

181204-16

STATE OF WYOMING                    )  
  ) SS.  
COUNTY OF LARAMIE                )

**BEFORE THE LARAMIE COUNTY BOARD OF COUNTY  
COMMISSIONERS**

IN THE MATTER OF:

AN ADMINSTRATIVE APPEAL FROM THE                    )  
DENIAL OF A REQUEST FOR APPROVAL                    )  
OF A SITE PLAN APPLICATION FOR                        )  
LONE TREE CREEK QUARRY SUBMITTED                    )  
BY ASPHALT SPECIALTIES CO., INC.                     )  
    In Sections 13, 23 and 24, T.13N, R.70W                )  
    of the 6<sup>th</sup> P.M. Laramie County, Wyoming            )

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING  
ADMINSTRATIVE APPEAL FROM DENIAL BY THE LARAMIE  
COUNTY PLANNING COMMISSION OF A REQUEST FOR APPROVAL  
OF A SITE PLAN FOR LONE TREE CREEK QUARRY**

THIS MATTER HAVING COME FOR A HEARING before the Laramie  
County Board of Commissioners, Laramie County, Wyoming (hereinafter referred  
to as “Board”), on both November 20, 2018 and December 4, 2018 pursuant to the  
Laramie County Land Use Regulations (2011 as amended) (LCLUR)<sup>1</sup>, including,  
but not limited to, Section 1-2-103 LCLUR;

**SUMMARY:**

Asphalt Specialties Co. Inc. (“Asphalt”)       made       application       to       the  
Laramie County Planning Department, pursuant to LCLUR Section 2-3-133(d) for

<sup>1</sup> All references herein to the LCLUR are to the 2011 LCLUR, unless specifically indicated otherwise

Asphaltway  
commissioners  
attorney  
planning

a site plan for a gravel quarrying operation located on Harriman Road, Laramie County, Wyoming. Pursuant to the LCLUR, Section 2-2-133 (d)(iv) the matter was heard before the Laramie County Planning Commission (“Commission”). The Commission denied the application by a tie vote and issued an Order with Findings of Fact and Conclusions of Law on October 9, 2018.

On October 16, 2018 Asphalt filed an Administrative Appeal, pursuant to LCLUR 1-2-102(a) from the Commission’s decision, to the Board.

On November 2, 2018 Asphalt timely filed a Petition for Review of Administrative action pursuant to W. S. 16-3-114. This matter is docketed and pending in the District Court, First Judicial District as Docket # 190-673.

At the hearing on November 20, 2018 Asphalt agreed to the ‘bifurcation’ of consideration of this Administrative Appeal, with the initial issue being whether the Board had the authority to hear an Administrative Appeal from the Commission’s decision.

Argument was heard from counsel from Asphalt on the question of whether the Board should hear an Administrative Appeal from the decision of the Planning Commission.

The Board continued the matter from November 20, 2018 to December 4, 2018 and heard further argument. The Board then voted to deny hearing the appeal and directed the preparation of a written order. The Board, having heard argument,

received testimony and evidence on this matter and being fully advised in the premises, finds, concludes, and orders as follows:

**I. FINDINGS OF FACT**

1. Laramie County, pursuant to W. S. §§ 18-5-201 et seq. in February 2011, enacted the Laramie County Land Use Regulations 2011, as amended (LCLUR) to promote the public health, safety, morals, and general welfare of the citizens of Laramie County. These were the regulations in effect at the time of Asphalt's application for site plan up until the Board's decision indicated by the instant Order.

2. The Site Plan, subject of the underlying decision by the Commission, lies within the boundaries of Laramie County. The aforementioned authority provides jurisdiction for actions taken pursuant to state statute and the LCLUR in regard to land use by Laramie County and its agencies.

3. The LCLUR states that the Planning Commission has both general and specific powers under state statute and pursuant to the LCLUR, including holding public hearings and making final decisions for specifically indicated purposes.

