acres of gravel extraction and processing was submitted. The permit was granted and allowed for extraction, mining, sale and processing of gravel but did not address crushing, which is regulated separate and apart from excavation by the DEQ-Air Quality Division. *Tr., p. 399; Exh. 21.*

69. The County presented further testimony that likewise, Seherr-Thoss did not obtain a permit from the DEQ-Air Quality Division. The County called Chad Schlictemeier of the DEQ-Air Quality Division to testify. Mr. Schlictemeier testified that beginning in 1974 DEQ rules and regulations required a permit for crushing equipment or any construction or modification of a source that will emit air pollution. *Tr., p. 608.*

70. Mr. Schlictemeier testified DEQ-Air Quality Division records are maintained indefinitely. A review of all records dating back to the 1970s shows that the first time Seherr-Thoss applied for any sort of DEQ-Air Quality permit was in 1998 when he applied for a wet screening and gravel operation. However, this permit did not allow crushing. *Tr., p. 612.*

71. The County also presented the testimony of Matt Satjse from the State of Wyoming Department of Revenue and Taxation. Mr. Satjse testified that extraction of gravel triggers an obligation to pay severance taxes to the State. There is no minimum or threshold level and a person is required to report to the Department of Revenue immediately for extraction of any level of gravel for commercial purposes. This tax went into effect in 1969. *Tr., p. 591-592.*

72. The severance tax system is a self-reporting system wherein the taxpayer reports production amounts to the Department of Revenue and the Department of Revenue

then bills the severance tax to the property owner. *Tr. p. 591.*

73. The Department of Revenue maintains severance tax records back to 1969 *Tr., p. 593.* At the County's request, Mr. Satjse conducted a review of Department of Revenue records since 1969. Neither Roger Seherr-Thoss, Seherr-Thoss Trucking and Excavation, RST Sand and Gravel, or Mr. Seherr-Thoss's father paid any severance tax to the State for gravel extraction until 1996. *Tr., p. 594-595; Exhs. 57, 58.*

74. As is set forth above, this admitted failure of Seherr-Thoss to obtain permits or pay taxes on his gravel operations in the early 1970s weighs against Seherr-Thoss' credibility and were it not for the testimony of the other witnesses, may have defeated his claim that he was conducting a full gravel operation prior to 1978.

75. After reviewing and considering all of the above, this Hearing Officer finds that while no one piece of evidence establishes by a preponderance of the evidence that Seherr-Thoss was engaged in gravel excavation and crushing as well as stockpiling and screening prior to 1978, the evidence as a whole indicates that it is more probable than not that Seherr-Thoss was doing so but most likely on a small scale. Given the undisputed testimony that Seherr-Thoss was stockpiling gravel before 1978 and the absence of evidence that he was importing gravel at that time, the reasonable inference is that he was excavating. That inference was confirmed by the testimony of the various witnesses. Likewise, this Hearing Officer was struck by the consistent testimony of Seherr-Thoss witnesses as to the presence of a crusher behind the Seherr-Thoss house and shop. Although Seherr-Thoss and Higgins were the only ones who testified that the crusher was put in use on a consistent basis and Moyer could only testify he saw it operating one time, and the reasonable inference was that since it was there it was in actual use or the intended use was established.

76. As credible as Mr. Owen's testimony was, it was outweighed by the testimony of the other witnesses which in turn was corroborated by the written statement of the other neighbors. The testimony of the other local witnesses called by the County was somewhat equivocal and did not have the same foundation that the testimony of Seherr-Thoss' witness' had.

77. The discrepancies in the witnesses' testimony can be reconciled when consideration is given to each witness' opportunities to view the property and also by a finding that while Seherr-Thoss previously used his property for such a gravel operation, it

was not a large operation. It was evidently not something that was well known or advertised. His business was no doubt limited and certainly not as obvious as it is today.

