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APR 06 2006

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL)
OF THE COPPERLEAF CHAPTER 23)
SUBDIVISION APPLICATION, #05-S-052)

Docket No. 05-3805

PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS

COMES NOW the Northfork Citizens for Responsible Development, and David Jamison (hereafter collectively referred to as "Northfork Group"), by and through their undersigned attorneys of record and responds to Respondent, Wyoming Department of Environmental Quality's ("DEQ") motion to dismiss the Northfork Group's Petition for Review as follows:

OVERVIEW

The Environmental Quality Act ("Act") was implemented for the express purpose to "enable the state . . . to preserve, and enhance the air, water and reclaim the land of Wyoming, to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state; . . . and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, . . . in carrying out these objective." W.S. § 35-11-102. The Act goes on to mandate that the DEQ specifically develop rules and regulations pursuant to review of subdivision permits. W.S. § 35-11-301(a)(xi). Pursuant to this mandate, the DEQ developed DEQ Rules and Regulations Chapter 23: "Minimum Standards for Subdivision Application." Having established such standards, the DEQ must follow them. In this case, the DEQ has flagrantly failed to do so.

DEQ seeks to avoid EQC scrutiny of their Chapter 23 review via a motion to dismiss. Their motion is based upon two arguments: 1) the special use permit ("SUP")

that resulted from the October 28, 2005, DEQ decision letter is not a final decision; and, 2) only the Park County Commissioners can grant a Special Use Permit (“SUP”) and therefore DEQ’s role in the matter is not reviewable. For the reasons cited below, the DEQ’s positions on those issues are incorrect and Petitioner is entitled to pursue the appeal it has filed with EQC.

STATEMENT OF THE FACTS

1. The subdivision of land in Park County, Wyoming for a major subdivision, such as Copperleaf, requires a developer to obtain an SUP. Park County Zoning Resolution (“ZR”) 4-400 through 4-425.

2. The selling of lots of subdivided land, in Park County, for a major subdivision such as Copperleaf, requires a developer to properly obtain, approval of a Final Plat. Park County Development Standards and Regulations (“DSR”) Ch 4 §§ 3 and 4.

3. Pursuant to W.S. § 18-5-306 the Park County Board of County Commissioners (“Board”) must require specific information with a subdivision application for a subdivision permit to issue.

4. Pursuant to W.S. § 35-11-301(a)(xi), the DEQ shall recommend rules and regulations, standards and permit systems for subdivision permit applications submitted pursuant to W.S. § 18-5-306.

5. DEQ Rules and Regulations, Chapter 23: Subdivision Application, sets forth the specific information and documentation that must be provided by an applicant seeking a subdivision permit.

6. In October of 2004, the Developer filed the Copperleaf Subdivision SUP Application.

7. On March 28, 2005, the Developer submitted its first Subdivision Application, pursuant to W.S. § 18-5-306(c), for review by the DEQ.

8. By letter dated May 25, 2005, Northfork Group provided the DEQ with written comments on the inadequacy of the Developer's subdivision application.

9. On May 26, 2005, the Developer formally withdrew its subdivision application before the DEQ.

10. By letter dated June 1, 2005, John F. Wager, stated that the DEQ had "intend[ed] to send the county a letter stating that the WQD (Water Quality Division) would be unable to make a final recommendation due to lack of some technical information." A copy of the Wagner letter is marked as "Exhibit A" and by this reference is incorporated herein.

11. Unwilling to wait for the Developer's second Subdivision Application to the DEQ, on June 21, 2005 the Board approved the Developers SUP with conditions. A copy of the Board's SUP Resolution # 2005-40 is marked as "Exhibit B". Since the Board chose not to wait for DEQ review, it conditioned ultimate approval of the permit upon the DEQ's eventual review and approval of the Developer's proposed sewage system and water supply system. See Exhibit B pp. 2 and 3.

