

IN THE SUPREME COURT, STATE OF WYOMING

ASPHALT SPECIALTIES CO., INC.,)	
a Colorado Corporation,)	
)	
Appellant (Petitioner))	
)	
vs.)	S-20-0127
)	
LARAMIE COUNTY PLANNING)	
COMMISSION, a Wyoming)	
Governmental Entity,)	
)	
Appellee (Respondent).)	

APPELLANT/PETITIONER ASPHALT SPECIALTIES CO., INC.'S
OPENING BRIEF

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Oral Argument is Requested

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STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court pursuant to W.R.App.P. 12.11 and Wyo.Stat. §16-3-115, being an appeal of the “*Findings of Fact, Conclusions of Law and Order Denying Request for Approval of Site Plan for Lone Tree Creek Quarry*,” issued by the Laramie County Planning Commission (“Planning Commission”) on October 9, 2018 (“Decision”). AR-635–665 (Appendix A). Asphalt Specialties Co., Inc., (“ASCI” or “Company”) first appealed to the First Judicial District Court pursuant to Wyo.Stat. §16-3-114(a). The District Court issued an *Order and Opinion* on February 28, 2020 affirming the Planning Commission Decision. *See* Case File in Civil Action No. 190-673, at 441–451. This appeal is timely because the Notice of Appeal was filed on March 25, 2020, within thirty (30) days after entry of the District Court’s Order.

STATEMENT OF THE ISSUES

1. Whether the Planning Commission Decision denying ASCI’s Site Plan Application for the Lone Tree Creek Quarry was unlawful and should be set aside as being in excess of statutory jurisdiction, authority and limitations and lacking statutory right.
2. Whether the Planning Commission Decision denying ASCI’s Site Plan Application for the Lone Tree Creek Quarry was unlawful and should be set aside as being unsupported by substantial evidence based on the record in this matter.
3. Whether the Planning Commission Decision denying ASCI’s Site Plan Application for the Lone Tree Creek Quarry was unlawful and should be set aside as being arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law.

4. Whether the Planning Commission Decision denying ASCI's Site Plan Application for the Lone Tree Creek Quarry was unlawful and should be set aside as being without observance of procedure required by law.

5. Whether the Planning Commission Decision denying ASCI's Site Plan Application for the Lone Tree Creek Quarry was unlawful and should be set aside as being contrary to constitutional right, power, privilege or immunity.¹

STATEMENT OF THE CASE

I. NATURE OF THE CASE

ASCI is asking this Court to review and reverse the Planning Commission Decision. ASCI first filed a Petition for Review with the District Court pursuant to Wyo.Stat. §16-3-114 and Rule 12 of the Wyoming Rules of Appellate Procedure. *See* Case File in Civil Action No. 190-673, pp. 5–80. The District Court issued its *Order and Opinion* on February 18th of this year, affirming the Planning Commission's decision.

¹ Although ASCI argued to the District Court that it should compel the Planning Commission to approve ASCI's Site Plan for the Lone Tree Creek Quarry pursuant to Wyo.Stat. § 16-3-114(c)(i), the Company is no longer pursuing that relief here. ASCI is instead focused on the reasons why this Court must set aside the Planning Commission's Decision and remand for entry of an Order consistent with this Court's instructions.

Wyo.R.App.P. 12.11 provides that “[a]n aggrieved party may obtain review of any final judgment of the district court by appeal to the supreme court.” Wyo.Stat. § 16-3-115, provides for Supreme Court review of agency action and closely mirrors this language, adding that “[t]he appeal shall be taken as in other civil cases.” ASCI respectfully requests this Court to hold unlawful and set aside the Planning Commission Decision.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. ASCI’s Property and Proposed Hard Rock Quarry

ASCI owns a 555-acre parcel of property in an area approximately twenty (20) miles west of Cheyenne, Wyoming. AR-357. The parcel is one-and-one-half miles south of Interstate 80 on the west side of Harriman Road in southwestern Laramie County. *Id.* ASCI has proposed establishing a fifteen (15) acre “Limited Mining Operation” (“LMO”) hard rock quarry on its property. *Id.*

On May 22, 2018, ASCI filed its Site Plan Application with Laramie County Planning and Development for the “Lone Tree Creek Quarry” to be operated on its property.² AR-343, 357–363 , 379–381. ASCI’s entire “Original Application Package”

² ASCI participated in a “Pre-Application Meeting” with the Planning and Development Office on October 10, 2017, during which the participants prepared the required “Pre-Application Meeting Results” for the Site Plan Application. Those “Results” specified the information and materials ASCI needed to include with its Site Plan. AR-338–341.

is contained within “Exhibit 1” of the Administrative Record. *See* AR Index at iv.³ The Laramie County Planning and Development Director (“Director”) subsequently referred ASCI’s Application to the Planning Commission for review. The Planning Commission held a public hearing related to ASCI’s Site Plan Application on July 12, 2018. The Director first provided a brief introduction of the project, specifically instructing the Planning Commission that ASCI’s property is located “outside the zoned boundary of Laramie County and, therefore, is not subject to any zoning regulations.” AR-Exhibit 4, July 12, 2018 Transcript. The Director further advised the Planning Commission that “[i]t is *essential to note* that Laramie County does not have any land use regulations regarding quarries or mining operations.” *Id.* (emphasis added).

The Associate County Planner presented the Planning Commission with a written Memorandum dated July 12, 2018 describing ASCI’s proposed project; summarizing the

³ The Administrative Record documents have been numbered in the lower right-hand corner of each page as required by Wyo.R.App.P. 12.07, with the exception of Exhibits 1–4. *See* AR Index at iv. Exhibit 1 contains the “Original Application Package” that ASCI filed with the Planning Department. Exhibit 2 contains “Supplemental Information” submitted by ASCI. Exhibit 3 contains information ASCI presented during the July 12, 2018 Planning Commission meeting. Exhibit 4 contains the three hearing Transcripts relevant to ASCI’s Site Plan Application, referred to below by date and page number.

topics of concern expressed by neighboring landowners; identifying Section 2-2-133 as being the governing Land Use Regulation; and providing aerial photographs, maps and other related documents. *See* AR-350–381, AR-Exhibit 2. The Associate County Planner’s Memorandum reminded the Planning Commission of the scope of its authority and pointed out three critically important facts:

This property is outside the zoned boundary of the County and, therefore, is not subject to any zoning regulations. It is also essential to note at this time Laramie County does not have any Land Use Regulations regarding Quarries or Mining Operations. The Planning Commission may hear a Site Plan application and make recommendations to the Planning Director for action on the Site Plan. (Emphasis added).

AR-351. The Planning Commission’s role was limited to reviewing ASCI’s Site Plan—the layout of the facility—to determine whether it met the requirements of Section 2-2-133 of the County Land Use Regulations (relevant pages included in the record at AR-369–378 and attached hereto as Appendix B), and making a recommendation to the Planning Director. *Id.*; *see also* AR-Exhibit 4, July 12, 2018 transcript at 5.

The Associate County Planner was also tasked with providing guidance to the Planning Commission, describing the “general purposes” of its review of ASCI’s Site Plan as including the “use of best practices in site design” and the “preservation and protection of health, safety and welfare of Laramie County residents.” AR-352. According to the July 12, 2018 Memorandum, the very “purpose of [Section 2-2-133] is to “protect the health, safety and welfare of Laramie County residents through [the] design of commercial, public and multi-family residential developments.” *Id.* (emphasis added). These

statements of general purpose, in other words, are not vehicles by which the Planning Commission could assume the authority to dictate “use” nor to prohibit entirely legal operations on particular parcels of property either within or outside of the zoned area of the County (although the Planning Commission’s authority is clearly more constrained on those lands that remain unzoned). As is discussed in more detail below, the “health, safety, and welfare” considerations are addressed by Section 2-2-133 itself, and are not stand-alone requirements to expand the Planning Commission’s authority or jurisdiction. Section 2-2-133 cannot be read to allow the Planning Commission to interject itself into areas of regulation and oversight that are instead within the sole jurisdiction of State and/or Federal agencies (such as the Department of Environmental Quality (“DEQ”), Wyoming State Engineer’s office (“WSEO”), Wyoming Department of Transportation (“WYDOT”), and the Environmental Protection Agency (“EPA”), among others).