4. The Commission is mandated by the regulations to perform duties as required by both state statute and the regulations and in addition to state statutory duties, to sit as the final decision maker for variances, and site plan applications. LCLUR 1-2-101, 2-2-133(d)(iv)

5. The 2011 LCLUR gave final approval to the Commission over certain

request for variances and site plans. In the approval of site plans, prior to 2011, final decision-making authority over variances and site plans had been lodged before the Board. (Pursuant to the newly enacted LCLUR, as of December 4, 2018, final approval of a site plans has been placed back before the Board, with the Commission still retaining authority over variances.)

6. The Board may take judicial noticed of its own records. Application of *Campbell Cty.*, 731 P.2d 1174, 1180 (Wyo. 1987). In the seven years since the provision of authority to the Commission by the 2011 LCLUR there have been only six (6) site plans referred to the Commission out of approximately 239 site plan applications (there were 33 such applications in 2018). The remainder were resolved by the Development Director.

7. The provisions in LCLUR Section 2-2-133 (iv) LCLUR state in regard to the Planning Commission's role and authority in regard to site plans:

**"Site plans will be reviewed by the Director. Site plans in the regulatory area of the County may require public hearing before the Planning Commission if the Planning and Development Director determines that the impacts of the proposed use will significantly impact surrounding Properties"**<sup>2</sup> (emphasis added)

8. The Laramie County Director of Planning properly determined that due to the potential of significant impact for the proposed Lone Tree Creek Quarry, the site

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<sup>2</sup> LCLUR Defines "Regulatory Area" - All lands in unincorporated Laramie County. Where zoning and/or overlay districts are in place, the requirements of the zoning district and/or overlay district takes precedence.

plan application should be referred to the Planning Commission for approval or denial. (See staff report dated August 23, 2018, record before the Commission)

9. In this matter, The Laramie County Planning Department and Applicant complied with all notice requirements as required by LCLUR Section 1-2-104 (b) (Tr. p. 36)

10. A public hearing in this matter was held before the Commission on July 12, 2018 at which representatives of the applicant, as well as interested and affected citizens and/or entities provided testimony and evidence.

11. After deliberation at a public hearing on October 3, 2018, a motion was made to the Commission to approve the application for a quarry submitted by Asphalt Specialties. The vote was taken and two Commission members voted in favor of approval and two opposed. The Commission concluded that a tie vote on an affirmative motion is a rejection or denial. *Hirschfield v. Bd. of Cty. Comm'rs of Cty. of Teton*, 944 P.2d 1139, 1144 (Wyo. 1997) See also *Ebzery v. City of Sheridan*, 982 P.2d 1251, 1253 (Wyo. 1999) The meeting was then adjourned, therefore, the decision denying the application is final.

12. On October 9, 2018, the Commission issued a Final Order with Findings of Fact and Conclusions of Law.

13. On October 9, 2018, Asphalt filed an application for Administrative Appeal pursuant to LCLUR 1-2-103(a). Asphalt, both in the appeal and in

subsequent submissions, made multiple arguments as to why the Board should hear the administrative appeal. These included, but were not limited to:

A) That provisions in the LCLUR, specifically Section 1-2-102 provides that decisions made by the Planning Commission must also be reviewed by the Board.

B) That the procedure, processes and conduct of the proceedings before the Planning Commission denied Asphalt due process, were unsupported by substantial evidence, in violation of law and that the decision of the Commission should therefore be reversed.

C) In order to exhaust all administrative remedies.

D) Changes made by the Wyoming Legislature in 2017 to W. S. §§ 18-5-203 requiring review by the Board of a decision made by any “delegatee.” (This argument was not presented in the initial administrative appeal filed on October 16, 2018, but rather raised in argument and submissions at the hearing before the County Commissioners on November 20, 2018)

14. The time period provided for an administrative appeal under the section cited by Asphalt, is significantly shorter than that provided for under W. S. §§ 16-3-114 and the Wyoming Rules of Administrative Procedure, Wyoming Rules of Appellate Procedure, Rule 12 et seq. Pursuant to the LCLUR, and administrative appeal must be filed within seven (7) calendar days from the date of the decision or

action. LCLUR 1-2-102(a)(i)

15. On November 2, 2018 the Applicant filed a Petition for Review of Administrative Action pursuant to W. S. §§16-3-114 in the First Judicial District seeking reversal of the Commission's decision. This matter is docketed as # 190-673.

