IN THE DISTRICT COURT OF TETON COUNTY, WYOMING

NINTH JUDICIAL DISTRICT

ROGER SEHERR-THOSS, d/b/a RST SAND & GRAVEL and/or RST Excavation and Trucking,	)	
Petitioner,	)	
vs.	)	Civil Action No. 15970
TETON COUNTY BOARD OF COUNTY COMMISSIONERS ex rel TETON COUNTY PLANNING DIRECTOR,	)	
Respondents/Agencies.	)	

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CLERK OF DISTRICT COURT

ORDER AFFIRMING ADMINISTRATIVE ACTION

THIS MATTER came before the Court for oral argument on July 5, 2012 on Petitioner's Petition for Review of Final Agency Action, filed December 6, 2011. Petitioner is challenging a November 7, 2011 order issued by the Teton County Board of County Commissioners ("Board") limiting the use of Petitioner's sand and gravel operation. Petitioner was represented by counsel Elizabeth N. Moore. The County was represented by counsel Nicole G. Krieger from the Teton County and Prosecuting Attorney's Office. After hearing argument, reviewing the parties' briefs, and considering the entire record on appeal, the Court finds as follows:

Background Facts:

1. The facts in this case are largely undisputed. To the extent that Petitioner disputes the facts in the Board's Order, the Court will address each of those instances in this Order.

2. Petitioner owns an approximately 300 acre parcel of land located at 4520 South Park Loop Road in Teton County, Wyoming. Petitioner has operated a gravel business on that parcel of land for over thirty years. Petitioner's father ran the operation in the 1970s prior to Petitioner assuming the business.

3. Teton County's first Land Development Regulations ("LDRs") took effect in 1978. It is undisputed that Petitioner's gravel operation predated the enactment of the LDRs. Under the LDRs, Petitioner's ranch was zoned as Residential-Agricultural, which does not allow for a gravel operation on the property. Despite the County's enactment of the LDRs, the County did not begin investigating Petitioner's use of his property until 1995. In 1995, the County began attempting to determine if Petitioner's gravel operation constituted a prior lawful nonconforming or grandfathered use of the property under the LDR's. Between 1995 and 2010 Petitioner and the County engaged in discussions regarding Petitioner's use of his property. In 1994, the County repealed the existing LDRs and enacted new LDRs which also prohibited Petitioner's gravel operation on his property.

4. On June 7, 2010, the Teton County Planning Director issued a Notice to Abate to Petitioner ordering him to cease gravel crushing and extraction operations on his property and to reduce his screening and stockpiling to pre-1978 levels. On February 16, 2011, the Planning Director issued an amended Notice to Abate that required petitioner to reduce levels of production to pre-1978 levels. Petitioner filed an appeal to the County, and in June 2011, a three-day contested case hearing was held to determine whether Petitioner's gravel pit complied with the LDRs and if it did not comply, whether it was

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"grandfathered," allowing Petitioner to continue to operate. On August 8, 2011, the hearing officer issued Findings of Fact, Conclusions of Law, and Order.

5. The Hearing Officer concluded, and the Board adopted the finding, that Petitioner's gravel operation, including the extraction and crushing of gravel, was a grandfathered prior nonconforming use under the LDRs. Specifically, the Hearing Officer found that Petitioner's use was grandfathered to the scope and degree that Petitioner was operating his gravel business at the time of the enactment of the LDRs in 1978. The Hearing Officer further concluded that Petitioner's gravel operation prior to 1978 consisted of a small seasonal operation. The hearing officer also found that the first inspection of the Seherr-Thoss gravel operation occurred in 1995 by John Erickson of the Department of Environmental Quality ("DEQ"), at which time the gravel operation covered approximately three (3) acres. Petitioner first reported the production volume on his property to the Department of Revenue in 1996 as 16,200 tons. The first year Petitioner reported extraction volumes to DEQ was 1998 when Petitioner extracted 17,000 cubic yards or 15,000 tons of gravel.

6. The Board then conducted a hearing on the issue based on the evidence received by the hearing officer. On November 7, 2011, the Board issued Findings of Fact, Conclusions of Law, and Order, in which the Board adopted the hearing officer's findings and ordered Petitioner to reduce his gravel operation to three acres, including all area used for extraction, screening, stockpiling, and crushing. The order further required Petitioner to submit a reclamation plan to the County within sixty days and to post a surety bond consistent with the LDRs, to reduce his volume of extracted gravel to 17,000 tons per year, and to limit his operations to Monday through Friday, 7:00 a.m. to 5:00 p.m.