B. Laramie County Land Use Regulations: Site Plan Process and Requirements

Section 2-2-133 of the County Land Use Regulations defines a “site plan” as:

A document or group of documents containing sketches, text, drawings, maps, photographs, and other material intended to present and explain certain elements of a proposed development, including physical design, siting of buildings and structures, interior vehicular and pedestrian access, the provision of improvements and the interrelationship of these elements. (Emphasis added).

Id. at 45 (Appendix B). Site plans provide an overview of the “footprint” of the development primarily associated with the external on-the-ground layout addressing those

factors identified in Section 2-2-133. By definition, Section 2-2-133 describes the scope and purpose of the Planning Commission’s site plan review. Section 2-2-133 enumerates an exhaustive list of site plan requirements and the standard by which they are judged.

There is nothing in Section 2-2-133 that contemplates an open-ended, broad, unconstrained assessment and evaluation of the environmental, economic, beneficial, or negative aspects of the particular residential or commercial development for which the site plan is being submitted (including gravel operations). Section 2-2-133 instead itemizes the components of an application, each of which makes sense in the context of the definition of a “site plan” as quoted above.

Subsection “d” of Section 2-2-133 lays out the “**General Site Plan Requirements,**” containing each of the following components:

- i. A landscaping, grading and storm water management plan shall be submitted with the application. A traffic study may be required.
- ii. Site plan applications are to be submitted on a form provided by the Planning and Development Office.
- iii. Site plans for regulatory areas⁴ require notice to adjacent property owners.⁵

⁴ The “regulatory area” is defined as “[a]ll lands in unincorporated Laramie County.” Land Use Regulations at 38.

⁵ In *BJ Hough, LLC v. City of Cheyenne*, 287 P.3d 761, 770, ¶ 25 (Wyo. 2012), this Court

- iv. Site plans are to be reviewed by the Director. Site plans in the regulatory area may require a public hearing before the Commission if the Director determines that the “impacts of the proposed use will significantly impact surrounding properties.”
- v. “Buffering” is required in certain circumstances.
- vi. Site plan elements:
 - A. Map details (title block, address, scale, north arrow, date);
 - B. Legal description;
 - C. Current zoning;
 - D. Surrounding and adjacent land uses and zoning;
 - E. Properties across a right-of-way of 120 feet or less;
 - F. Names of property owners who share a common lot line;
 - G. Names of adjacent streets; right-of-way widths, pavement widths, and any pertinent easements;
 - H. Locations and dimensions of proposed access points;
 - I. Overall site dimensions;
 - J. Location and dimensions of outside storage/display areas;
 - K. Location and width of existing and proposed sidewalks.
 - L. Dimensions, height and setbacks of existing buildings;
 - M. Dimensions, height and setbacks of proposed buildings;
 - N. Location of nearest fire hydrant(s);
 - O. Trash containment;

defined “adjacent”:

1.a: not distant: nearby ... b: having a common endpoint or border ... sin adjacent, adjoining, contiguous, juxtaposed mean being in close proximity. *Adjacent may or may not imply contact but always implies absence of anything of the same kind in between* <a house with an *adjacent* garage> (Some emphasis added.) *Webster's Third New International Dictionary* (1993) contains similar definitions at pages 492 and 26, respectively: adjacent ... 1 a: not distant or far off ...: nearby but not touching ... b: relatively near and having nothing of the same kind intervening: having a common border: abutting, touching: living nearby or sitting or standing relatively near or close together

- P. Ground surface/covering;
- Q. Parking information;
- R. Drainage and contour lines;
- S. Depictions of where drainage enters and leaves the site;
- T. Proposed screening by type and height;
- U. Structures or features within the right-of-way for a distance of 100 feet on either side of the site's boundaries;
- V. Physical barriers between properties;
- W. Driveways;
- X. Building floor elevations;
- Y. Computation table showing: (1) total site area; (2) building area; (3) parking provisions; (4) landscape area; (5) impervious area;
- Z. A landscape plan (conforming with Section 2-2-134).

Id. at 369–372. The Planning Commission's role in reviewing ASCI's Site Plan Application was limited to these elements.

C. ASCI's Site Plan Application and Supplemental Information

On May 22, 2018 ASCI submitted its Site Plan Application, along with 11 attachments, "in accordance with Laramie County Site Plan requirements stated in the Pre-Application meeting notes October 10, 2017." AR-Exhibit 1 at 1. ASCI confirmed in its May 22, 2018 transmittal letter that it had met or exceeded the site plan requirements: "The proposed Project, as conditioned by the draft permits, meets all applicable statutory and regulatory criteria." *Id.* Attachment 4 to ASCI's Application is a "Narrative" providing a more detailed description of the project and further confirming compliance with each element of Section 2-2-133 (with **bolded notes** identifying the relevant subsection).

- The specific location of the 15-acre LMO was selected because it is surrounded by natural topographical high barriers (i.e., cliffs). "By using the natural barriers in conjunction with constructing the quarry below the current ground surface

elevation, this will eliminate or substantially minimize any visual observance from the North, East, South and West.” AR-Exhibit 1, Narrative, at 1. **[Siting the quarry here meets the “buffering” requirements of Section 2-2-133(d)(v).]**

- “The closest neighboring residence is approximately 2,300 feet [almost one-half (½) mile] southeast of the proposed quarry operation.” *Id.* **[The homes in the Willadsen Estates are not “adjacent” to the proposed quarry as per the Supreme Court’s definition quoted above; ASCI provided notice of its Site Plan to the adjacent property owners as per Section 2-2-133(d)(iii).]**
- “The mine site will sit 40 feet below the north-south ridge point within the property.” *Id.*
- Attachment Figure 1A identifies the location of the proposed quarry, the access point, the legal description, the north arrow, the date of preparation, overall site dimensions and property location. **[Attachment Figure 1A meets the requirements of Section 2-2-133(d)(vi)(A), (B), (H), and (I).]**
- Attachment Figure 1B provides the required information related to surrounding and bordering property owners sharing a common lot line, adjacent streets, the public right of way, zoning and land uses. **[Attachment Figure 1B meets the requirements of Section 2-2-133(d)(iv)(C), (D), (F), and (G).]**
- Attachment Figure 2 references the 15-acre quarry with other mining operations in the area, location of trash containment, scale trailer office, proposed access/haul

road, portable toilet, parking location for employees, proposed drainage arrows and contour lines. It also provides a computation table showing the total site area (15 acres), the buildings (shed, storage, etc.), an impervious area (the paved access/haul road), and ground cover (topsoils, overburden, wastes, granite). [**Attachment Figure 2 meets the requirements of Section 2-2-133(d)(iv)(H), (J), (L), (M), (O), (P), (Q), (R), (S), and (Y).**]⁷

- “ASCI has and will submit applications to the WYDEQ [Wyoming Department of Environmental Quality] including Land Quality, Water Quality and Air Quality Division. We have received authorization for Land Quality Division to commence the Limited Mining Operations (LMO) permits subject to compliance with other State and Federal permit requirements.” *Id.* at 1–2. (emphasis added).
- “ASCI is committed to a monitoring program that not only meets but exceeds the WYDEQ requirements for a 15-acre LMO. This includes the commitment to protect the air quality, surface water, groundwater, wildlife, and cultural resources

⁷ Subsection (E), (K), (N), (T), (U), (V), and (W) are not applicable—there are no properties “across a right-of-way of 120 feet or less,” there are no sidewalks on the property, fire hydrants will not be installed, there is no need for a screen, there will be no structures or features within a right-of-way, there are no physical boundaries (other than substantial acreage) between properties, and there are no driveways.

of the State of Wyoming. This effort has included both completed and ongoing: cultural surveys of the proposed mining operations, wildlife and raptor surveys, baseline surface and groundwater monitoring, traffic surveys and air quality permitting. ASCI has established a network of seven monitoring wells to define the hydrogeologic characteristics of the Pre-Cambrian (granite/gneiss) aquifer.” *Id.* at 2. (emphasis added).

