

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL)
OF THE COPPERLEAF SUBDIVISION WATER)
SUPPLY, TREATMENT, STORAGE, AND) Docket No. 06-3814
BOOSTER PUMPING SYSTEMS,)
Permit No. 06-274RR / Reference No. 06-236RR)

RESPONSE TO MOTION TO DISMISS

Petitioners/Appellants David Jamison, Robert Hoszwa and Northfork Citizens for Responsible Development (Petitioners), by and through their undersigned attorneys, hereby respond to and oppose the "Motion To Dismiss Petitioners' Petition for Review filed and served by Respondent, Worthington Group of Wyoming, LLC (formerly known as Northfork Communities, Inc.) ("Developer").

A. Introduction Allegations and Facts Concerning Standing.

1. Petitioners Jamison and Hoszwa.

Petitioners Jamison and Hoszwa are private landowners who own lands adjoining, down stream, and down gradient of the proposed Copperleaf Subdivision. They also both hold existing valid State of Wyoming groundwater permits for wells that are located in the area potentially affected by the three Copperleaf Subdivision emergency water wells. Documents already set forth in the DEQ record/on this matter establish this and have been verified by the DEQ recently in its April 24, 2007 sworn responses to Petitioners' written discovery. A copy of the sworn responses is attached as "Exhibit A" *see* p. 5 Response No. 2. Petitioner Jamison holds groundwater permit no. P108760W and Petitioner Hoszwa holds groundwater permit no.

79371W. Id. Jamison and Hoszwa also hold surface water rights for their lands in this area. See attached "Exhibit B" and State Engineer public water rights records.

2. Petitioner North Fork Citizens for Responsible Development.

Petitioner North Fork Citizens for Responsible Development ("North Fork") is a local corporate entity comprised of numerous concerned Park County citizens who have a specific interest in the Copperleaf Subdivision proposal. Jamison and Hoszwa are members of this group and are active in its ongoing review and comment on all phases of the proposed Copperleaf Subdivision. Northfork Citizens as a group, including Petitioners Jamison and Hoszwa together, has actively participated in the substantive review process through the Developer's repeated efforts to file, withdraw, refile and otherwise seek a water system permit for the proposed Copperleaf Subdivision. At no time during that entire process did anyone affiliated with the DEQ or the State of Wyoming ever take the position that Northfork Citizens could not or should not be involved in the substantive review and comment process for the Developer's DEQ permit applications and activities.

3. Developer's admission that Petitioners' wells will be affected.

The Developer is judicially estopped in this proceeding to now claim that Jamison, Hoszwa and all other groundwater permit holders and users in the area near the proposed Copperleaf Subdivision will not be potentially injured or otherwise adversely affected by the Developer's development or use of groundwater wells as any part of the proposed subdivision's domestic water supply. On April 20, 2005, the Developer wrote, signed and submitted a petition to the Wyoming State Engineer's Office ("SEO") asking the SEO to expressly authorize an exchange of North Fork of the Shoshone River water for reservoir water in Buffalo Bill Reservoir. A copy of the Developer's petition is attached as "Exhibit B." The Developer filed

this petition with the SEO on May 4, 2005. Id. At the time the petition for exchange was written and submitted to the SEO, the only potential surface water that the Developer was proposing to use as the sole water supply for the proposed subdivision was a potential surface water right that still remained to be perfected under SEO surface water permit no. 33288. A copy of the Application for Permit To Appropriate Surface Water and Permit No. 33288 is collectively attached hereto as "Exhibit C."¹ Expressly for the purpose of inducing the SEO to grant an exchange order, and because the Developer did not have a sufficient quantity of available surface water to reliably supply the proposed subdivision domestic water system, **the Developer specifically stated in its exchange petition that an exchange of surface water would be required for the proposed Copperleaf Subdivision because:**

. . . due to the junior priority date of Permit No. 33288, the Copperleaf Subdivision Pipeline may not have a reliable supply of water under said permit alone during some periods of the year.

Exhibit B at p. 1, ¶ 1 (last sentence)(emphasis added). The Developer also expressly stated in its petition that:

. . . for the reason that the priority of the original supply under the permit listed in paragraph three (3) above [Permit 33288 with a best possible priority of 2005] is such that there is **not sufficient water available to provide a full supply of water for the year round uses**

Id. at p. 1, ¶ 6 (emphasis added). Then, most relevant to the instant standing issue before the Council, Developer expressly represented that:

Due to the need for a reliable, year-round domestic supply of water for the residents of the Copperleaf Subdivision; the presence of many existing wells in the area around Copperleaf Subdivision; and the proven insufficient supply of ground water in the area, your petitioner believes this proposed exchange is the most cost-effective means to supply the needed water supply

¹ Note that according to the specific terms of this surface water permit, the Developer's 2005 direct flow water right from Permit 33288 is expressly conditioned and tied to the proposed water exchange proposal.