78. Those witnesses who simply drove by and did not have an opportunity to be on the property, did not observe the operations most likely because it was a small seasonal operation. It is also noted that Seherr- Thoss stated he did not advertise or seek customers, so his operation may not have been as well known as the other gravel operations in the area. Further, consideration is given to the testimony regarding the economic climate at the time. Harry Seaton, probably stated it best that in the early 70s one "had to be a jack of all trades to make a living around here". *Tr., p. 241.* Indeed many of the witnesses testified that they performed several different jobs in the early 70s. It seems that Seherr-Thoss' reputation was that of a trucker. That does not however mean that he did not have the small gravel operation.

C. EXPANSION AND ENLARGEMENT OF THE USE.

79. With regard to the issue of expansion and enlargement, there was really no dispute that such expansion and enlargement has occurred. Indeed in closing argument counsel for Seherr-Thoss conceded as much. *Tr., p. 685.* Further, a comparison of the aerial photographs from 1978 to 2009 show in black and white that there has been considerable expansion and enlargement of what was once a small gravel operation. *Exh.13- 20.*

80. With respect to the actual degree of expansion and enlargement the County met its burden of proof and showed the following,

a. Per computer mapping performed by Teton County Code Compliance Officer Jennifer Anderson, the pond on Seherr-Thoss' property in 1978 measured .34 acres and the disturbed area on the southeast corner of the property measured approximately .7 acres. *Tr., p. 641; Exh. 120.* In contrast, in 2009, the pond measured 5.68 acres and the entirety of the disturbed area for gravel measured just under 8 acres with a margin of error of approximately .5 acres. *Tr., pp. 641-642; Exh. 121.*

b. Seherr-Thoss testified that in the 1970s the equipment used as part of his gravel operation included the following: an old backhoe, a dump truck, a small CAT, a yellow-orange portable crusher; and no gravel screener. *Tr., p. 306.* Between one to eight loads of gravel were being extracted from the pond, each load containing 12 cubic yards of gravel. *Tr., p. 306-308.*

c. Seherr-Thoss testified that at present, the equipment on his property includes two crushers, a dredge, two front-end loaders, a wash plant, another little screener, three dump trucks, a water truck and a CAT that holds the dredge. The

operation currently runs 8 hours a day five days a week and truckS between 20 and 50 truckloads of gravel off his property each day in the summer of 2010. *Tr., p. 322-323.*

d. Per inspections by DEQ's John Erickson, the Seherr-Thoss gravel operation in 2010 is larger in size and scope than it was in 1995. In 1995 the operation was limited to a three-acre area. In contrast, in 2010 it covered a full 10-acres. *Tr., p. 415.*

81. While there were no Annual Reports filed by Seherr-Thoss in the 1970s or 1980s, reports submitted to DEQ and the Department of Revenue starting in the mid-1990s to date show the following production,

a. in 1996 -16,200 tons

b. in 1997- 3,877 tons *(Exh 58)*

c. in 1998 -17,000 cubic yards or 15,000 tons *(Exh 26)*

d. in 2007-77,604 tons;

e. in 2009 - 63,713 tons. *(Exh. 57)*

f. In 2010 - 28,000 tons *(Exh 37)*

Transcript 416 -417, 596-7;

82. The testimony throughout the case established that the size of the operation depended upon the demand in the area and there have been years when a lot of construction was going on and years when no building was going on. Neverhteless, based upon the above testimony and evidence, it can been seen that the operations have basically tripled in size, ie. acreage, tonnage, days and times of operation.

VII. CONCLUSIONS OF LAW

83. At the onset, this Hearing Officer will address Seherr-Thoss' equitable estoppel argument, as that argument would be dispositive of the entire matter if successful.