- “ASCI is presently conducting wildlife, wetland, and raptor surveys as part of their permitting effort which is a requirement of the Wyoming Department of Environmental Quality (DEQ) and will continue to remain in compliance with state and federal requirements.” *Id.* (emphasis added).
- “Cultural surveys have been completed and the proposed disturbance will not adversely affect any cultural features or artifacts.” *Id.*
- “ASCI held a community meeting on March 29, 2018 at the Little America Hotel and Resort facility in Cheyenne, Wyoming. We had sent out 65 invitations to the surrounding property owners and neighbors to discuss future development plans for the Lone Tree Creek Quarry property. Approximately 45 people attended and were presented with an overview of our 15-acre LMO application, provided an opportunity to ask questions, express concerns, and submit comment sheets to be addressed by ASCI.” *Id.* (emphasis added). **[2-2-133(d)(iii) mandates notice only.]**
- “As a result of the [public] meeting, ASCI will adopt measures and implement

standards to specifically address concerns expressed by the community. These include paving the main access road to mitigate dust generated from trucks, protocols for safe truck driving practices, opportunity for homeowners to have their water wells tested at ASCI's expense to document their pre-mining water quality conditions, assurance to homeowners that any impacts to residential water wells will be addressed as required by state law, possible shut downs due to high winds, replanting native plant species as part of the reclamation, and collaborating with the local volunteer fire department on fire safety procedures as part of the mine safety program." *Id.* **[While ASCI was not required to make these changes or adopt these policies, they did so to address concerns expressed by the neighbors.]**

- ASCI obtained a Traffic Study as per Section 2-2-133(d)(i). "We have concentrated on roadway capacity issues, i.e., the ability of the roadways to carry a given volume of traffic as presented in the Traffic Study. The Traffic Study... has identified adequate site distance from the Quarry site access road onto Harriman Road. The study included existing traffic conditions within traffic counts, total traffic scenarios, intersection site distance analysis, trip generation, peak hour traffic levels, short and long-term study horizons, and WYDOT I-80 Ramp geometry review for the [proposed] Lone Tree Creek Quarry development located west of Harriman Road." *Id.* at 3.
- "When leaving the site, the approved trucking route will have trucks going north on

Harriman Road to access Interstate 80. Trucks will not be authorized to go south on Harriman Road or use other roads in the area unless or due to an emergency.” *Id.*

- ASCI described in detail its construction activities and the manner in which it would stockpile and protect topsoil, create buffers, operate the facility, and divert storm runoff. “The well and pond will be permitted with the Wyoming State Engineer’s Office and Water Quality Division, as applicable, for miscellaneous use and dust control.” *Id.* at 3–4. (emphasis added).
- ASCI developed a blasting plan to address concerns expressed by neighboring landowners. “As part of our land ownership, we have established buffer zones around the quarry that will separate neighboring lands from our mining operation. Our 15-acre mine siting is located within a topographic low, which is defined by a 40-foot ridge. This siting practice will also mitigate noise and visual impact.” *Id.* at 4. **[These efforts further confirm compliance with the “buffering” requirements set forth in Section 2-2-133(d)(v) quoted above.]**
- “This [blasting] process will be in full compliance with federal and state regulations and adequate notice will be provided to all property owners in advance of a blast. Given the size of the operation, blasting will be a limited effort both spatially and temporally.” *Id.* (emphasis added).
- “Reclamation will take place at the end of mining. The 15-acre LMO will be reclaimed in accordance with the Land Quality Division (LQD) permit.” *Id.* at 5.

- ASCI requested waivers for certain site plan requirements as they are either not relevant to this particular facility or operation, or they are covered by and included with other filings—most specifically in those filings and permits required by Wyoming State Agencies (such as the DEQ or the Wyoming State Engineer’s Office (“WSEO”)). *See* AR-Exhibit 1, Attachment 4 at 677.
 - ASCI requested a waiver for the drainage study. ASCI instead submitted a “Storm Water Pollution Prevention Plan” (“SWPPP”) and Grading Erosion and Sediment Control Plan (“GESCP”) as per DEQ requirements. “These plans describe the preservation of the existing natural drainage ways, streams, ponds and depressions and drainage improvements that are planned to minimize increases in total volume and rate of flow of surface drainage in any existing way.” *Id.* at 6.
 - “The SWPPP and GESCP identify local site drainage and cover all construction activities.[...] The development of the area will not impact regulated floodplains and all activities will comply with the provisions of Chapter 2 of the Wyoming Water Quality Rules and Regulations.” *Id.* (emphasis added).
 - “ASCI is requesting a waiver for the Landscape Detail since it is identified and presented in our site reclamation plans and is in compliance with the rules of the Wyoming DEQ – Land Quality Division (DEQ/LQD).” *Id.*

(emphasis added).

- “ASCI is requesting a waiver of the Environmental Impact Study since we have and continue to conduct Cultural, Wetland, Bird, Vegetation, [and] Wildlife Study for [the] Wyoming Department of Environmental Quality.”

Id. (emphasis added).

ASCI Narrative at 1–7 (AR-Exhibit 1).

ASCI submitted “Supplemental Information” to the Planning Commission on July 2, 2018 as confirmation of its compliance with the applicable County Land Use Regulations. AR-Exhibit 2. ASCI also sought to address concerns expressed in the public comments that had been submitted (discussed below), providing, for example, additional information related to air quality issues.

Director Emmons confirmed that ASCI had complied with the Laramie County Land Use Regulations: “All site required documents were provided. Site meets the requirements of Section 2-2-133(d) of the Laramie County Land Use Regulations. The Land Use Regulations have no specific regulations to quarry uses.” AR-364.

At no time throughout the Site Plan Application review process did anyone dispute that ASCI’s Site Plan complied with each and every requirement of Section 2-2-133, nor did anyone dispute that ACSI complied with all other applicable statutory and regulatory requirements of county, state, and federal law. In fact, as quoted above, the Planning Director instructed the Planning Commission that ACSI’s Site Plan Application did in fact

“meet the requirements of section 2-2-133(d).” AR-364. Those who challenged ASCI’s Site Plan Application did not focus upon the “site plan” itself or compliance with the County Regulations. They instead focused upon issues that were not within the Planning Commission’s jurisdiction, and on matters that are irrelevant to a site plan review. *See* AR-Exhibit 4 (July 12, 2018 Transcript and October 3, 2018 Transcript); AR-1-221. 236–320, 495–557 (written comments to Planning Commission (with some duplication)).

D. ASCI Presentation to Planning Commission During July 12th Meeting

ASCI presented its Site Plan to the Planning Commission on July 12th, during which it summarized the project, identified the regulatory agencies with jurisdiction over gravel operations, described the studies and due diligence that had been completed, described the information that it had already submitted, and confirmed compliance with the County site plan review requirements and process. AR Exhibit 4, July 12, 2018 Transcript at 5–39; AR Exhibits 1, 2 and 3. ASCI’s presentation included maps; photographs; the economic benefits of the project; traffic information; compliance with air quality requirements; the use of best management practices; the permitting process (including jurisdiction of the respective agencies); water well information, including monitoring; the mine layout; blasting; environmental studies and protections; and “key points.” *Id.*

ASCI identified the state and federal agencies that would oversee, monitor, and regulate its proposed gravel operations, with those agencies having jurisdiction over the “health, safety, and welfare” issues raised in the public comments and addressed by the

Planning Commission Decision. *Id.* Specifically, ASCI’s representatives testified that the Wyoming DEQ, Land Quality Division (“LQD”) had approved their LMO, and ASCI “inten[ded] to comply with all requirements and governing regulations that will ensure the protection of the public, the environment, [ASCI] employees, and, of course, our neighbors.” AR Exhibit 4, July 12, 2018 Transcript at 8. ASCI also responded that state and federal air-quality standards should alleviate their neighbors fears that sensitive populations who live nearby, as well as crops and animals may possibly be “expos[ed] to particulate matter in air generated from the quarry.” *Id.* at 16–17. According to ASCI:

[T]here are already existing standards in place that are protective of these groups. The federal EPA Clean Air Act has National Ambient Air Quality Standards. They’ve developed two types of standards. The primary standard, which provides public health protection, including protecting health sensitive populations, such as asthmatics, children and the elderly. These levels are set to where they are protective of the area residents and sensitive populations.