12. On September 1, 2005 the Developer submitted to the DEQ its second Subdivision Application for review by the DEQ.

13. On October 14, 2005, in response to the Developer's second Subdivision Application to the DEQ, the Northfork Group submitted to the DEQ a detailed

itemization of the areas in which the Developer's second application still failed to meet the requirements of Chapter 23. A copy of the Northfork Group submittal is marked as "Exhibit C".

14. By letter dated October 28, 2005, the DEQ expressly found and concluded that the application/Developer: "has provided appropriate documentation, adequate evaluation, and the necessary certification in addressing his obligations associated with the adequacy of the proposed subdivision's wastewater collection and treatment system." A copy of the October 28, 2005 decision letter is marked as "Exhibit D".

15. Upon receipt of this favorable finding and conclusion by DEQ, pursuant to W.S. § 18-5-306 and DEQ Chapter 23, and subject to pending appeals filed by the Northfork Group, the Developer obtained the legal right to subdivide for future sale.

ARGUMENT

I: A Special Use Permit is final agency action.

A. A subdivision permit is final agency action.

Foundational to the law of agency is the rule that only a final administrative order is appealable. *Wyoming v. U.S. Dept. of Interior*, 360 F.Supp.2d 1214 (10th Cir. 2005). Final agency action is defined as: 1) the action must mark the consummation of the agency's decision-making process; and, 2) the action must be one by which rights and obligations have been determined or from which legal consequences will flow. *Id* at 1227. Specific to the subdivision of land there are two phases involved: 1) the actual

division of the land¹ and 2) the actual sale of the land.² Each distinct phase is independent of the other.

At issue in this case is the grant of a subdivision permit pursuant to W.S. § 18-5-304. Contrary to the characterizations of the DEQ, the permit at issue in this case meets both requirements for final agency action. The grant of a subdivision permit “marks the consummation of the agency’s decision-making process”. *Wyoming*, 360 F.Supp.2d at p. 1227. Pursuant to W. S. § 18-5-304, upon receipt of a subdivision permit, and not until then, a person may: divide land or begin the physical layout of dividing land or begin construction of a subdivision.³ Absent receipt of a subdivision permit a person has no legal authority to even divide the land for purposes of future sale. *Id.*

The grant of a subdivision permit also finally fixes “rights and obligations” of a developer. *Id.* at 1227. Absent the award of a subdivision permit, no division of property can occur. W.S. § 18-5-304. Until a developer obtains a final subdivision permit, there is no legal right to subdivide for the purpose of selling lots either immediately or in the future. W.S. § 18-5-302(a)(vii). As will be shown below, subdivision permits issued by Park County carry with them additional indicia of legal rights and obligations from which legal consequences flow.

¹ W.S. § 18-5-304 “No person shall subdivide land **or** commence the physical layout **or** construction of a subdivision without first obtaining a subdivision permit from the board of the county in which the land is located”. (emphasis added).

³ The subdividing of land is defined by statute as: “the creation or division of a lot, tract, parcel or other unit of land for the **immediate or future purpose** of sale, building development or redevelopment, for residential, recreational, industrial, commercial or public uses” (emphasis added). W.S. § 18-5-302(a)(vii) No where in either the requirement that a developer obtain a subdivision permit (W.S. § 18-5-304) nor in the definition of the term “subdivision” (W.S. § 18-5-302(a)(vii)) is a developer actually required to sell divided lots. Subdivision includes the basic ability to legally just divide the property for the purpose of sale, building, etc. either immediately or in the future. Consequently, the fact that other steps are involved in the permitting of actual sewage and water systems if lots are sold, does not negate the fact that the grant of a subdivision permit is the consummation of agency decision-making in one phase of development.

In addition to the above definition of final agency action, the Northfork Group is in agreement with DEQ's reliance upon the definition found in: *Ash Creek Mining Company v. Lujan*, 934 F.2d 240 (10th Cir. 1991). Specifically, the *Ash Creek* case defines an administrative order to be final if it does one of the following: 1) impose an obligation, 2) deny a right or 3) "fix some legal relationship as a consummation of the administrative process". *Id* at p. 243. However, the DEQ's call to the Council to dismiss this appeal based upon the facts in *Ash Creek* is in error. In *Ash Creek*, the issue was a "proposed" land exchange. As shown above, in this case, the issue is the actual grant of authority to divide land. Unlike the agency proposal in *Ash Creek*, the subdivision permit in this case grants to the developer an immediate and substantial right that it did not have before: the right to divide land.⁴ W.S. § 18-5-304.