A. SEHERR-THOSS HAS FAILED TO PROVE EQUITABLE ESTOPPEL

84. Seherr-Thoss argued that all enforcement action by the County should be dismissed or denied based upon laches or the doctrine of equitable estoppels. Seherr-Thoss argued repeatedly that the County had failed to show any reasonable basis for its failure to enforce the LDRs during the period of 1978 until date of the Notice to Abate. It was not

however the Counties burden. Rather, the party claiming laches or equitable estoppel has the burden of proof. *Pickett v. Associates Discount Corp. of Wyo.*, 435 P.2d 445, 447 (Wyo. 1967).

85. "The defense of laches is a form of equitable estoppel based on "[a][n] unreasonable delay by a party in asserting a right." *Hammond v. Hammond,* 14 P.3d 199, 200 (Wyo. 2000) "The party asserting the doctrine of laches must show that he relied upon the Plaintiff's actions and changed his position in reliance thereon to his prejudice...

86. The length of a delay alone is not enough to prevail on a laches claim. "Laches does not depend on the passage of time alone; the plaintiff must be chargeable with lack of diligence in failing to proceed more promptly. Laches will apply when the delay has worked injustice, prejudice, or disadvantage to the defendant." *Mullinnix LLC, v. HKB Royalty Trust,* 2006 WY 14, ¶32, 126 P.3d 909, 923 (Wyo. 2006) *quoting Cathcart v. Meyer,* 2004 WY 49, ¶13, 88 P.3d 1050, 1058 (Wyo. 2004).

87. The case law is also clear that as a general rule, estoppel will not lie against governmental bodies without a showing of **affirmative misconduct**. Further "estoppel arises only when a party, by acts, conduct, or acquiescence causes another to change his position." *Snake River Brewing Co., Inc. v. Town of Jackson,* 2002 WY 11, ¶ ¶26, 28, 39 P.3d 397, 407-08 (Wyo. 2002) and *Thompson v. Board of County Com'rs of the County of Sublette,* 2001 WY 108, ¶ 11, 34 P.3d 278, 281 (Wyo. 2001).

88. A government entity seeking to enforce its zoning regulations is not barred by laches where the zoning authority was unaware or ignorant of the violation, as actual knowledge of existing conditions or rights is a prerequisite to applying laches. 73 A.L.R. 4th, III, §6. Specifically, where a property owner has failed to produce evidence that county officials knew of a violation prior to the date in question, the County does not waive its right to enforce its zoning ordinances. *Bd. of County Com'rs v. Echternacht,* 572 P.2d 143 (Colo. 1977)[2]

---

[2] In *Echternacht,* zoning violations which began in 1960 were not made known to the County until 1973, at which time the County diligently sought to abate the violation. The defendant in that case was operating an excavation business and storing trucks and heavy equipment in an agricultural and residential zone. The Court held that defendant's failure to provide evidence that the County was aware of the zoning violation prior to 1973 allowed it to enforce its zoning regulations 13 years later.

89. This Hearing Officer concludes that Seherr-Thoss has failed to meet that burden. While the County clearly did nothing to enforce the LDRs as against Seherr-Thoss from 1978 to 1995, there was no showing that the County was necessarily aware of Seherr-Thoss' business. Even if the County had knowledge, the evidence simply does not show that the County engaged in affirmative misconduct. At best the County was inactive but it certainly did not take any action to encourage Seherr-Thoss. Nor does the evidence show that Seherr-Thoss relied upon the Counties inactivity to his detriment. He did not destroy documents or make investments based upon anything the County did or didn't do between 1978 to 1995.

90. From 1995 to date of the Notice to Abate, Seherr-Thoss was on notice that the County believed he may be in violation of the LDR's. The County attempted to work with Seherr-Thoss to resolve the issue and it should not be faulted or estopped from pursuing the action now due to the delay while such efforts were undertaken. Beginning in 1995, as soon as the Planning Department became aware that an illegal gravel operation existed on the Seherr-Thoss property, it acted diligently in trying to work with Seherr-Thoss to determine if he had a grandfathered use. The Planning Department also worked with Seherr-Thoss to obtain permits and/or to assess a number of other options for use of his property. *Tr., p. 151, 170.*

91. Consequently, the County should not be barred by the doctrine of equitable estoppels from pursuing its enforcement action.