They’re [sic] also secondary standards. These standards are set at levels that protect welfare of the public, including protection against decreased visibility, damage to animal, crops and vegetation. These standards are set at a level that are protective of animals and crops in the area.

In addition, Wyoming has their own Ambient Air Quality Standards. They are the same as the EPA National Ambient Air Quality Standards. Plus there’s one additional standard that DEQ developed specifically to protect Wyoming’s air quality.

... Air Quality Division will evaluate air quality with data from all sources in the area. This would include particulate matter generated from other mines in the area in addition to what we would generate. If these standards are exceeded, a permit will not be issued.

Id. at 17–18.

In terms of addressing air quality issues, ASCI confirmed that it “implemented best management practices based on preliminary emissions calculations.” *Id.* at 18. ASCI had also agreed to pave the on-site haul road to “eliminate 75 percent of that potential particulate matter.” *Id.* The remaining 25% of particulate matter would be mitigated by using sprayers on the crushing and screening equipment to suppress dust at emission points. There would also be “mandatory opacity testing ... conducted to verify the equipment is operating correctly.” *Id.* at 18–19. Further, the location’s “natural barriers” would “minimize wind, and, therefore, minimize the amount of particulate matter generated [on] the 15-acre site better than any other location on the property.” *Id.* at 19. All of these air, land and water quality issues within the oversight and jurisdiction of the DEQ pursuant to the Environmental Quality Act (“EQA”), including Air Quality Division (“AQD”), the Land Quality Division (“LQD”) and the Water Quality Division (“WQD”). The relevant provisions of the EQA are included in the “General Provisions” (Wyo.Stat. §§ 35-11-101 *et seq.*), the Air Quality Act (Wyo.Stat. §§ 35-11-201 *et seq.*), the Water Quality Act (Wyo.Stat. §§ 35-11-301 *et seq.*), and Land Quality Act (Wyo.Stat. §§ 35-11-401 *et seq.*).

In sum, and as ASCI explained to the Planning Commission, essentially every aspect of its operations is governed by an existing state or federal agency. As such, it must meet and stay in compliance with all relevant statutory and regulatory requirements that come within the purview of DEQ, EPA, OSHA, MSHA, and the State Engineer’s Office, in relation to air and water quality standards and permitting standards. See AR Exhibit 4.

Such compliance ensures that ASCI's operations would have little if any impact on adjacent areas. AR-Exhibit 4, July 12, 2018 Transcript at 7–8, 16–19, 21, 64. The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) is responsible for overseeing ASCI's blasting plan and operations. *Id.* at 32. In fact, that is the very purpose of those agencies—to oversee operations such as those proposed by ASCI. The point here being that these regulatory agencies possess the expertise and personnel to monitor and regulate the type of development, including gravel operations, that come within their purview. That is why the Wyoming Legislature saw fit to largely preempt the ability of boards such as the Laramie County Planning Commission to invade their authority (as is discussed in greater detail below).

E. Opposition to Project Expressed at July 12 Hearing

Several individuals spoke in opposition to ASCI's Site Plan. None of them disputed or refuted ASCI's data or information. Although they criticized ASCI's potential operations, and they speculated as to what “could” potentially happen in terms of environmental impacts, they did not provide any site-specific evidence to support those concerns (such as water quality or quantity data, air quality data, or road use information related to whether Harriman Road was adequate to handle ASCI's truck traffic). None of these landowners explained why the measures ASCI identified were inadequate to address their concerns. The information that they provided and criticisms that they made were instead general in nature, speculative, unsubstantiated, and/or irrelevant. Most

importantly here from the standpoint of the “substantial evidence” standard, none of them spoke to the issue of whether ASCI’s Site Plan met and/or complied with each and every requirement of Section 2-2-133 of the Laramie County Land Use Regulations.

None of the objectors who spoke on July 12th challenged the fact that ASCI’s Site Plan complies with each of the elements set forth in Section 2-2-133 of the Laramie County Land Use Regulations. They instead challenged ASCI’s very existence, arguing that because they did not want to have a gravel operation in the area near Harriman Road that the Planning Commission should reject the proposed site plan. The objectors were not interested in the question of whether ASCI has complied with the County’s regulatory requirements, including Section 2-2-133; they simply wanted to stop the project at all costs.

Section 2-2-133 does not include “approval of neighboring landowners” as one of the elements by which the adequacy of a site plan is judged. Whether the neighboring landowners approve of ASCI’s operations on its own property is not the standard by which the Planning Commission was required to judge the Site Plan. The Planning Commission was instead required to evaluate the “elements of [the] proposed development, including physical design, siting of buildings and structures, interior vehicular and pedestrian access...” (Land Use Regulations at 45; District Court Docket, pp. 208–209), based upon the objective criteria found in the Land Use Regulations—Section 2-2-133(d).

F. ASCI’s August 23, 2018 Submittal

On August 23, 2018 ASCI filed a “succinct rebuttal” to the accusations made during

the July 12th hearing to ensure that the Planning Commission had a complete and accurate understanding of the on-the-ground situation and the governing law. The August 23rd narrative is found at AR-621-629; the entire filing is Appendix C to ASCI's Opening Brief filed in the District Court (District Court Docket at pp. 220-380), and in Volume III of the "Agency Record." It addresses the inaccurate information presented to the Planning Commission through written and oral comments made during the July 12th hearing and noted that the objections were not directed to the Section 2-2-133 factors governing site plans but were instead focused on matters outside of the Planning Commission's purview and jurisdiction. ASCI's August 23rd filing also exposed the fact that most of the individuals who opposed ASCI's proposed site plan lacked even a rudimentary understanding of the operation and regulation of LMOs in the State of Wyoming. *Id.*

ASCI took the opportunity in its August 23rd filing to address the concerns expressed related to its proposed operations, providing the Planning Commission with a detailed description of the regulatory framework within which it must operate, and the resources available to ensure its compliance with both Federal and State law.

- ASCI, for example, addressed the concerns regarding "silica dust":
 - "DEQ/AQD regulates impacts to ambient air quality standards including fugitive dust, i.e., silica dust. The existing Wyoming Ambient Air Quality Standards include silica dust as part of the Particulate Matter standards. Before issuing a permit, DEQ/AQD will evaluate ambient air quality with data from all sources in an area including Particulate Matter and silica dust generated from the two (2) mines operating nearby. If levels are not safe for area residents, animals, or crops, DEQ/AQD will not issue a permit."

- “ASCI has committed to control fugitive emissions including silica dust, by fitting all crushers and screens with spray bars, re-vegetating stockpiles and asphalt paving its haul road. **OSHA and MSHA have determined wet spray methods greatly reduce the silica exposure levels, and the EPA through NSPS subpart OOO and the DEQ/AQD set opacity limits on crushers and screens to reduce fugitive dust emissions.** ASCI must comply with these standards.” (Emphasis in original).
- “By mitigating silica dust at the source, it ensures the public, who will remain a minimum of 3,000 feet away from the crusher and will generally not be present during crusher operations (8-10 hours during the working day), will have significantly less exposure than the workers. No evidence has been presented by the opposition which indicates levels of silica dust will be harmful to health and the environment at distances of 0.5-miles or greater from the site. In fact, ASCI believe[s] that the anticipated levels will not be harmful on site (adjacent to the crusher), within 250 feet of the crusher, let alone 0.5 miles from the site.”
- “ASCI must comply with all statutes, rules and regulations, including those adopted by the DEQ/AQD, Wyoming Department of Workforce Services (State Mine Inspector), OSHA, MSHA, and EPA. Compliance with these standards ensures air quality related to silica dust.”