7. In conjunction with this appeal, Petitioner sought an injunction from the enforcement of the Notice to Abate during the pendency of the appeal. The Court granted Petitioner's request subject to certain conditions, specifically a limit on the amount of gravel Petitioner could extract and the hours during which Petitioner could operate. The Court's order remains in effect at this time.

Standard of Review

1. The review of an administrative decision is governed by the Wyoming Rules of Appellate Procedure. Wyo. R. App. P. 12. Rule 12.09(a) limits the review to matters contained in the Wyoming Administrative Procedures Act, which provides in pertinent part:

> (c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:
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> (i) Compel agency action unlawfully withheld or unreasonably delayed; and
>
> (ii) Hold unlawful and set aside agency action, findings and conclusions found to be:
>
> (A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; [or]
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> ***
>
> (E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.[1]

[1] W.S. § 16-3-114(c)(ii) also allows a district court to set aside an agency action if the action is "(B) Contrary to constitutional right, power, privilege or immunity; [or] (C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right [or] (D) Without observance of procedure required by law." Petitioner does not raise any of those grounds in his appeal and they are not relevant to case at hand.

Wyo. Stat. Ann. § 16-3-114(c).

2. Courts "review an agency's findings of fact by applying the substantial evidence standard. We affirm an agency's conclusions of law when they are in accordance with the law." *Id.*

3. The substantial evidence test is described as follows:

> In reviewing findings of fact, we 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, we cannot properly substitute our 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.

Newman v. Wyoming Workers' Safety and Comp. Div., 49 P.3d 163, 168 (Wyo. 2002), quoting *State ex rel. Wyo. Workers' Safety and Comp. Div. v. Jensen*, 24 P.3d 1133, 1136 (Wyo. 2001). In addition, in conducting a substantial evidence review of the record,

> the 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 173.

4. The Wyoming Supreme Court has recently clarified the use of the substantial evidence standard for review of evidentiary matters in contested case hearings:

> [W]e hold that henceforth the substantial evidence standard will be applied any time we review an evidentiary ruling. . . . If the hearing examiner determines that the burdened party failed to meet his burden of proof, we will decide whether there is substantial evidence to support the agency's decision to reject the evidence offered by the burdened party by considering whether that conclusion was contrary to the overwhelming weight of the evidence in the record as a whole. . . . If, in the course of its decision making process, the agency disregards certain evidence and explains its reasons for doing so based upon determinations of credibility or other factors contained in the record, its decision will be sustainable under the substantial evidence test. Importantly, our review of any particular decision turns not on whether we agree with the outcome, but on whether the agency could reasonably conclude as it did, based on all the evidence before it.

Dale v. S & S Builders, LLC, 2008 WY 84, ¶ 22, 188 P.3d 554, 561 (Wyo. 2008).

5. In *Dale*, the Wyoming Supreme Court also affirmed that it would continue to apply the arbitrary and capricious standard "as a 'safety net' to catch agency action which prejudices a party's substantial rights or which may be contrary to the other WAPA review standards yet is not easily categorized or fit to any one particular standard." *Dale*, ¶ 18, quoting *Newman*, 49 P.3d at 172. It explained this application of the arbitrary and capricious standard as follows:

> For example, the administrative record may be replete with evidence supporting the decision, and yet the agency may have willfully discounted credible evidence, refused to admit certain testimony or documentary exhibits, or failed to provide findings of fact or conclusions of law. This

> listing is demonstrative and not intended, by any means, as an inclusive catalog of all possible circumstances. However, when both parties present evidence, the substantial evidence test should be utilized to review the soundness of the agency's factual findings.

Id.

6. The Wyoming Supreme Court has held that "an agency's failure to follow its own procedural rules was an arbitrary and capricious act" requiring the reversal of the agency order. *State Elec. Bd. v. Hansen*, 928 P.2d 482, 484 (Wyo. 1996), *citing Bowen v. State, Wyoming Real Estate Comm'n*, 900 P.2d 1140, 1142 (Wyo. 1995), *State ex rel. Workers' Compensation Div. v. Brown*, 805 P.2d 830, 835 (Wyo. 1991).