B. BURDEN OF PROOF

92. With respect to the merits of the case then, as noted above, the parties were in disagreement as to which side bears the burden of proof. There does not appear to be any Wyoming law directly on point. Having reviewed general administrative law and planning and zoning case law this Hearing Officer ruled that the burden in this case was initially on the Planning Director to show a violation of the land use regulations, the burden then shifted to the Seherr-Thoss to prove a grandfathered use of the property. If the Seherr-Thoss proved a grandfathered use and what that use was, the ultimate burden to show a violation reverted to the Planning Director. The Planning Director had the burden to show that there is still a violation of the regulations because Seherr-Thoss has abandoned the grandfathered use, exceeded or enlarged the grandfathered use beyond that acceptable under the

regulations or any other matter which would tend to show that the Seherr-Thoss' use is still a violation of the regulations.

93. In making that ruling this Hearing Officer relied upon *J M vs. Department of Family Services,* 1996 WY 108, 922 P.2d 219, wherein some general rules and policy considerations for assigning the burden of proof in contested case hearings were set forth. The Court stated,

> The general rule in administrative law is that, unless a statute otherwise assigns **the burden of proof, the proponent of an order has the burden of proof.** BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 7.8 (2d ed. 1984). "In general, an agency is the proponent of its orders, while an applicant for benefits or for a license is the proponent in eligibility determinations." 4 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 24.02 at 24-21 (1987).
>
> [¶11] We considered the complex burden-of-proof subject in Casper Iron & Metal, Inc. v. Unemployment Insurance Commission of Department of Employment of the State of Wyoming, 845 P.2d 387, 393 (Wyo. 1993) (quoting 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 66 (1977)):
>
> The general term, burden of proof, identifies two separate legal doctrines: the burden of persuasion; and the burden of production, also termed the burden of producing evidence or the burden of going forward with the evidence. The burden of persuasion is attached to the party who "runs the risk of nonpersuasion." During a trial, this means if the "party with the burden of persuasion has not sustained it by a fair preponderance of the evidence - if the evidence is in equipoise or the opposing party's preponderates - the party with the burden must fail." The burden of producing evidence is "the obligation of the party to present at the appropriate time . . . evidence on the issue involved of sufficient substance to permit the fact finder to act upon it." The burden of producing evidence shifts during the presentation of evidence. The burden of persuasion, which generally does not shift unless by the operation of a legal presumption, becomes operative only after all the evidence is submitted.
>
> [¶12] In determining which party bears the burden of proof, we consider the applicable substantive statutes....

94. The court in that case went on to consider the purpose of the substantive law in issue and the public policy. Likewise in *Three Sons LLC vs. Wyoming Occupational Health and Safety Commission,* 2007 WY 93, 160 P.3d 58, the court assigned the burden of proof to the agency as follows,

[¶17] Addressing the burden of proof in administrative actions, we have said:

> [The] allocation of the burden of proof is a matter of law. The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. In general, an agency is the proponent of its orders, while an applicant for benefits or for a license is the proponent in eligibility determinations. JM v. Dep't of Family Servs., 922 P.2d 219, 221(Wyo. 1996) (citations omitted). In determining which party bears the burden of proof, we consider the applicable substantive statutes. Id. at 222. **When the statutes do not assign the burden of proof, the proponent of the order has both the initial burden of production and the ultimate burden of persuasion in a contested case hearing. Id.**
>
> [¶18] The purpose of Wyoming's OSHA statutes is to prevent accidents and promote safety in the workplace. Wyo. Stat. Ann. § 27-11-102 (LexisNexis 2005). The statutes do not assign the burden of proof. Therefore, WOSHA, as the proponent of orders upholding citations and penalties, has both the initial burden of production and the ultimate burden of persuasion in a contested case hearing to prove an employer committed the violations. ....