Id. at 1–3

- ASCI addressed concerns regarding fire and emergency response, explaining that its groundwater wells will be developed in a different aquifer than that which is used by the Fire District. ASCI also again explained that its drivers are safety trained and will comply with all existing laws (such as speed limits). ASCI has also offered to assist with any accidents if requested, and to maintain first aid and fire-fighting facilities on site. *Id.* at 3–4.
- ASCI reiterated the findings of the “third party independent engineering consultant, Traffic Solutions, Inc.,” related to the adequacy of Harriman Road and I-80 to

handle the traffic associated with the LMO. *Id.* at 4.

- ASCI yet again addressed and rebutted concerns regarding any blasting that would take place within the LMO. ASCI described its blasting program and confirmed that “all blasting will be completed by federal and State of Wyoming licensed blasting experts.” *Id.* at 5.
- ASCI yet again rebutted the concerns regarding impacts on groundwater and groundwater wells, describing the applicable State regulatory framework, as well as the protections that it will voluntarily put in place to address concerns. *Id.*
- ASCI pointed out that none of the objectors provided any data to support their claims regarding alleged impacts to surface water. *Id.* at 6.
- ASCI provided additional information regarding area wildlife. *Id.* at 6–7.
- ASCI addressed the objectors’ concerns about “cultural issues”: “... ASCI will not impact any cultural resource sites on their property and clearly will not impact cultural sites on others’ property.” *Id.* at 7. (Emphasis in original).
- ASCI challenged the allegations regarding its compliance with certain relevant legal and regulatory requirements. “Put plainly, Wyoming law provides for LMO’s, and ASCI is following that law.” *Id.*
- ASCI submitted an economic analysis to refute claims that its LMO would decrease property values in the area. *Id.*
- ASCI addressed its compliance with the County Land Use Regulations (and

“Comprehensive Plan,” although the latter document has no force and effect of law):

- “The Site Plan submitted by ASCI meets all the requirements of the Laramie County Land Use Regulations (LCLUR) and the Laramie County Comprehensive Plan. In conformance with the Section 2-2-133 of the LCLUR governing site plans, the Lone Tree Creek Quarry uses best practices to protect the health, safety and welfare of Laramie County residents, preserving environmental quality and promotes economic vitality.” *Id.* at 8.

There was no evidence, information, or materials submitted to the Planning Commission that refuted ASCI’s supplemental information. Most importantly, there was no evidence presented challenging the fact that ASCI’s Site Plan complied with Section 2-2-133 of the Laramie County Land Use Regulations.

G. October 3, 2018 Planning Commission Hearing

On October 3, 2018, the Planning Commission held a second public hearing on ASCI’s Site Plan Application. One Commissioner asked additional questions regarding water, primarily directed to whether the on-site resources were adequate for dust suppression. AR-Exhibit 4, October 3 Transcript at 3–4. ASCI again explained that water quantity and dust suppression are addressed by the DEQ requirements, and that ASCI will not be allowed to operate unless it meets those standards. *Id.* at 5–6. None of the objectors submitted contrary evidence.

Another Planning Commissioner commented that “I think the Applicant has

followed all the prescribed requirements. I think that the crux of the matter for me is it seems like they got off on the wrong foot in the community, and hopefully they can make amends to that.” *Id.* at 6. None of the objectors challenged the Commissioner’s conclusion.

ASCI provided additional information about its truck driving program and its dedication to safety at the October 3rd hearing:

So let me just tell you about what ASCI’s program is with our truck drivers. And we have over 70 of them, and we do go through the Smith System Driver Improvement Program, which is a nationally recognized acclaimed program.

And in this program, all of our drivers are required to go through this program. ...

We – and over the last two years that we have been involved with this program, our record has been stellar with this. We’ve had 47 driver inspections; 27 vehicle inspections; and we have an overall rating of zero unsafe driving record on road safety, and zero acute critical violations that have – were not discovered.

Id. at 7–8. None of the objectors challenged ASCI’s driver safety program.

At the conclusion of the October 3, 2018 hearing, Planning Commissioner Moffett moved to approve ASCI’s Site Plan Application with three conditions: (1) establishment of a road use agreement with Laramie County Public Works; (2) establishment of a road maintenance plan with Laramie County Public Works; and (3) establishment of a blasting agreement with Southern Star Gas Pipeline Company. *Id.* at 13. ASCI did not object to those conditions. Two of the Planning Commissioners voted in favor of approval and two voted against. A tie vote “constitutes denial of the application.” *Id.*

On October 9, 2018, the Planning Commission issued its written Decision setting

forth its reasons for denying ASCI's Site Plan Application.

H. District Court Proceedings

On November 2, 2018, and pursuant to Rule 12 of the Wyoming Rules of Appellate Procedure, ASCI timely filed its "Petition for Judicial Review of Administrative Decision" with the District Court for the First Judicial District. ASCI and the Planning Commission filed their respective briefs between March and May 2019 (*see* Docket No. 190-673 at 100-383, 399-416, 419-438). The District Court heard oral argument on August 29, 2019 (*see* Volume 3, Transcript of Hearing), and issued its "Order and Opinion" affirming the Planning Commission's Decision on February 28, 2020. *See* Docket No.190-673 at 441-451. This Rule 12 appeal followed. *Id.* at 458-564.

I. District Court Order and Opinion

With only one single citation to what is a fairly voluminous administrative record consisting of close to 1000 pages of evidence presented to the Planning Commission, the District Court affirmed the tie-vote decision rejecting ASCI's Site Plan Application. Although the District Court recited the "substantial evidence" standard of review, there is nothing in its opinion that demonstrates that it actually weighed the competing evidence that was presented to the Planning Commission, or in fact that it weighed any evidence at all. The District Court ignored entirely ASCI's arguments presented pursuant to Wyo.Stat. § 16-3-114(c)(ii)(A)-(D), never bothering to address the obvious agency abuse that resulted in the Planning Commission's decision to reject ASCI's Site Plan Application.

Perhaps recognizing that the Planning Commission “went entirely off the rails,” the District Court chose to avoid addressing either the facts or the law and simply affirmed its Decision.

The District Court marched forward with its affirmation of the Planning Commission Decision by misconstruing this Court’s decisions regarding County authority to regulate gravel mining, and entirely sidestepping the question of whether the Planning Commission had any authority to use a site plan review process to regulate land use in the unzoned area of Laramie County. The District Court also chose to treat the “Laramie County Comprehensive Plan” (which is nowhere in the record) as though it had the full force and effect of law, despite this Court’s clear direction that such an approach is entirely unlawful. Finally, the District Court exhibited a fundamental misunderstanding of this Court’s decisions in *River Springs Ltd. Liab. Co. v. Bd. of Cnty. Comm’rs of Cnty. of Teton*, 899 P.2d 1329 (Wyo. 1995), and *Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm’rs*, 2014 WY 82, 329 P.3d 936 (Wyo. 2014), and, in so doing, effectively allowed the Planning Commission to “zone” ASCI’s property—contrary to Wyoming law, important due process protections, and the Company’s property rights as protected by the United States and Wyoming Constitutions.

A. RULINGS PRESENTED FOR REVIEW

ASCI is seeking review of the Planning Commission’s October 10, 2018 “*Findings of Fact, Conclusions of Law and Order Denying Request for Approval of Site Plan for Lone Tree Creek Quarry*” (AR-635–665). To the extent necessary to its decision, ASCI is also

asking this Court to review the District Court’s February 27, 2020 Order and Opinion.