16. The 2011 LCLUR states as follows in regard to appeals:

### **1-2-102 PROCEDURE FOR APPEALS**

#### **a. Administrative Appeals**

Appeals of Administrative decisions shall be made in accordance with the following requirements.

i. An appeal shall be requested in writing on a County-approved form by any party aggrieved by a decision or action of the Planning and Development Director in enforcing any of the provisions of this regulation. The appeal shall be filed at the Office of the Laramie County Clerk within seven (7) calendar days from the date of the decision or action.

ii. The appeal shall specify the actions or decisions being appealed. The appeal shall describe the type of application presented, the date of the decision or action, and a statement of issues on appeal. The appeal shall also reference the section of this regulation or other regulations which are the subject of the appeal.

iii. The appeal will be placed on the first regularly scheduled Board meeting that occurs at least seven (7) calendar days after the Office of the County Clerk receives the appeal. The Board's decision will be rendered within forty-five (45) days from the date the appeal is filed with the County Clerk.

#### **b. Appeals of Planning Commission and Board Decisions**

Appeals from any decision of the Planning Commission and Board shall be made in accordance with the provisions of Wyoming state statute.

17. Board finds that subsection (b) above has been interpreted since the enactment of the 2011 LCLUR as providing that appeals from final agency decisions

made by the Board or the Commission are to be conducted through the procedures outlined in the Wyoming Administrative Procedures Act, to wit: W. S. §§ 16-3-114.

18. Based on the 2011 LCLUR, appeals from final decisions by the Board or Commission are to be brought pursuant to W.S. 16-3-114(a).

19. In 2017, the Wyoming legislature enacted changes to W.S. 18-5-203. The changes were as *highlighted below* and were to be effective July 1, 2017.

“It is unlawful to locate, erect, construct, reconstruct, enlarge, change, maintain or use any building or use any land within any area included in a zoning resolution without first obtaining a zoning certificate from the board of county commissioners **or its designee** and no zoning certificate shall be issued unless the plans for the proposed building, structure or use fully comply with the zoning regulations then in effect. The board of county commissioners **or its designee** shall act promptly upon any application filed with it and shall grant certificates when the proposed construction or use complies with the requirements of the zoning resolution. If it denies the application, the **board or its designee** shall specify the reasons for ~~such~~ the denial. **Any applicant desiring to appeal shall appeal to the board of county commissioners.** The decision of the board of county commissioners may be reviewed by the district court and by the supreme court upon appeal in the same manner as provided in W.S. 15-1-609, for review of decisions of boards of adjustment” Wyo. Stat. Ann. § 18-5-203

20. The Board takes notice of the fact that in early 2018, the Laramie County Planning Department began the process of making significant modifications to the LCLUR. Public meetings were held with the Planning Department over this process, input was received from the citizenry. On October 16, 2018, pursuant to W.S. 16-3-



103, the Board issued a resolution providing notice of an intent to make changes to the LCLUR.

21. On December 4, 2018, the Board issued a resolution striking the previous version of the LCLUR and adopting a new version of same. This new version of the LCLUR, among many other changes, shifted final approval of site plans back to the Board from the Commission leaving final approval of variances with the Commission.

22. On December 4, 2018, the Board, having heard argument by the representatives of Asphalt, acted on a motion to deny the administrative appeal in this matter. The vote on the motion was taken resulting in three in favor, two opposed, the motion to deny therefore passed. The Board further directed staff to create a written order findings and conclusions in line with their discussion deliberations and decision.

## **II. CONCLUSIONS OF LAW**

1. Laramie County, pursuant to W. S. §§ 18-5-201 et seq. in February 2011, enacted the Laramie County Land Use Regulations 2011, as amended (hereinafter “LCLUR”) to promote the public health, safety, morals, and general welfare of the citizens of Laramie County.