The court then considered that the burden to prove affirmative defenses lies with the opponent. In that case it also noted that the opponent, an employer had an affirmative duty to comply with the law and therefore it should be prepared to prove its affirmative defenses. The court then adopted a burden shifting method as follow,

> Although the agency has the initial burden of production and the ultimate burden of persuasion to prove that a violation occurred, it is reasonable and in accord with our usual evidentiary rules for the burden to shift upon presentation by WOSHA of a prima facie case to the employer to prove the affirmative defense of employee misconduct.

95. In reviewing the statutory provisions at issue herein, it is clear that the statute does not allocate the burden of proof. Likewise, the applicable regulations do not set forth a burden of proof. Therefore as a general rule the agency has the burden of proof. However, in accordance with the law consideration should be given to the public policy and to Seherr-Thoss' fundamental rights. The applicable statute is as follows,

> § 18-5-207. Continuation of existing uses; effect of alteration or addition; future use after discontinuation of nonconforming use.
>
> 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.

96. The case law certainly shows that the right to continue a use in existence prior to the adoption of planning or zoning regulations is a fundamental right. In *Snake River Brewing Company Inc vs. Town of Jackson*, 2002 WY 11, 39 P.3d 397, the court stated,

> This right to continue a non-conforming use is a vested property right, protected by statute, and by both federal and state constitutions.2 Wyoming's county and municipal zoning statutes both protect vested property rights, although in different ways. Wyo. Stat. Ann. § 18-5-207 (LexisNexis 2001) simply forbids counties from enacting zoning regulations that prohibit existing uses. Wyo. Stat. Ann. § 15-1-601(d)(iv), on the other hand, renders invalid any municipal zoning regulation that constitutes an unconstitutional taking without compensation. This Court has also noted that the doctrine of equitable estoppel plays a role in denying the authority to outlaw a grandfathered use. Snake River Venture, 616 P.2d at 750; see also Allen v. City and County of Honolulu, 58 Haw. 432, 571 P.2d 328, 330 (1977); 12 Richard R. Powell and Michael Allen Wolf, Powell on Real Property § 79C.06[1] (2001) and cases cited therein.3 "The concept of vested rights 'is a judicial construct designed to provide individual relief in zoning cases involving egregious statutory or bureaucratic inequities.'" Ebzery v. City of Sheridan, 982 P.2d 1251, 1257 (Wyo. 1999) (quoting Bruno v. Zoning Bd. of Adjustment of City of Philadelphia, 664 A.2d 1077, 1080 (Pa.Cmwlth. 1995)).

The court also noted however that the continuation of a non conforming use could "thwart the public policies behind comprehensive plans. Consequently, courts narrowly construe the right to continue a non-conforming use. *Young, supra*, § 6.07 at 500-02; 83 Am.Jur.2d, supra, § 700 at 604-05; 8A *McQuillin, supra*, § 25.183."

97. Balancing the fundamental right of the Seherr-Thoss then and the public policy, this Hearing Officer ruled that is was appropriate in this case to utilize the burden shifting method.

C. STANDARD OF PROOF

98. In addition to the burden of proof, it is important to consider the degree of proof required in this matter. This is especially true as it was evident that the Planning Director required a different level of proof than what is required in the administrative and judicial proceedings. More particularly, to make a determination of the grandfathered status the Planning Director required something more than the testimony of witnesses with personal knowledge. He admitted that the information provided to him in the form of the written statements and some of the documentary evidence set forth above came close to establishing the grandfathered use, however he did not think it met the preponderance standard and he required more documentary evidence. *Tr., pp. 116-118, 133-135.* The law is not so exacting however and a claimant could conceivably prove his or her claim through his or her own credible testimony and without an additional eyewitness testimony or documentary evidence.