Id. at p. 2 ¶ 7 (emphasis added).

On July 28, 2005 the SEO granted the Developer an exchange order. A copy of the exchange order is attached as “Exhibit D.” Neighboring water appropriators then timely challenged the legality of the exchange order by pursuing a W.R.A.P. 12 petition against the SEO. A copy of the appeal of the exchange order is attached “Exhibit E”. The Developer expressly intervened² in this W.R.A.P. 12 proceeding and actively argued that the exchange order should be upheld, thereby also arguing in district court that the express representations that it made to the SEO to obtain entry of the exchange order in the first place were valid and correct. A copy of the Developer’s brief is attached as “Exhibit F” see pp 7 – 11. On April 13, 2007 the district court issued a letter decision invalidating the Developer’s exchange order and petition as illegal. A copy of the decision letter is attached as “Exhibit G.” The Developer litigated actively throughout the district court proceedings concerning the validity of its petition for exchange and the resulting exchange order. At no point during those proceedings did the Developer ever take the position that there was anything inaccurate or incorrect about the express clear representations that it made to the SEO in the exchange petition to induce the SEO to enter the exchange order stating that river and well water in this area were insufficient in and of themselves to supply a subdivision like Copperleaf. Id.

When the Developer filed its Subdivision Application with the DEQ for the water system permit at issue in this case, it did so knowingly relying upon unexplained and contrary representations about the quantity of water available year-round in this area for the subdivision.

² Actually, the SEO and the State of Wyoming never entered any appearance in this proceeding and the SEO filed no brief on appeal. The Developer, acting as an intervenor, was the only respondent party who appeared and argued to defend the exchange order and its petition for the exchange in the case at all.

See copy of the Developer's Subdivision Application is attached as "Exhibit H," see unnumbered pp 1, 3 and 4 therein. Exactly opposite from the earlier representations that the Developer relied upon and litigated to protect in the SEO exchange petition proceedings, this application appears to represent that the Developer claims it has adequate water for the proposed Copperleaf based solely on a 2005 surface water diversion from the river. Id. In the meantime, the Developer had applied for and received three groundwater well permits that allow groundwater to be taken only in priority with surface water under the single source of supply rule. See the conditions pages on the attached copies of the well permit applications attached as "Exhibit I". Shortly thereafter, Developer added these wells to its water system permit application to the DEQ. The Developer did not ever identify or explain to the DEQ that while it was attempting to rely upon a 2005 priority surface water diversion and three wells regulated to the same or later priority with surface water in the area, it was also going forward litigating to preserve its exchange permit application and order in which it categorically stated to the SEO that such water sources were proven to be insufficient for the proposed subdivision. Despite objections from the Northfork Citizens Group and Jamison, the DEQ never investigated this glaring inconsistency and instead, in October of 2006 the DEQ granted a permit to construct that included three wells. A copy of the permit to construct, which is the subject of this appeal, is attached as "Exhibit J".

During the County platting process the Developer also took totally inconsistent positions concerning its factual representations to Park County concerning the availability of water for the proposed subdivision. In January 2006 while the Developer was telling the SEO that both surface and groundwater supplies in this area were proven insufficient to supply the subdivision without an exchange, and while it was in the process of telling the DEQ that surface and groundwater would be used to supply domestic water to the proposed subdivision, the Developer expressly

represented to Park County that it would not use any groundwater wells for the proposed subdivision. On March 7, 2006 at a public hearing before the Park County Commissioners Developer reaffirmed the claim that no well water would be used to supply the subdivision. A copy of the March 7, 2006 Park County Commissioner Minutes is attached as “Exhibit K” at p. 1585. The Developer made these representations while it continued to pursue a DEQ water system permit that expressly relied upon groundwater wells; the Developer never identified or explained its contrary representations to the DEQ and the Park County when it was making them.

Throughout this process, the North Fork citizens group, Mr. Jamison and Mr. Hoszwa have consistently appeared and objected to the Developer’s repeated attempts to get whatever permit it needs at a given moment by first categorically representing to the SEO that neither surface or groundwater in this area could ever provide sufficient domestic water supply to the subdivision (2005 exchange petition) and then, after that, repeatedly misrepresenting that unavailability of water from the same sources to the DEQ to induce the DEQ to grant a subdivision water supply construction permit. See, e.g., attached “Exhibit L”.