2. Counties are allowed broad powers to control and regulate the use of Property within their borders, both by statute and by judicial decision:

“The legislature has granted broad power to counties to regulate the unincorporated lands within their respective jurisdictions. *Ford v. Board of County Commissioners of Converse County*, 924 P.2d 91, 95 (Wyo.1996); *Snake River Venture v. Board of County Commissioners, Teton County*, 616 P.2d 744, 752–53 (Wyo.1980). *Bd. of Cty. Comm'rs of Teton Cty. v. Crow*, 2003 WY 40, ¶ 14, 65 P.3d 720, 726 (Wyo. 2003)

3. Pursuant to W. S. §§18-5-202, the legislature has mandated that the County create a Planning Commission:

**“Planning and zoning commission; composition; residency requirements, terms and removal of members; vacancies; rules; record; meetings to be public; secretary; preparation and amendments; purpose; certifications and hearing; amendments.**

(a) Each board of county commissioners may by resolution create and establish a planning and zoning commission. The commission shall be composed of five (5) members appointed by the board at least three (3) of whom shall reside in the unincorporated area of the county, provided that this provision shall not affect the membership composition of any existing commission...” (Bold in original)

4. The Laramie County Planning Commission was created pursuant to W. S. 18-5-202.

5. The Board concludes that the LCLUR (2011) provides the Planning Commission with both general and specific powers under state statute and pursuant to the LCLUR, including holding public hearings and making final decisions for specifically indicated purposes. These powers making final administrative decision on variances and site plans include LCLUR 1-2-101, 2-2-133(d)(iv)

6. The doctrine of improper delegation holds that an entity, such as the Board, may not devolve its legislative authority. Delegation of authority to the Commission

for final decisions on either site plan applications or for variances is not a delegation of legislative power, and is therefore not an improper delegation.

7. The County's authority in matters of zoning is broad, it derives from the police power inherent in Government and includes both the express power to enact zoning ordinances and the implied power to do those things which makes the express power to regulate and restrict use of buildings and land in unincorporated areas of the county meaningful. *Wilson Advisory Comm. v. Bd. of Cty. Comm'rs*, 2012 WY 163, ¶ 27, 292 P.3d 855, 862 (Wyo. 2012)

8. The County's broad authority over zoning is specifically provided by state statute and;

“Where a delegation of power is made to an administrative agency, the authority to take appropriate action to effectuate that power will be implied. *Wyoming Hosp. Ass'n v. Harris*, 527 F. Supp. 551, 556 (D. Wyo. 1981), *aff'd*, 727 F.2d 936 (10th Cir. 1984)

9. The provisions in LCLUR Section 2-2-133 (iv) LCLUR state in regard to the Planning Commission's role and authority in regard to site plans:

**“Site plans will be reviewed by the Director. Site plans in the regulatory area of the County may require public hearing before the Planning Commission** if the Planning and Development Director determines that the impacts of the proposed use will significantly impact surrounding Properties” (emphasis added)

10. Laramie County Director of Planning acted in accord with the LCLUR when he determined that due to potential of significant impact for the proposed Lone Tree Creek Quarry, the site plan application should be referred to the Planning

Commission for approval or denial. Evidence for the appropriateness of this decision, that is the “significant impacts,” is abundantly provided both by the record before the Commission as well as its thorough findings conclusions and order in regard to the site plan application.

11. The 2011 LCLUR states as follows in regard to appeals from administrative decisions:

### **1-2-102 PROCEDURE FOR APPEALS**

#### **a. Administrative Appeals**

Appeals of Administrative decisions shall be made in accordance with the following requirements.

i. An appeal shall be requested in writing on a County-approved form by any party aggrieved by a decision or action of the Planning and Development Director in enforcing any of the provisions of this regulation. The appeal shall be filed at the Office of the Laramie County Clerk within seven (7) calendar days from the date of the decision or action.

ii. The appeal shall specify the actions or decisions being appealed. The appeal shall describe the type of application presented, the date of the decision or action, and a statement of issues on appeal. The appeal shall also reference the section of this regulation or other regulations which are the subject of the appeal.

iii. The appeal will be placed on the first regularly scheduled Board meeting that occurs at least seven (7) calendar days after the Office of the County Clerk receives the appeal. The Board's decision will be rendered within forty-five (45) days from the date the appeal is filed with the County Clerk.