99. In other administrative proceedings it has been said that "The testimony of an individual alone is sufficient to prove his case if there is nothing to impeach or discredit the testimony and the statements are corroborated by surrounding circumstances." *Ikenberry v. State ex rel. Wyoming Workers' Compensation Division*, 5 P.3d 799, 803 (Wyo. 2000). Moreover, the absence of documentary evidence does not prevent findings of facts from being made.

100. The normal standard of proof in administrative hearings is the preponderance-of-the-evidence standard. *J M vs. Department of Family Services, supra.* A preponderance of the evidence means that the proposition is more probable than not.

D. THE COUNTY MET ITS INITIAL BURDEN OF PROOF TO SHOW A VIOLATION OF THE LDRS

101. As noted above, Seherr-Thoss conceded that the County satisfied its burden of proving that Seherr-Thoss is presently in violation of the current LDRs relating to gravel extraction and processing, thus the burden shifted Seherr-Thoss to prove his grandfathered status.

E. SEHERR-THOSS HAS MET HIS BURDEN TO PROVE A PRIOR NON CONFORMING USE

102. The 1978, as well as the current LDRs, define "use" as "[t]he purpose for which a site or structure is arranged, designed, intended, constructed, erected, moved, altered, or enlarged or for which either a site or structure is or may be occupied or maintained." Chapter 1, section 7, subsection rrr.

103. Further the LDR's define "non conforming use" as "[t]he use of a ...site **which was established** prior to the effective date of this resolution which does not conform with the use regulations of the land use district within which it is located as prescribed in Chapter II. Page 33 or the environmental protection district within which it is located as prescribed in Chapter III, page 41." Chapter 1, section 7, subsection eee.

104. Therefore Seherr-Thoss was required to prove by a preponderance of the evidence that;

a. Prior to January 1, 1978,

b. the purpose for which his land was arranged, designed, intended, constructed, erected, moved, altered, or enlarged or for which his land is or may be occupied or maintained,

c. was established as extraction, crushing, stockpiling and screening of gravel.

105. While an intended use is included, it also must be established. *Snake River Venture v. Board of County Com'rs.,* 616 P.2d 744 (Wyo. 1980) *Snake River Brewing Company, Inc. v. Town of Jackson, supra,* holding there is no vested right to a potential use of property.

106. As set forth above, Seherr-Thoss has proven by a preponderance of the evidence, that he was conducting a gravel operation on his property prior to 1978, including extracting and crushing gravel.

F. THE COUNTY HAS THE LEGAL AUTHORITY TO REGULATE EXPANSION OR ENLARGEMENT OF A PRIOR NON CONFORMING USE

107. The LDRs provide in pertinent part,

> 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.

Per LDR Section 7120.

108. In passing the LDRs however, the County was subject to state law, the applicable provision of which again reads as follows,

> § 18-5-207. **Continuation of existing uses**; effect of alteration or addition; future use after discontinuation of nonconforming use.
>
> 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.**

109. The statute only proscribes zoning resolutions that prohibit the continuance of a use of land at the time the resolution is adopted, ie. an existing use. This is in keeping with the concept of vested rights to protect property owners' prior investments in their property. *Snake River Venture*, 616 P.2d at 750. It does not proscribe zoning resolutions that prohibit the expansion or enlargement of a prior non conforming use.

110. Seherr-Thoss argues that the exclusion of the term "land" from the second sentence means that expansion and enlargement of a use of the land may not be regulated or prohibited by zoning resolution."

111. Under Seherr-Thoss' interpretation, in order to give the county authority to regulate expansion and enlargement of the use of land, the statute would have to read

> "However 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."

112. The addition of the word land would not make sense and the deletion of the term land from that sentence is most likely due to the fact that the possibility of one "altering or adding to land", or even "enlarging or expanding land" as opposed to a building or structure, is minimal. "To alter means to "change or make different". Webster's New World Dictionary Fourth Edition (2003). Land is land, it is not subject to alteration.

Nor can one necessarily add to land, it is a definitive quantity. One can acquire more land, but not add to land.