B. The Park County Special Use Permit is a Subdivision Permit.

In Park County, the subdivision permit identified in W.S. § 18-5-304 is called a Special Use Permit ("SUP"). Park County Zoning Resolution ("ZR") 4-500 through 4-525. Support for this position is two fold: First, with one exception, the statutory requirements for a subdivision permit found in W.S. § 18-5-306 are restated in the Park County rules at ZR 4-510 through 4-520. The sole element missing from the Park County regulations, that is required in W.S. § 18-5-306(a)(ii), is the requirement that a detailed survey plat be submitted. In error, the Park County regulations have failed to include this requirement. However, all other requirements are included.

Second, the parties expressly agree that the Park County SUP is the subdivision permit identified in the W.S. § 18-5-306. Evidence of this agreement is as follows: The

⁴ Developers right is subject to any proper appeals or declaratory judgment based challenges. Petitioners expressly reserve, and do not waive, its claims and rights to pursue such appeal and/or actions concerning the Copperleaf Development.

Board's approval of the Copperleaf SUP is conditioned upon favorable review by the DEQ. Exhibit A at pp. 2-5. According to the law, that review can only occur pursuant to W.S. § 18-5-306. During the SUP phase of review the Developer made a "Subdivision Application" to the DEQ for Chapter 23 approval. The DEQ accepted the Developers "Subdivision Application" for Chapter 23 review and consummated that review in the DEQ October 28, 2005 letter.

C. The Park County SUP is final agency action.

Separate and distinct from the grant or review of a final plat, which would entitle a developer to actually sell lots, an SUP allows for actual division of the property. W.S. § 18-5-304. As stated above the Park County SUP requirements are the same as the statutory requirements for a subdivision permit. However, in addition to the legal right to subdivide that comes with the grant of a subdivision permit, a Park County SUP carries two additional indicia of finality. First, the SUP "runs with the land" (ZR-4-475, p. 4-11).⁵ As a consequence, a developer can obtain an SUP, divide lots but never actually sell the divided lots individually. This use of an SUP is in keeping with the grant of a subdivision permit in that the statute does not require the actual selling of lots. W.S. § 18-5-304 Since the SUP runs with the land, the developer can sell the total parcel of land to which the SUP has attached to another developer who may or may not choose to pursue a final plat and actual sale of lots.⁶

⁵ ZR 4-475: "All discretionary development approvals granted by the Board of County Commissioners or Planning and Zoning Commission shall run with the land . . ." SUPs are discretionary development approvals granted by the Board of County Commissioners. ZR 4-400.

⁶ In Park County SUPs have an expiration date. "If activities allowed by a special use permit have not been established within one year of the approval of the permit or have ceased to occur for at least one year after having been established, the special use permit shall expire and no such activities may resume unless an application is filed and approved in accordance with the procedures for review of new special use permits."

Second, Park County itself expressly considers the grant of an SUP a “final decision” in its controlling rules. ZR 4-400, Figure 4-A Step 9B, p. 4-8⁷. Obviously, the drafters of the Park County regulations recognized and intended that grant of an SUP by the Board would be both action that marks the consummation of the agency’s decision-making process, and action by which rights and obligations have been determined or from which legal consequences flow. *Wyoming, 360 F.Supp.2d at 1214.*

II: DEQ’s October 28, 2005 decision letter is reviewable.

As agreed by both the DEQ and the Northfork Group, the *Ash Creek* decision defines an administrative order to be final if it does any one or more of the following: 1) impose an obligation; 2) deny a right; or 3) “fix some legal relationship as a consummation of the administrative process”. *Ash Creek Mining Company, 934 F.2d at p. 243.* By virtue of the manner in which this case was procedurally handled by the Board and the DEQ, DEQ’s October 28, 2005 letter could only have served as the final consummation of the administrative process that resulted in the Developer having an SUP. Therefore the DEQ’s decision is reviewable.