B. Argument.

1. Controlling Standards for Analyzing Standing Disputes.

a. Basic Standing Analysis.

Pursuant to W.S. § 16-3-114(a): “any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, . . . is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken, . . .” Those persons “sufficiently affected to insure that a justiciable controversy is presented to the court” have standing. *Roe v. Board of County Com’rs, Campbell County*, 997 P.2d 1021, 1022 (Wyo. 2000).

The criteria for a justiciable controversy were set out in *Brimmer v. Thomson*, 521 P.2d 574, 578, (Wyo. 1974). In that case the Wyoming Supreme Court adopted a four-element test for whether a justiciable controversy exists:

First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking purely political, administrative, philosophical or academic conclusion. Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution.

Brimmer, 521 P.2d at 578.³

The *Brimmer* test for a justiciable controversy was considered in the analysis of whether the plaintiff in *Pedro/Aspen Ltd. v. Board of County Com'rs for Natrona County* had standing. 2004 WY 84, ¶9, 94 P.3d 412, 415-16 (Wyo. 2004). After explaining that “standing focuses upon whether a litigant is properly situated to assert an issue for judicial or quasi-judicial determination [a] litigant is said to have standing when he has a ‘personal stake in the outcome of the controversy,’” the Court in *Pedro/Aspen* recited the *Brimmer* test for a justiciable controversy before stating that “the fundamental question is whether the litigant has a ‘tangible interest’ at stake in the controversy.” *Pedro/Aspen Ltd.* ¶9. “The tangible interest requirement guarantees that a litigant is sufficiently interested in a case to present a justiciable controversy.” *Pedro/Aspen Ltd.* ¶8.

³ In *Brimmer*, the court also stated that: “there is a well recognized exception that the rule requiring existence of a justiciable controversy is not followed or is relaxed in matters of great public interest or importance. *Id.*”

In *Pedro/Aspen*, the claim was that the county ordinance was in excess of the authority granted to the county by statute. The Court did not invoke the doctrine of relaxed standing in matters of great public interest or importance and held that the owner of an equitable interest in property under a contract for deed had standing to pursue a declaratory judgment action against the county. *Pedro/Aspen* sought to subdivide a property into 40 acre parcels, and the county zoning regulation prohibited the sale of land where a property was subdivided into three or more parcels 35 to 80 acres in size, without first having an approved subdivision plan. The applicable statute, however, limited a county's authority to regulate the subdivision of land only where the parcels are less than 35 acres in size. *Pedro/Aspen Ltd.*, ¶25. The court applied the justiciable controversy test to determine the plaintiff's standing, to wit:

We do not relax the standing requirement in the context of an action under the Uniform Declaratory Judgments Act, but require:

1. the parties must have existing and genuine, as distinguished from theoretical, rights or interests.
2. The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.
3. It must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status, or other legal relationships of one or more of the real parties in interest, or, wanting these qualities to be of such great and overriding public moment as to constitute the legal equivalent of all of them.
4. The proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.

Pedro/Aspen, ¶9. The plaintiff's interest, which allowed it "to market, sell, and presumably realize profits from the [subdivided] parcels," was sufficient to satisfy the first element because

of the “direct impact of the zoning regulation upon that interest.” *Id.* at ¶19. Because the county evidenced its intent to enforce the ordinance, the rights were not theoretical.

The second element was met because the county was actively enforcing its ordinance and if the plaintiff’s actions to have such declared invalid and *ultra vires* were successful, the ordinance would be unenforceable against anyone. The third element was met because a declaration that the ordinance was invalid would allow the plaintiff to continue selling lots and thus have “the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of the one or more of the real parties.” Finally, despite the plaintiff having submitted a plan for approval, the court said “no doubt exists that the parties’ positions are adverse.” The plaintiff’s attempt to comply with the ordinance did not prevent it from contending the ordinance was invalid, and the fourth element was satisfied. *Id.* at ¶¶ 20-23.

Similarly, the Wyoming Supreme Court has repeatedly and specifically found that adjoining landowners have standing to challenge land use planning decisions by a local agency. *Hirschfield v. Board of County Comm’rs*, 944 P.2d 1139, 1143 (Wyo. 1997); and, *Hoke v. Moyer*, 865 P.2d 624, 628 (Wyo. 1993). While not providing an exhaustive list of inherent harms, the Wyoming Supreme Court has found that a landowner that adjoins property that is slated for large scale development will suffer the following inherent perceptible harms: increased density, increased traffic, congestion and corresponding health and safety concerns. *Hoke*, 865 P.2d at 628.

b. Standing to Insist Upon Proper Regulation By DEQ.