113. "Expansion or enlargement of a use" of the land, however, is a different matter and there is nothing in the statute that prohibits the County from regulating expansion and enlargement of the use. Indeed, the courts have made clear that while prior uses of property are to be respected and are vested property rights, those rights are to be narrowly construed.

114. The failure to include the term "land" in the second sentence of the statute does not mean as a matter of law that the County is prohibited from regulating enlargement or expansion of a prior nonconforming use. Rather, the County's authority to do so is implied from its broad authority to regulate planning and zoning. In *Ford v. Bd of County Commissioners of Carbon County*, 1996 WY 125, 924 P.2d 91 the Court stated,

> `As an arm of the state, the county has only those powers expressly granted by the constitution or statutory law **or reasonably implied from powers granted**.'" Board of County Commissioners of Laramie County v. Dunnegan, 884 P.2d 35, 40 (Wyo. 1994) (quoting Dunnegan v. Laramie County Commissioners, 852 P.2d 1138, 1142 (Wyo. 1993)). Counties have been statutorily granted the authority to regulate the use of their lands. WYO. STAT. §§ 18-5-201 to -207 (1996). We have found that the authority granted in § 18-5-201 **gives counties broad power to regulate their lands**. Snake River Venture v. Board of County Commissioners of Teton County, 616 P.2d 744, 752 (Wyo. 1980). The authority is, however, for zoning:
>
> > Specifically, the boards were empowered to create planning and zoning commissions which would develop comprehensive plans outlining the counties' zoning restrictions. From these plans, zoning resolutions would be drawn which were to provide details describing the zoning restrictions and the procedure necessary to effectuate any zoning changes.
>
> Croxton v. Board of County Commissioners of Natrona County, 644 P.2d 780, 783 (Wyo. 1982) (emphasis added) (referring to §§ 18-5-201 to -207). "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 Limited Liability Company v. Board of County Commissioners of County of Teton, 899 P.2d 1329, 1334 (Wyo. 1995) (emphasis added).
>
> Id at [¶16]

See also Snake River Venture v. Board of County Com'rs., supra discussing the limits on ability to enlarge or expand a nonconforming use.

Hence, this Hearing Officer finds and concludes that the County did have authority to limit the enlargement and expansion of the non conforming use.

G. THE COUNTY HAS MET ITS BURDEN OF PROOF TO SHOW UNLAWFUL EXPANSION AND ENLARGEMENT

115. As noted above, Seherr-Thoss conceded that he had expanded and enlarged his operation. Further, the evidence presented clearly showed that although the amount of production has fluctuated over the years, the operation has definitely expanded in size, in amount of production, days of operation and equipment used.

H. THE DOCTRINE OF DIMINISHING ASSETS APPLIES

116. Seherr-Thoss argues that even if the statute did not have the effect of precluding County prohibition or regulation of the expansion of his operation, the common law doctrine of diminishing assets would have the same effect.

117. The doctrine of diminishing assets is applied by most jurisdictions, though it has not been specifically adopted by the Wyoming Supreme Court. As the County stated in pretrial briefing: "courts have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be limited to the land actually excavated at the time of the enactment of the restrictive ordinance, because to do so, would in effect, deprive the landowner of the use of the property as a quarry." *See County's Prehearing Statement at p. 13, citing cases.*

118. The parties appear to agree then and this Hearing Officer also agrees that the Wyoming Supreme Court would join the majority of jurisdictions and adopt and apply the doctrine in this case. The dispute however centers on how that doctrine applies, if at all, to the enlargement or expansion of the Seherr-Thoss gravel operation. More particularly, Seherr- Thoss argues that under the doctrine he would be allowed to conduct gravel operations anywhere or everywhere on his 299 acres of property.

119. The County argues that " the nature of allowed expansion is limited by the intent of the operator, as shown by objective evidence at the time the zoning regulations become effective: "the excavator must show by objective evidence that the land where the excavator wants to extend excavation was clearly intended to be excavated before the ordinance was enacted." *Town of Wolfboro v. Smith,* 556 A.2d 755, 759 (N.H. 1989).