#### **b. Appeals of Planning Commission and Board Decisions**

Appeals from any decision of the Planning Commission and Board shall be made in accordance with the provisions of Wyoming state statute.

12. The Board concludes that subsection (b) above provides that appeals from final agency decisions made by the Commission are to be through the processes and

procedures of the Wyoming administrative procedures act, to wit W. S. §§

16-3-114

13. The decision by the Planning Commission, pursuant to LCLUR 2-2-133, is not a recommendation, but is a final agency decision.

14. The Final Order of the Commission in the instant matters held, in part:

**IT IS THEREFORE ORDERED** that the application for a site plan, submitted by Asphalt Specialties Co. Inc. be denied.

Pursuant to WS 16-3-114 (a) Any person aggrieved or adversely affected in fact by this final decision is entitled to judicial review in the District Court, First Judicial District.

15. The Board concludes, based on the LCLUR, the directive above in the Commission's final order as to the nature of any appeal to be taken, is correct.

16. Section 1-1-102(b) of the LCLUR mandates that final decisions of either the Board or the Commission must be appealed pursuant to Wyoming Statute. As these are administrative agency decisions, the Board concludes that this refers to the Wyoming Administrative Procedures Act, including, but not limited to, WS 16-3-114.

17. The Board concludes that based on applicable law and regulation, the County could create a separate entity, group or board of individuals to whom it could delegate its adjudicative authority to make decisions about the approval of site plans, zoning variances or any number of other items having to do with land use. The fact that county chose to delegate the authority at issue herein, to an existing entity, the

Laramie County Planning Commission, does not abrogate the county's authority to delegate these functions.

18. The Board concludes that the due process available to Asphalt, the applicant in this matter, and any other similarly situated applicant since 2011, before the Commission, is identical to the process which would occur had the matter been before the Board. An application process would be initiated, staff review and consultation would take place, public notice of the time and place for the hearing would be given, and a public hearing would be held. This would be followed by a final decision.

19. The Wyoming Supreme Court has held in regard to delegation:

“The separation of powers doctrine, critical to our democratic system, implicates improper delegation from one branch of government to another; and does not apply to delegations of power by one branch to a public agency or private entity. Lawrence notes that all three branches, to some extent, have lawfully delegated authority to both private and public entities. Lawrence suggests that, instead, **the proper focus should be whether the delegation violates concepts of due process, and whether it is reasonable. The Court finds this analysis to be compelling and therefore adopts this approach.**” *Newport Int'l Univ., Inc. v. State, Dep't of Educ.*, 2008 WY 72, ¶ 24, 186 P.3d 382, 388–89 (Wyo. 2008) (emphasis added)

20. The Board concludes that the process before the Commission was reasonable and did not violate concepts of Due Process. Further that it duplicated in all respects the process that would have existed had final authority been placed

before Board as it was before 2011 and will be again, subsequent to the new modifications of the LCLUR.

21. At a hearing on November 20, 2018 and December 4, 2018, before the Board, Asphalt raised the issue of a change in state statute. In particular, the modifications to W. S. §§18-5-203 which became effective in July at 2017. These changes, in summary, provide direct rather than implied, authority to county commissioners to delegate authority to other entities in regard to the issuance of “zoning certificates,” and further, added the following to the statute in regard to decisions made by such “delegates”: **“Any applicant desiring to appeal shall appeal to the board of county commissioners.”**

22. W. S. §§18-5-203 is not the sole source of County authority over land use, nor is it cited by the State Supreme Court as the primary source of such authority:

“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.” *Ford v. Bd. of Cty. Comm'rs of Converse Cty.*, 924 P.2d 91, 95 (Wyo. 1996) (emphasis added)

22. No case law or Court Order exists determining exactly what regulations may or may not have been affected, overruled or modified by the changes to this particular statute in 2017.

23. Asphalt argued at hearing on November 20, 2018, before the Board, that as a result of the above noted change to W. S. §§18-5-203, the Board was mandated

by statute to hear an appeal from its "delegatee," the Commission. The Board concludes this is not the case and would require a violations of law to comply with such a request

24. In order to comply with applicant's argument in regard to the changes to W. S. §§18-5-203, the Board would have to ignore and/or abrogate the plain reading of the 2011 LCLUR.