ARGUMENT

I. SUMMARY OF ARGUMENT

The nature and scope of the flaws in the Planning Commission’s Decision and the District Court’s Order and Opinion are almost unfathomable. Few of the “facts” are “facts,” and the “law” that they believe governs ASCI’s Site Plan Application is not the law in Wyoming. Both the Planning Commission and the District Court based their decisions upon a “Comprehensive Plan” that is legally unenforceable, and the imposition of what amount to “zoning” restrictions in a geographic area of Laramie County where there is no zoning. The Planning Commission has sought to regulate an activity over which it has no jurisdiction (mining and gravel production), and entirely ignored the applicability of the Environmental Quality Act (“EQA”) and the Wyoming Water Code found in Title 41. The District Court then blessed the Planning Commission’s regulatory overreach while ignoring the relevant statutes and cases that are on point with every issue addressed.

The Planning Commission Decision contradicts Laramie County’s own Land Use Regulations, every applicable Wyoming statute, and every decision issued by this Court on the topic at hand. The Planning Commission Decision is not focused upon ASCI’s Site Plan Application, but upon concerns expressed by other landowners (largely outside of the site planning framework), or on what can only be described as “expert testimony by proxy.”

The Planning Commission Decision has managed to turn an unenforceable “vision”

document into a hard-and-fast zoning restriction, thereby converting ASCI's 555 acres of private property into "open space forever," based upon a standard that does not exist, zoning regulations that have never been passed, and "evidence" that does not meet even the most rudimentary requirement of reliability.

The Planning Commission has exceeded its statutory jurisdiction, authority and limitations. The Planning Commission has violated ASCI's property rights by imposing non-existent zoning restrictions on the 555 acres that it owns west of Cheyenne. Its Decision is arbitrary, capricious, an abuse of discretion, and not in accordance with law. The Planning Commission also refused to follow the foundational requirements of due process by failing to consider ASCI's rebuttal to the concerns and claims presented before and during the July 12, 2018 public hearing. The Planning Commission's Decision is not supported by substantial evidence in the record as the only relevant "evidence" (no matter how loosely defined) related to the subject Site Plan Application was presented by ASCI, evidence that was never even challenged, let alone rebutted.

In short, the Planning Commission Decision is not based on "facts" but on insupportable "concerns" that were not only proved to be unfounded but are entirely outside of the scope of review related to ASCI's Site Plan Application. The District Court made the same fundamental mistake, apparently believing that compliance with Wyoming's statutory requirements for zoning can be circumvented because Laramie County has a "vision" regarding how certain lands should be managed, while at the same

time ignoring essentially every aspect of this Court's repeated pronouncements on the exact issues involved here. It is fortunate that this Court is tasked with reviewing the Planning Commission Decision without reference to the District Court's clearly erroneous Order and Opinion, as there is no reason to spend much time or effort dissecting a decision that is so clearly wrong on the facts and the law.

II. STANDARD OF REVIEW

Judicial review of agency decisions is governed by the Wyoming Administrative Procedure Act as set forth in Wyo.Stat. § 16-3-114(c). ASCI seeks an order from this Court holding unlawful and setting aside the Planning Commission Decision as being (1) in excess of its statutory jurisdiction, authority or limitations or lacking statutory right (Subsection (c)(ii)(C)); (2) unsupported by substantial evidence in the record (Subsection (c)(ii)(E)); (3) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law (Subsection (c)(ii)(A)); (4) without observance of procedure required by law (Subsection (c)(ii)(D)); and (5) contrary to constitutional right, power, privilege or immunity (Subsection (c)(ii)(B)).

This Court considers an appeal of an administrative agency's decision as though it came directly from that agency and gives no special deference to the District Court's decision. *Seherr-Thoss v. Teton County Board of County Commissioners*, 2014 WY 82, ¶ 11, 329 P.3d at 943. This Court reviews an agency's legal conclusions *de novo*, affirming them if they are "in accordance with the law." *Dale v. S&S Builders, LLC*, 2008

WY 84, ¶ 261, 188 P.3d 554, 561-562 (Wyo. 2008); *see also N. Laramie Range Foundation v. Converse County Board of County Commissioners*, 290 P.3d 1063, 1073 (Wyo. 2012). “We do not afford any deference to an agency’s determination on a question of law and will correct any errors made in interpreting or applying the law.” *Delcon v. Partners LLC Wyo. Dep’t of Revenue*, 2019 WY 106, ¶ 7, 450 P.3d 682, 684 (Wyo. 2019).

Administrative agencies are bound by their own properly adopted regulations. An agency’s rules and regulations “have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action.” *Tayback v. Teton County Board of County Commissioners*, 2017 WY 114, ¶ 25, 402 P.3d 984, 990 (Wyo. 2017) (internal quotation marks omitted).

We interpret administrative regulations as a matter of law using our well-known rules of statutory construction. If we determine that the language is clear and unambiguous, we give effect to its plain meaning. In general, we defer to an agency’s interpretation of its own rules and regulations unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules. *Id.*

Courts “review the agency’s conclusions of law *de novo*, and apply the substantial evidence standard to evidentiary issues.” *Faber v. State Dep’t of Transp.*, 2009 WY 137, ¶ 5, 220 P.3d 236, 237 (Wyo. 2009). The Court will defer to an agency’s findings of fact *only* so long as such findings are supported by substantial evidence. *Dale v. S&S Builders, LLC*, 2008 WY 84, ¶ 22, 188 P.3d at 561. *See also Straube v. State ex rel. Wyoming Workers’ Safety & Comp. Division*, 2009 WY 66, ¶ 14, 208 P.3d 41, 47 (Wyo. 2009). This Court set out the substantial evidence test in *Dale*, stating in pertinent part:

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. (Citation omitted and emphasis added).

¶ 22, 188 P.3d at 561. Highly relevant to this case is the additional part of substantial evidence test elucidated by the *Dale* Court:

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. (Emphasis added).

Id. As such, the reviewing court not only examines the record to determine if there is substantial evidence to support the agency's decision, but also examines "conflicting evidence to determine if the agency reasonably could have made its findings and order based upon all of the evidence before it." *Little v. State ex rel. Dep't of Workforce Servs., Workers' Comp. Div.*, 2013 WY 100, ¶ 37, 308 P.3d 832, 843 (Wyo. 2013) (citations and internal quotation marks omitted); accord *Three Sons, LLC v. Wyo. Occupational Health & Safety Comm'n*, 2007 WY 93, ¶ 11, 160 P.3d 58, 62 (Wyo. 2007) (citation and internal quotation marks omitted).

In reviewing the Planning Commission Decision, this Court shall hold unlawful and set aside agency action found to be "[a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Wyo.Stat. § 16-3-114(c)(ii)(A). "The arbitrary

and capricious standard remains a ‘safety net’ to catch agency action which prejudices a party’s substantial rights or which may be contrary to the other W.A.P.A. review standards yet is not easily categorized or fit to any one particular standard.” *Dale*, ¶ 23, 188 P.3d at 561 (citation omitted); accord *Anderson v. Board of Cnty. Comm’rs of Teton Cnty.*, 2009 WY 122, ¶ 12, 217 P.3d 401, 405 (Wyo. 2009) (citation and internal quotation omitted). The arbitrary and capricious standard applies if the agency “failed to provide appropriate findings of fact or conclusions of law.” *Dale*, ¶ 23, 188 P.3d at 561. Courts only affirm conclusions of law if they are “in accordance with the law.” ¶ 26, *id.* at 562 (citations and internal quotations omitted); *Anderson*, ¶ 12, 217 P.3d at 405 (citation omitted).