7. A hearing examiner's conclusions of law are afforded no special deference and will be affirmed only if truly in accord with the law. *Hermosillo v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 58 P.3d 924, 926 (Wyo. 2002). Thus, the Court reviews all questions of law *de novo*.

Issues

8. The Court considers the following issues: (1) whether the Board's order of abatement is supported by substantial evidence; and (2) whether the Board's order of abatement is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

Analysis

9. Petitioner challenges the Board's order on numerous grounds. First, petitioner argues that the plain language of Wyo. Stat. § 18-5-207 prohibits the County from regulating Petitioner's expansion of his grandfathered land use. Next, petitioner argues that the County's regulation is preempted by DEQ's authority. Petitioner also asserts that the doctrine of diminishing assets prohibits the county from regulating the expansion of Petitioner's gravel operation. Finally, Petitioner argues that the County is equitably estopped from forcing Petitioner to abate his gravel operation. The Court will address each of these arguments below.

Statutory Construction

10. Petitioner asserts that Wyo. Stat. § 18-5-207 prohibits the County from regulating Petitioner's expansion of his grandfathered sand and gravel operation. The County, on the other hand, argues that, despite the language of § 18-5-207, the County has the broad authority to regulate land use, as set forth in Wyo. Stat. § 18-5-201. The statutes provide:

> **§ 18-5-201. Authority vested in board of county commissioners; inapplicability of chapter to incorporated cities and towns and mineral resources.**
>
> 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. However, nothing in W.S. 18-5-201 through 18-5-208 shall be construed to contravene any zoning authority of any incorporated city or town and no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.
>
> **§ 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.

Petitioner argues that the omission of "land" from the portion of § 18-5-207 that provides "[h]owever 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" necessarily means that the County lacks the authority from regulating alteration or addition to land. Simply speaking, Petitioner argues that while § 18-5-201 provides the County broad regulatory authority over land use, § 18-5-207 sets forth an exception to that authority. Furthermore, Petitioner argues that the language quoted above provides an exception to the exception, again giving the County regulatory authority over alterations or additions to buildings or structures if use is changed but denying that regulatory authority with respect to alterations or additions to land by virtue of omitting "land" from that exception to the exception. The County asserts that Petitioner's proposed reading of § 18-5-207 would render the broad authority granted by § 18-5-201 meaningless.

11. "In reviewing a constitutionally based challenge to a statute, [courts] presume the statute to be constitutional and any doubt in the matter must be resolved in favor of the statute's constitutionality." *Thomson v. Wyoming In–Stream Flow Committee*, 651 P.2d 778, 789–90 (Wyo.1982). Furthermore, "all portions of an act must be read in pari material, and every word, clause and sentence of it must be considered so that no part will be inoperative or superfluous[.]" *Hamlin v. Transcon Lines, Wyo.*, 701 P.2d 1139, 1142 (Wyo. 1985). Wyo. Stat. § 18-5-201 gives counties broad regulatory powers over the use of lands, while Wyo. Stat. § 18-5-207 limits those powers to prohibit the county from denying prior lawful non-conforming uses. As long as the county does not deny a grandfathered use, it can reasonably regulate such vested rights both under § 18-5-201 and case law legitimizing such reasonable regulation. *See Snake River Brewing Company, Inc. v. Town of Jackson*, 39 P.3d 397, 407 (Wyo. 2002) ("We have long held that a municipality may, through the exercise of its police power, regulate property usage without paying compensation, so long as the purpose of the regulation is to protect the public 'health, safety, morals and general welfare,' and the means used to implement the regulation are reasonable." (citations omitted)). The affirmative power granted to counties under § 18-5-207 to regulate alterations or additions to existing "buildings or structures" for the purpose of effecting any change in use is a more detailed specification of a power the county already has under § 18-5-201, including the broad power to regulate uses of land and changes in land use. Appellant focuses on the omission of the word "land" in § 18-5-207 to the effect that the County cannot regulate changes in uses of land. To convey that meaning, § 18-5-207 would have to disallow the county from such regulation by restrictive or prohibitive language such as, "zoning regulation may regulate or prohibit change in use only for alterations or additions to any existing building or structure."[2] The permissive power granted by §18-5-207 to regulate changes in use due to alterations or additions to buildings or structures does not prohibit the county from exercising its general and broad regulatory authority over uses of land and alterations or additions thereto, so long as they are reasonable and an otherwise proper exercise of its zoning authority.