120. Given the holding in *Snake River Brewing Company Inc vs. Town of Jackson*, supra, and *Snake River Venture v. Board of County Com'rs., supra* in which the Court discussed

the principles of vested rights and the need to protect the prior investments of a property owner, but not planned or contemplated investments, this Hearing Officer finds that the doctorine of diminishing assets would also be applied with regard to the initial intent of the operator, as shown by objective evidence at the time the zoning regulations became effective.

121. The objective evidence of Seherr-Thoss intent at that time was to excavate areas the size of his initial two pits, the one behind his house and the pond. There is no objective evidence that any additional property had been prepared for, designated or cordoned off for excavation. There was evidence that Seherr-Thoss intended to make a living in the gravel business, but that does not equate to an intent to expand and enlarge a small operation into a major operation. Consequently Seherr-Thoss may continue his operation under the doctrine of diminishing assets but only to the extent that he can excavate new pits of the same size and process gravel from these new pits to the same extent that he was doing in 1978.

122. As stated in the Notice to Abate, definitive levels of the operations in 1978 had never been established. The County was willing to allow Seherr-Thoss to continue operations at the levels permitted in 1998. It is recommended that the Board of County Commissioners likewise permit those levels in an effort to avoid further disagreement as to the extent of the use in 1978.

123. It is also noted however that per the current or last DEQ permit Seherr-Thoss gravel operation is limited to 10 acres. *Tr., p. 409.* Seherr-Thoss has applied for a small mining permit which still limits his operation to 10 acres per year or 10,000 yards of overburden. The DEQ is holding the permit "pending concurrence from Teton County that it's in compliance with local zoning". *Tr., p. 413.*

124. The Board must also be cognizant r of the ruling in *River Springs Ltd Liability Co vs. Board of County Commissioners of Teton County*, 1995 WY 112, 899 P.2d 1329,

> In adopting the EQA, the legislature explicitly and specifically has granted the authority to prohibit and regulate mining activities to the DEQ. As discussed above, if the county zoning forecloses activities the DEQ otherwise would regulate, there can be no excavation, extraction, production, or processing of sand, gravel, rock, or limestone. If the zoning regulations cannot or do not inhibit these activities, however, then the regulation of those activities is accomplished by the DEQ. The

authority of Teton County is limited by the authority granted to DEQ by the language of the EQA.....

A county can prohibit the extraction or processing of sand, gravel, rock, and limestone pursuant to its zoning authority, but a "grandfathered" use cannot be prohibited. **If the county permits the extraction, production, or processing** of sand, gravel, rock, or limestone, **or must do so because the use was a preexisting use, then regulation of those activities is accomplished under the EQA by the DEQ**. If, however, the DEQ, pursuant to an exception in the statute, does not regulate those activities, they may be regulated by the county in a way that does not conflict with state regulation.

125. Accordingly, it is recommended that the parties confer with the DEQ and come to an agreement as to a final determination of the size and scope of Seherr-Thoss' operation.

Dated this 8 day of August, 2011.

Sharon M. Rose
Wyo. State Bar #5-1981
Hearing Officer

CERTIFICATE OF SERVICE

This is to certify that on the 8 day of August, 2011, I served the above and foregoing document by sending a true and correct copy thereof in the U.S. Mail, postage prepaid, addressed as follows

James K. Lubing
Leah Corrigan
P.O. Box 3894
Jackson, WY 83001

Board of County Commissioners
c/o Sandy Birdyshaw
P.O. Box 3594
Jackson, WY 83001

Mr. Roger Seherr Thoss
PO Box 1709
Jackson WY 83001

Nicole G. Krieger
Deputy County Attorney
P.O. Box 4068
Jackson, WY 83001

Legal Assistant to Sharon M. Rose