25. The rules Asphalt sought to have the Board ignore or abrogate, include LCLUR 1-2-102(b) which in concert with other regulations providing final authority to the Commission over site plans, mentioned herein, specifically directs that appeals from a Commission decision on a site plan be brought pursuant to W. S. §§ 16-3-114.

26. The LCLUR provisions that Asphalt requests the Board to abrogate are "substantive" regulations, not merely interpretive or procedural.

27. The Wyoming Supreme Court has held:

"A substantive rule is the administrative equivalent of a statute, compelling compliance with its terms on the part of those within the agency ambit. Substantive rules are issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations. An interpretative rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. Interpretative rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers." *Mountain Reg'l Servs., Inc. v. State ex rel. Dep't of Health*, 2014 WY 69, ¶ 11, 326 P.3d 182, 185 (Wyo. 2014)



28. Interpretive rules and general statements of policy do not establish binding norms which are finally determinative of anyone's rights. Rules regarding which organ of county government makes a final administrative decision in a site plan, or determine what the methodology of appeal from such a decision may be, *do* create binding norms. The rules in question, have a present-day binding effect and impose rights and obligations. These rules do not leave the agency and its decision makers free to exercise discretion. *Id.*

29. As the record before the Commission and its final order with findings and conclusions clearly indicates, the rights or opportunities of multiple other members of the public, institutions and entities, not just Asphalt, are affected by these rules and the decisions made in these matters. Precipitate change to these rules in the absence of clear authority to do so, operates in opposition to the rights of all interested parties in this matter.

30. The Board is not free to make such a change or to ignore its existing rules absent the rule-making process provided for under W. S. §§16-3-102, 103.

31. The Wyoming Supreme Court has held in multiple cases:

“[R]ulemaking in accordance with the Wyoming Administrative Procedure Act is **necessary when a proposed action of an agency is substantive or legislative, as opposed to interpretive.** *See Mountain States Legal Foundation v. Hodel*, 668 F.Supp. 1466 (D.Wyo.1987). “A substantive/legislative rule is one affecting individual rights and obligations” *Matter of Bessemer Mt.*, 856 P.2d 450, 453 (Wyo. 1993) (emphasis added)

32. In summary, the Board concludes that its delegation of final administrative authority over site plans to the Commission in the LCLUR of 2011, was proper and in accord with law. Any time for challenge to that particular regulation has long passed. W. S. §§16-3-103(c)

The procedures for appeal outlined in the LCLUR mandate that appeal from a site plan decision by the Commission is through the procedures under the Wyoming Administrative Procedures Act, not by administrative appeal pursuant to Section 1-2-102(a) to the Board. The Board, therefore, lacks "jurisdiction" to hear this administrative appeal by operation of the LCLUR provisions.

The Board concludes that changes made by the Legislature to W. S. §§ 18-5-203 either do not affect the issues of delegation or path of appeal, as the Boards authority is broadly provided by multiple other statutory sources, or should the changes be found to directly do so, cannot overrule the clear requirement that the Board engage in the rule making process before modifying substantive regulations.

### **III. Order**

**IT IS THEREFORE ORDERED** that the Application for Administrative Appeal brought by Asphalt Specialties Co. Inc. is denied.

Pursuant to WS 16-3-114 (a) Any person aggrieved or adversely affected in fact by this final decision is entitled to judicial review in the District Court, First Judicial District.

Dated this the 18 day of December, 2018.

BOARD OF LARAMIE COUNTY COMMISSIONERS

K. M. Buck Haines

Chairman

ATTEST:

Debra K. Lee

Debra Lee: Laramie County Clerk

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING ADMINISTRATIVE APPEAL FROM DENIAL BY THE LARAMIE COUNTY PLANNING COMMISSION OF A REQUEST FOR APPROVAL OF A SITE PLAN FOR LONE TREE CREEK QUARRY** was placed in the U.S. Mail, postage prepaid, on the 18th day of December, 2018, addressed to the following:

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