12. Additionally, the County is not in violation of §18-5-207 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.*" (emphasis added). The evidence is that the extnt of

[2] Furthermore, the reasoning of the hearing officer adopted by the Teton County Board of County Commissioners at paragraphs 112-114 of the Findings of Fact, Conclusions of Law & Order questions the logic of Seherr-Thoss's interpretation, trying to equate the alteration or addition to a structure or building with a non-equivalent such as land that is a quantity certain and not alterable or capable of being added to in the same sense as a building or structure.

the Seherr-Thoss sand and gravel operation at the time of the resolution, that is when the LDRs were adopted in 1978, did not exceed three (3) acres in scope. The County is allowing the continuance of the land (three acres) that was used for sand and gravel at the time of the first resolution. Accordingly, the County's regulation of Petitioner's land use was permitted under §18-5-201.

Preemption

13. 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). In *River Springs*, the Supreme Court considered, in part, on certification from the district court whether the Environmental Quality Act preempts local authority to prohibit mineral extraction. In that case, the Court considered, as in this case, extraction of minerals from an area less than ten (10) acres that was controlled by a limited mining exemption in the EQA, Wyo. Stat. § 35-11-401(e)(vi).[3] The Court found that regulation by DEQ under the ten (10) acre exception to full regulation is of a limited scope and that the County may invoke its regulatory authority as long as it does not conflict with a regulation by the state. The issue of a limited mining permit by the DEQ manifests a decision not to exercise state regulatory authority. *River Springs*, 899 P.2d at 1336.

14. The 3-acre parcel Petitioner was using at the time the LDRs were enacted is the grandfathered use. Its continued use is permitted under § 18-5-207; however, any change in or expansion of the use (use of additional lands) is governed by the broad powers given to the County to regulate and restrict the use of lands under § 18-5-201, and that authority is not foreclosed by the affirmative power granted to counties to regulate the alteration or addition to "any existing building or structure for the purpose of effecting any change in use." The Court's task is to harmonize different statutory provisions and try to give legitimate effect to all. *Id.* at 1335.

15. If Petitioner had met the test of the diminishing assets doctrine, then his property would be grandfathered to the extent the objective evidence showed he intended to mine it for sand and gravel. In that case, presumably, greater than ten (10) acres of the Seherr-Thoss property would be mined and mining regulations by DEQ would then be in place. In the absence of that, however, the County must be able to regulate expanding non-conforming uses under their general health, safety and welfare powers set forth in § 18-5-201.

16. Under *River Springs*, counties have zoning and planning authority under § 18-5-201 to regulate the use of land for extraction of sand and gravel, and "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.* at 1334. 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.

17. Furthermore, under the Wyoming Supreme Court's holding in *Snake River Brewing*, counties may regulate property usage, even as to vested rights of grandfathered non-conforming use, without being considered a taking (i.e. without paying compensation) so long as the purpose of the requirement is to protect the public health, safety, and general welfare, and the means used to implement the regulation are reasonable. 39 P.3d at 407. Regulation is improper if 1) regulations unreasonably deprive the owner of a substantial

[3] The statute provides that EQA requirements shall not apply to: "Surface mining operations, whether commercial or noncommercial, for the removal of sand, gravel, scoria, limestone, dolomite, shale, ballast or feldspar from an area of ten (10) acres or less of affected land if the operator has written permission for the operation from the owner and lessee, if any, of the surface; provided that the operator shall notify the land quality division of the department of environmental quality of the land to be mined before commencing operations. ***"

portion of the value of his property; or 2) whether enforcement of the ordinance would render "valueless substantial improvements or business built up over the years [or] cause serious financial harm to the property owner." *Id.* In this case, the County is reasonably exercising its power to regulate Petitioner's non-conforming property usage.

Doctrine of Diminishing Assets

18. Next, Petitioner argues that the County's regulation of his property use is improper under the Doctrine of Diminishing Assets. In support of his argument, Petitioner cites to *Town of West Greenwich v. A. Cardi Realty Associates, et al.*, 786 A.2d 354 (R.I. 2001).[4] In *West Greenwich*, the Court explained that the doctrine of diminishing assets may permit a landowner to expand the parameters of a nonconforming use of land. To establish a right to expand a nonconforming use, a landowner must first

> prove that the excavation activities were actively being pursued when the [ordinance] became effective; second, [the landowner] must prove that the area he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent, and third, [the landowner] must prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood.