In the case of *State ex rel. Bayou Liquors, Inc. v. City of Casper*, 906 P.2d 1046 (Wyo. 1985), the Wyoming Supreme Court interpreted the term “residents” broadly to hold that residents of the City of Casper had standing to bring a declaratory judgment action against the City challenging the issuance of a liquor license. *Id.* at 1050. In reaching this conclusion, the court expressly determined that any legal action by City residents:

. . . which seek to ensure that licenses are issued, renewed or transferred in compliance with the liquor code and local ordinances fits within the broad purpose enunciated by the statute. Certainly residents have a strong interest in seeing compliance with the law.

Id. and Cox v. City of Cheyenne, 2003 WY 146 at ¶ 12, 79 P.3d 500, 506 (Wyo. 2003) (landowners whose land was located across a road or within ½ mile of lands proposed for annexation by the City of Cheyenne had standing to challenge the legality and irregularity of the City’s annexation activities). When the issue before the EQC on review is a specific challenge by neighboring landowners alleging that the DEQ has failed to properly or fully apply its own controlling laws and regulations, neighboring landowners must have standing to litigate those issues or there would be no substantive ability for anyone to review them. Jamison and Hoszwa are entitled to rely on the DEQ to apply and enforce its regulations and therefore have the right to insist on their enforcement. *State ex rel. Bayou Liquors, Inc.*, 906 P.2d at 1050, *Cox*, 2003 WY 146 at ¶ 12, 79 P.3d at 506. *Accord Columbia Broadcasting Systems, Inc. v. U.S.*, 316 U.S. 407, 422 (1942) (stating that agency regulations on which persons are “entitled to rely” bind the agency and are therefore ripe for judicial review); *Yellow Transit Freight Lines, Inc. v. US*, 221 F. Supp. 465, 471 (N.D. Tex. 1963); and, *US v. Leahey*, 434 F.2d 7, 10-11 (1st Cir. 1970);

c. Alternative and Additional Relaxed Standing Analysis.

The Wyoming Supreme Court also long ago adopted and applied the well-recognized exception to the rule requiring a justiciable controversy where the issues involve matters of great public interest of importance in *Brimmer*, 521 P.2d at 578. Since that time, the Court has extended the doctrine to relax the requirement of standing in matters of great public interest or importance.⁴ The Court has explained:

We have recognized a relaxed standing requirement in matters of great public interest or importance. . . . We have applied the great public interest doctrine when a constitutional question is presented or where there is an issue concerning apportionment of state revenues among governmental entities.

Riedel v. Anderson, 2003 WY 70, ¶ 22, 70 P.3d 223, ¶22 (Wyo. 2003). See also *Director of the Office of State Lands & Investments v. Merbanco*, 2003 WY 73, 70 P.3d 241 (Wyo. 2003)

2. Application of Standing Concepts to this Contested Case.

a. The Developer Is Judicially Estopped To Deny and Has Admitted That Use Of Groundwater Wells for the Domestic Water Supply of the Subdivision Could Harm Jamison and Hoszwa.

The Developer long ago established that the area where the Copperleaf Subdivision is proposed does not have suitable surface water and/or groundwater availability to supply a reliable year-round quantity of water to the proposed subdivision. See Exhibit B. By virtue of its litigation in the exchange petition case in District Court, the Developer is now judicially estopped to argue otherwise before this Council or other judicial or quasi-judicial bodies.

It is undisputed that the Developer expressly represented to the SEO in its 2005 exchange petition that the area has “proven” insufficient groundwater resources for its proposed development and that a 2005 priority surface water diversion permit would not supply reliable adequate year-round water for the proposed Copperleaf Subdivision. *Id.* The Developer’s

⁴ The history of extending this doctrine to standing is recounted in *Jolley v. State Loan and Inv. Bd.*, 2002 WY 7, ¶9 38 P.3d 1073, ¶9 and in *Riedel v. Anderson*, 2003 WY 70, ¶ 22, 70 P.3d 223, ¶22 (Wyo. 2003).

knowing decision to make the representations that it made in the exchange petition and then to actively litigate to defend those representations in District Court now judicially estop the Developer from arguing that Jamison and Hoszwa cannot show possible harm to their groundwater interests from the Developer's water supply permit that is the subject of this contested case proceeding. *Wilson v. Lucerne Canal and Power Company*, 2007 WY 10, ¶ 26, 150 P.3d 653, 663 (Wyo. 2007) (litigants are not permitted to blow hot and cold in successive judicial and quasi-judicial proceedings in order to "game" the system to get a result that suits them).