III. DISCUSSION OF THE ISSUES

A. **The Planning Commission’s Decision Is in Excess of Statutory Jurisdiction, Authority and Limitations and Lacking Statutory Right**

“[C]ounties have no sovereignty independent from that of the state, and the only power available to them is the power that has been delegated to them by the state.” *Seherr-Thoss v. Teton County Board of County Commissioners*, 2014 WY 82, ¶ 24, 329 P.3d at 946. “Thus, a county’s authority to adopt a zoning ordinance is limited by state statute, and the general grant of power to [counties] to adopt zoning laws in the interest of public welfare does not permit the local governing bodies to override state law and the policies supporting it.” *Id.* (Citations and quotations omitted). Statutes take precedence over county regulations or zoning ordinances. *Ahearn v. Town of Wheatland*, 39 P.3d 409, 416 (Wyo. 2002).

The question before this Court is focused upon the Planning Commission's statutory and regulatory authority to block ASCI's proposed gravel mining operations under the auspices of a Site Plan review. A related question is whether the Planning Commission has the legal authority to reject ASCI's Site Plan Application based on factors *outside* of those contained in Section 2-2-133 of the Laramie County Land Use Regulations.

Neither the Planning Commission nor the District Court had far to go to find cases perfectly on point for determining the scope of regulatory authority. The Planning Commission's jurisdiction and authority, or lack thereof, to prevent ASCI from operating a gravel pit on its property is largely determined by this Court's decisions in two cases out of Teton County, *River Springs Ltd. Liab. Co. v. Bd. of Cnty. Comm'rs of Cnty. of Teton*, and *Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm'rs*. Applying this Court's analyses and holdings in these two cases to this matter clearly shows that the Planning Commission's denial of ASCI's Site Plan Application is in conflict with the EQA and state policy and must therefore be set aside. There is simply no other conclusion: The Planning Commission exceeded its statutory jurisdiction and authority.

The Planning Commission cited to Wyo. Stat. § 18-5-201 et seq. for its authority to promulgate the Laramie County Land Use Regulations. *See* Docket No. 190-673 at 193. Wyo. Stat. § 18-5-201, however, states: "[...] 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." Importantly, Laramie County has never

adopted any land use regulations that prevent “the extraction or production of the mineral resources.” Gravel operations are therefore operational within Laramie County. The question then becomes what authority does the Planning Commission have over ASCI’s proposed operations under the statutory scheme at issue here.

This Court squarely addressed the scope of a Planning Commission’s authority to regulate the mining of “gravel, sand, rock and limestone” in *River Springs Liab. Co. v. Bd. of Cnty. Comm’rs of Cnty. of Teton*. Applying the “ordinary and natural meaning” test, the *River Springs* Court determined that “gravel, rock and limestone” are not minerals for the purposes of Wyo. Stat. § 18-5-201, and thus:

all the Wyoming counties are free to apply their zoning and planning authority under Wyo.Stat. § 18-5201 to “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 a county.

River Springs, 899 P.2d at 1333–34. This Court did not end its analysis after addressing that preliminary question, recognizing that this was the first step. The *River Springs* Court next addressed whether the DEQ through the EQA has preempted the authority of counties to regulate gravel, rock and limestone quarries. Critical to the present case, the *River Springs* Court noted that in “adopting the EQA, the legislature explicitly and specifically has granted the authority to prohibit and regulate mining activities to the DEQ.” *Id.* at 1335. But, “if the county zoning forecloses activities the DEQ otherwise would regulate,” such as gravel mining, “there can be no excavation, extraction, production, or processing

of sand, gravel, rock, or limestone.” *Id.* As is the case in Laramie County, “if the zoning regulations cannot or do not inhibit these activities, however, then the regulation of those activities is accomplished by the DEQ.” *Id.* Applying the second prong of the *River Springs* holding, “the authority of [Laramie] County is limited by the authority granted to DEQ by the language of the EQA.” *Id.* at 1335–36.

The final holding from *River Springs* addresses situations, such as ASCI’s, where “the state has the authority to regulate, but excludes certain instances from its regulation[;]” in those instances, “the local authority may invoke its regulatory power.” 899 P.2d at 1336. But the local authority’s regulatory power in such instances is limited by the state regulations. As this Court concluded in the *River Springs* case, “[w]e recognize the authority of the Board to regulate these activities so long as regulation by the county does not conflict with a regulation by the state.” *Id.*

Although there are lands within Laramie County that have been zoned, ASCI’s property is not within any of those areas. AR-Exhibit 4, July 12th Transcript at 4. Because Laramie County “do[es] not inhibit these activities”—namely, mining for gravel⁶—“the regulation of those activities is accomplished by the DEQ.” *See id.* at 1335.

As discussed above, ASCI is seeking to operate the Lone Tree Creek Quarry as an

⁶ There are in fact two other gravel operations within the general vicinity, located on the north side of I-80.

“LMO” pursuant to the land quality statutes found in Wyo.Stat. § 35-11-401(e)(vi), which means that not all the DEQ/EQA regulations for “regular” mines apply to ASCI. To the extent that Laramie County seeks to regulate particular discrete aspects of ASCI’s land use, it could do so, but only under certain limited circumstances, and only “so long as regulation by the county does not conflict with a regulation by the state.” See *River Springs*, 899 P.2d at 1336. The County cannot, for example, use a site plan procedure to prevent ASCI from operating a gravel pit on its property, although it could impose certain “site plan” requirements on ASCI—which brings us full circle. ASCI complied with those aspects of the Laramie County Land Use Regulations that are addressed to its “site,” and that are not within the jurisdiction of the DEQ. To repeat, ASCI, having met *each and every one of those site plan requirements*, also met and complied with those County requirements that may not be addressed in the statutes governing LMO’s (although there may very well be some overlap between the two). The point is that pursuant to this Court’s long-standing view of authority over gravel operations, the County is required to “stay in its own lane.” Some County oversight may be allowed, but such oversight cannot stray into the DEQ’s lane, and cannot operate to prohibit a gravel mining when the DEQ has authorized such operation pursuant to the EQA.

Applying *River Springs* to the instant case means that while Laramie County is allowed to promulgate regulations regarding ASCI’s site plan application, and it in fact has done so by adopting Section 2-2-133, it may *not* prohibit ASCI’s Lone Tree Creek Quarry

in a way “that conflict[s] with a regulation by the state.” For instance, one of the statutory requirements for conducting an LMO is that “the affected lands shall not be within three hundred (300) feet of any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery unless the landowner’s consent has been obtained.” Wyo.Stat. § 35-11-401(e)(vi)(A). As such, all of the Planning Commission’s Findings of Fact and Conclusions of Law that relate to the distance between the Lone Tree Creek Quarry and any other “occupied dwelling, home [like residential areas], public building [like a Fire Station], school, church, community or institutional building, park or cemetery” conflicts with the regulation by the state, and must be set aside as unlawful agency action. See, e.g., October 9, 2018 Order, Findings of Fact, ¶¶ 9, 26–27, 32–39, 57, 81–83; and Conclusions of Law ¶¶ 15–23, 25 (“The Harriman road area, surrounding the proposed quarry [. . .] has a public school [. . .] and a fire station.), 26–29, 31–33 (“Laramie County has no [] regulation [for] high winds exacerbate airborne dust [. . .]. This would have a frequent and a negative effect on any downwind residents.”), 37 (“such dust concentrations would directly affect the residents east of a surrounding the quarry [sic]”), 42 (“applicant has failed to demonstrate that the proposed quarry would protect the health safety and welfare of the citizens of Laramie County, in particular those residents in the immediate vicinity of the quarry.”) (emphasis added), 43 (“the presence of the quarry would significantly reduce the property values of residential properties in the area. This negatively impacts the welfare of Laramie County citizens and causes damage

to residents in their most important investments. The amount of loss of value presented based solely on distance from quarry was significant.”), 44, 45 (“installation of an industrial use in a quiet rural environment, directly upwind from a residential subdivision, will significantly reduce property values and future investment and development in the area.”), 46–48, 52, 59 (“applicant's proposed use does not fulfill the purpose of the site plan regulation. It does not adequately protect the health, safety and welfare of Laramie County residents.”). These Findings of Fact and Conclusions of Law, however, are in direct conflict with the EQA and the state’s regulatory policy.