In a typical case, the Board does not rule on an SUP until **after** the DEQ has weighed in. In fact, that is precisely the procedure set forth by statute: W. S. § 18-5-308(a)(ii) (“The board shall approve or disapprove the subdivision application and issue a subdivision permit or ruling: . . . within sixty (60) days **after** the department of environmental quality submits its recommendation to the board . . . ”(emphasis added)). *See also* W. S. § 18-5-306(c) (“Upon receipt of a subdivision permit application filed with a county and **prior** to subdivision permit approval, the county or subdivider shall send

⁷ ZR 4-400, Figure 4-A Step 9B: On discretionary development applications, like SUPS, the Board of County Commissioners hold a public hearing and render a “final decision”.

three (3) copies of the portions of the application prepared under this section to the department of environmental quality for review . . .”(emphasis added)).

Here, the Board unexplainably chose to grant the permit on condition of ultimate favorable DEQ review. Exhibit A at pp 2 and 3. Had the DEQ given an adverse recommendation, the Developer’s SUP would have been void, without further consideration by the Board. Consequently, it was the consummation of DEQ’s chapter 23 review that finally “fix[ed] the legal relationship of the Developer as a permit holder.

The courts have recognized the contingency wherein an agency may make a final decision conditioned upon a ruling by a separate agency. That is why the definition of a final decision expressly includes the collaborative decision by an agency that “fix some legal relationship as a consummation of the administrative process.” *Ash Creek 934 F.2d at p. 243*. The fact is that, regardless of the title given to the final decision in the DEQ’s October 28, 2005 letter to the Board, that written and final decision “fixes some legal relationship as a consummation of the administrative process” *Id.* The legal relationship that was established is that the Developers of the proposed Copperleaf Subdivision became SUP holders and entitled to all the rights and responsibilities that flow from that position. The consummation of the administrative process was the Chapter 23 Subdivision Application Review that DEQ alleges to have completed in making its decision in the October 28, 2005 letter.

Pursuant to W.S. § 35-11-302(a)(xi) DEQ has developed Chapter 23: Subdivision Application, as the standard for review of sewage and water system plans that are proposed under a subdivision permit (W.S. § 18-5-306). DEQ’s Chapter 23 rules are entitled: “**Minimum** Standards for Subdivision Applications” (emphasis added). *Id.* In

reviewing the Copperleaf Subdivision Application, DEQ completely ignored vast sections of substantive requirements of their own Chapter 23 “minimum standards”. The choice to ignore those requirements resulted in the consummation of an SUP award to the developers of the Copperleaf Subdivision. A laundry list of the items missing from the Copperleaf Subdivision Application and therefore from DEQ review is marked as Exhibit “C” and by this reference is incorporated herein.

At the time DEQ began review of the Copperleaf Subdivision Application DEQ knew that Park County had already approved the SUP conditioned only upon favorable DEQ review. It is therefore reversible error to allow DEQ to both ignore its own “minimum standards” for subdivision review and avoid Council review of the very agency decision that ultimately consummated the grant of the Copperleaf SUP.

CONCLUSION

For the reasons stated above, Petitioner requests that the Council deny Respondent’s motion to dismiss and set Petitioner’s underlying Petition for Review for contested case hearing before the Council.

DATED this 4 day of April, 2006.

Counsel for Petitioners


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CERTIFICATE OF SERVICE

I, Debra J. Wendtland, attorney for the Petitioners, in the above-entitled and numbered cause do hereby certify that on the ___ day of April, 2006 I caused a true and correct copy of PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS, to be served via first class mail as follows:

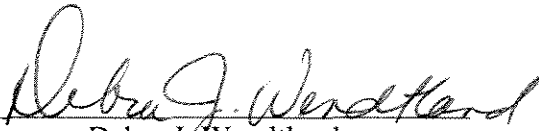
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