Now, Jamison and Hoszwa contest the Developer's DEQ water system permit in this case partly on the grounds that the Developer seeks to construct and operate a proposed Copperleaf subdivision domestic water supply that relies heavily on groundwater as a source of supply. According to the Developer's own April 2005 exchange petition, Jamison and Hoszwa clearly are potentially affected and aggrieved groundwater users whose interest will be negatively affected by the Developer's plans to pump groundwater in the very area that it told the SEO would not supply adequate groundwater because of the pre-existence of numerous wells. Jamison and Hoszwa also otherwise meet all of the requirements of the *Brimmer* and *Pedro/Aspen Ltd.* analysis:

1. Jamison and Hoszwa both own land adjoining the proposed Copperleaf Subdivision and they hold valid perfected groundwater permits in the area affected by the groundwater wells that the Developer's DEQ water system permit relies upon.
2. The EQC has primary jurisdiction in this matter to review and decide upon the sufficiency and legality of the Developer's water system permit.
3. The EQC's final decision in this contested case proceeding will determine whether or not the Developer has proposed and established that it can and will construct a domestic water supply system for the proposed Copperleaf

subdivision that complies with controlling mandatory laws and regulations for the construction of such a system. If the EQC finds and concludes that the DEQ has improperly or erroneously granted the Developer a water system permit, the EQC's order reversing the permit will be final and will have the effect of precluding construction of the system.

4. The Petitioners, the DEQ and the Developer are all clearly adverse to each other on the issues before the Council.

Jamison and Hoszwa easily meet and establish all of these basic elements of proof for standing in this case. As neighboring landowners who own groundwater wells and surface water diversions in the very area where the Developer previously expressly admitted that its development would unreasonably tax an already "proven" insufficient water supply, they clearly can be potentially adversely affected by the Developer's attempt to use a DEQ water system permit at issue in this case, to use groundwater to supply its subdivision. The Developer's prior statements in its exchange petition about the unavailability of water for large-scale development in this area establish this. Jamison and Hoszwa are adjoining landowners with standing to object to the Developer's improper attempts to obtain a DEQ water system permit using a local water supply that the Developer has previously admitted will not be sufficient. They are adjoining landowners with standing to insist that the DEQ must substantively follow and substantively enforce its own regulations and hold the Developer to its prior representations about water supply sources in this area when reviewing and acting upon the Developer's DEQ water system permit application.

b. Relaxed Standing Analysis Applies for all Petitioners As Well.

North Fork also easily meets and establishes elements 2-4. To the extent that North Fork consists of a group of persons that includes both Jamison and Hoszwa as group members, which it does, that group also easily meets all four elements of the standing test.

Further, this is clearly a case in which the North Fork citizen group should receive relaxed standing treatment under *Reidel*. The Copperleaf subdivision proposal has been pending

before various agencies and has been hotly contested in the public eye for roughly two years now. As set forth herein, among the important issues before the Council in this case is the Council's critically important review of the DEQ's analysis of whether the proposed Copperleaf subdivision will have an adequate year-round supply of domestic water. The Copperleaf proposal has been hotly debated in the Park County public eye and has raised statewide awareness about the problems and issues that large-scale development of pristine rural lands cause in Wyoming at this time. The North Fork citizens group also have legitimate concerns as citizens about whether the DEQ has properly required the Developer to go through the Chapter 23 process from beginning to end in one consistent permit application process that provided the public in this area with proper notice and information about the Developer's proposed water supply for the development so that the public could actually know what the Developer was proposing and could make intelligent comment on it at that time. *State ex rel. Bayou Liquors, Inc.*, 906 P.2d at 1050.

All of these issues arise against a backdrop of development proposed at the upper end of the Wapiti Valley near Yellowstone Park and in a long-term drought environment. It is hard to imagine another DEQ subdivision water system case and controversy in Wyoming that would raise more important and fundamental public interest issues. The North Fork citizens group easily has standing to participate in this proceedings based on all of these interests.

D. Conclusion.

Based upon the foregoing allegations, facts, arguments and authorities, Petitioners Jamison, Hoszwa and Northfork Citizens have standing to go forward and top participate in these proceedings. Therefore, they respectfully request that the Council deny the Developer's Motion To Dismiss.

CERTIFICATE OF SERVICE

I, Debra J. Wendtland, attorney for the Petitioners, in the above-entitled and numbered cause do hereby certify that on the 8th day of May, 2007, I caused a true and correct copy of the Petitioners' Response to Respondent's Motion To Dismiss to be served as follows:

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DATED this 4th day of May, 2007.

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