Id. at 363, *citing Town of Wolfeboro v. Smith*, 556 A.2d 755 (N.H. 1989) (modifications original). "[W]hether an earth removal operation may be expanded or has been unlawfully expanded should be measured by the intent of the owner, as measured by objective criteria applied to the circumstances that existed when the lot became nonconforming." *Id.* at 362. Further, in determining the scope of nonconforming use at inception when applying the diminishing assets doctrine, one must consider "areas actually excavated are areas where future excavation is manifestly implied by the actual operations." *Stephan and Sons, Inc. v. Municipality of Anchorage Zoning Board*, 685 P.2d 98, 102 n.7 (Alaska 1984)

19. In this case, Petitioner asserts that he objectively demonstrated an intent to expand his gravel operation at the time the LDRs were enacted. Petitioner's argument fails because the Board's decision that Petitioner 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. "[T]he character of [Seherr-Thoss's] use of the gravel pit in [1978] in no way manifestly indicated an objective intent to appropriate the entire [300] acres." *Id.* For example, the Board concluded that "[t]he objective evidence of Seherr-Thoss's intent prior to 1978 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." ¶122 (emphasis added). Similarly, Petitioner's argument fails the third prong of the diminishing assets test because there is no evidence that a continued use would not have a substantially different and adverse impact on the neighborhood.

Equitable Estoppel

20. Finally, Petitioner argues that the County should be equitably estopped from regulating Petitioner's gravel operation. The County argues that the Court should not consider Petitioner's equitable estoppel argument because it was not an issue below and, thus, should not be considered on appeal; however, ¶26 of the *Findings of Fact, Conclusions of Law and Order* from the Board clearly demonstrates that the equitable estoppel argument was raised and rejected below.

[4] Although the Doctrine of Diminishing Assets has not been previously considered by Wyoming courts, both parties agreed that it is likely that, given the opportunity, the Wyoming Supreme Court would adopt the doctrine. The County asserts that the Doctrine applies to the case at hand, and that Petitioner did not make a showing that he intended to expand the use of his property from the 1978 levels; Petitioner asserts that he objectively demonstrated an intent to use his full property for sand and gravel extraction.

21. The Wyoming Supreme Court discussed applying equitable estoppel against a governmental entity in *Thompson v. Bd. of County Com'rs of the County of Sublette*, 2001 34 P.3d 278 (Wyo. 2001):

> [E]quitable estoppel should not be invoked against a government or public agency functioning in its governmental capacity, except in rare and unusual circumstances, and may not be invoked where it would serve to defeat the effective operation of a policy adopted to protect the public. In order to invoke the doctrine against a government or public agency functioning in its official capacity, there must be a showing of affirmative misconduct. Affirmative misconduct exists where a person, by his acts, representations, or admissions, intentionally or through culpable negligence induces another to believe that certain facts exist and the other person rightfully relies and acts on such belief and will be prejudiced if the former is permitted to deny the existence of such facts.

Id. at 281 (citations omitted).

22. In this case, Petitioner failed to show affirmative misconduct by the County which is required under the rigorous standard of equitable estoppel when it is applied against the government. While there is evidence of a delay by the County in seeking enforcement of the LDRs with regards to Petitioner's property, there is no evidence in the record that the County engaged in any form of misconduct related to that delay. Instead, the record reflects that the County engaged in numerous discussions and negotiations with Petitioner over the course of several years to determine if Petitioner had a grandfathered use and to assist Petitioner in obtaining permits for his property. Thus, absent a showing of affirmative misconduct, Petitioner's equitable estoppel argument necessarily fails.

IT IS, THEREFORE, HEREBY ORDERED that the Board's November 7, 2011 Order limiting Petitioner's gravel operation is AFFIRMED.

Dated this 29th day of January, 2013.

BY THE COURT:

Honorable Timothy C. Day
District Judge

CERTIFICATE OF SERVICE
This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 30 day of Jan 20 13.

B Hultman

E Moore

By D Hassler, Deputy Clerk