The State of Wyoming has set the regulatory policy in the EQA with regards to neighboring property owners’ concerns with health, safety, and welfare impacts from a limited mining operations of 15 acres or less: as long the LMO is 300 feet from “any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery,” *see* Wyo.Stat. § 35-11-401(e)(vi)(A), the LMO may operate. This reflects the state’s policy decision that a limited mining operation of 15 acres or less that is at least 300 feet away from other properties does not pose a risk to the health, safety, or welfare of those property owners. Accordingly, Laramie County lacked the authority and jurisdiction to exercise its regulatory authority in a way that conflicts with the state policy reflected in the EQA, and its Order denying ASCI’s site application plan must be set aside.

This Court’s 2014 analysis of an LMO in Teton County confirms the preceding

analysis. In *Seherr-Thoss*, Teton County argued that, consistent with *River Springs*, “the EQA permits counties to regulate mining operations as long as the county’s regulation does not prohibit all mining and does not conflict with DEQ regulations.” *Seherr-Thoss*, 2014 WY at ¶ 55, 329 P.3d at 954 (emphasis added). Ultimately, this Court determined that “the requirements of the [Teton County] Board’s Order pertaining to bonding and reclamation [were] duplicat[ive] and [in] conflict with the DEQ’s regulatory authority.” *Id.* at ¶ 58, 329 P.3d at 954 (emphasis added).

Although Teton County attempted to duplicate DEQ regulations, at least Teton County accepted that under this Court’s *River Springs* precedent, when the EQA governs the subject mining activities, counties may not prohibit mining through their regulations. In contrast, the Planning Commission here has done just that, and denied ASCI the ability to conduct *any* mining operation on its property through denial of its Site Plan Application—a huge step well beyond even Teton County’s attempt in *Seherr-Thoss*.

It is also critical to recognize that the LMO provisions under the EQA *only* apply to land quality issues. There is no similar “LMO” under either the Air Quality provisions of the EQA or the Water Quality provisions of the EQA. Those statutory provisions are comprehensive and controlling. Laramie County, in other words, has no jurisdiction to regulate or restrict ASCI’s emissions; the AQD is solely responsible for doing so. Similarly, Laramie County has no jurisdiction or authority to regulate water quality issues; the WQD is solely responsible for doing so. The vast majority of the Planning

Commission's rationale for denying ASCI's Site Plan Application, however, relate to air quality and water quality concerns. The Planning Commission in other words, exercised what can only be described as the ultimate in regulatory authority—it denied ASCI from operating entirely—based on authority that it does not have and while entirely subsuming the authority that the Legislature has rightfully granted to the AQD and WQD. The Planning Commission's actions clearly “conflict with a regulation by the state,” (*see River Springs*, 899 P.2d at 1336) and cannot stand.

A similar situation exists in relation to the water quantity and the groundwater issues raised by the Planning Commission. Oversight and regulation of Wyoming's water is squarely within the purview of the WSEO and Board of Control. *See* Wyo.Const. Article 8, §1 (water is the property of the State), § 2 (Board of Control has supervision of the waters of the State and their appropriation, distribution and diversion), § 3 (prior appropriation), § 5 (authority of the State Engineer; Wyo.Stat. §§ 4-3-901 (administration of groundwater); Wyo.Stat. §§ 41-4-501, *et seq.* (water right permitting). The Planning Commission has no legal authority to involve itself in these issues.

It is obvious from the record in this case that the Planning Commission made no attempt to “thread the needle” in order to find that one narrow area where the EQA or the Wyoming water statutes may not cover one particular aspect of ASCI's proposed operations, thereby allowing the County to “fill the void,” as contemplated by this Court when issuing the *River Springs* and *Seherr-Thoss* decisions. The Planning Commission

instead muscled aside those state and federal agencies that have jurisdiction over ASCI's mining operations, donned the hats of the AQD, WQD, State Engineer's Office, OSHA, MSHA and ATF (and potentially others), and declared that it had the authority under the auspices of a site plan review to block gravel operations in the County. Not only do the applicable statutes prohibit the Planning Commission's overreach in that regard, Section 2-2-133 of the Land Use Regulations make no provision for such a naked power grab. The Planning Commission clearly exceeded its statutory and regulatory jurisdiction, and its decision must be set aside.

B. The Planning Commission Decision Is Unsupported by Substantial Evidence in the Record

The Planning Commission's Decision is not supported by substantial evidence in the record. Perhaps the most glaring example of a lack of evidentiary support is exposed in Paragraph 11 of the Decision in which the Planning Commission references the statements of an unnamed "individual" who spoke in opposition to ASCI's Application during the July 12, 2018 hearing, claiming that "15 acres if I'm right, is the magic number when it comes to EPA and environmental laws. If I read the statute right, 15 acres exempts the operation from complying with *all* of the requirements of the Land Quality regs in Wyoming." AR Exhibit 4, July 12th Transcript at 102. He then went on to imply that it was somehow nefarious for ASCI to pursue an LMO on its property. *Id.* at 102–103. (emphasis added). The problem is that the individual who spoke is not even close to

“right,” yet the Planning Commission relied upon his allegations as the basis for its Finding of Fact # 11, *as well as the next eight (8) thereafter*, and for several of its conclusions of law. (See ¶¶ 11–19, 35–37, AR-637–638, 659). This individual’s haphazard guess about the governing law not only conflicts with what the law is, but the Planning Commission should have seen it for the hyperbole that it clearly was. At a minimum the Planning Commission should have done the rudimentary research to determine the accuracy of the allegation before making it the cornerstone of its Decision. In fact, the Planning Commission had to look no further than the information that ASCI provided describing the State and Federal agencies that regulate its activities, and its compliance obligations with regard to land quality, air quality, water quality and quantity, blasting, protection of cultural resources, trucking safety, and hauling of product.

Notably, and as is discussed above, while the Lone Tree Creek Quarry LMO would be exempted from some statutory requirements under the Land Quality Act, (Wyo.Stat. § 35-11-401(e)(vi)(A)), there are no such exceptions for the Water Quality Act and Air Quality. Those statutory provisions apply in full. The DEQ has also adopted extensive Rules and Regulations that are applicable to air quality, land quality and water quality. These statutory and regulatory provisions expose the thin reed upon which the Planning Commission’s decision is perched and show that its allegation that ASCI is trying to “pull a fast one” by pursuing an LMO is fundamentally flawed.

It is entirely legal for ASCI to pursue an LMO pursuant to Wyoming law and there

is nothing “nefarious” about its decision to do so. Rather than speculate as to ASCI’s motivations, the Planning Commission’s responsibility was to review the Company’s Site Plan Application based upon the objective standard set forth in Section 2-2-133 of the County’s Land Use Regulations. The Planning Commission ignored the actual evidence that was presented and, in the process, issued a decision that was not based on the evidence in the record, but instead the offhand opinion of an uninformed individual who never bothered to address the only question at hand: whether ASCI’s Site Plan Application met the requirements of Section 2-2-133.

1. Traffic Study and Concerns for Emergency Services

The Planning Commission Decision also focuses upon concerns expressed regarding the increased traffic associated with ASCI’s operations. Those “Findings of Fact” and “Conclusions of Law” are set forth in paragraphs 20-32, 75-78, 52-55. AR-638–640, 649–650, AR-662. Section 2-2-133(d) of the Land Use Regulations states that “[a] traffic study may be required.” ASCI met this requirement and submitted a traffic study. The claims made by neighbors were both technically unsupported and speculative. The only “facts” that were thus submitted in the underlying proceeding were those presented by ASCI. The Planning Commission ignored ASCI’s traffic study and based its decision on fear and speculation instead. Its findings and decision in relation to traffic are without substantial evidence and must be set aside.

2. Air Quality, Water Quality and Water Quantity

In paragraphs 33–75 of its “Findings of Fact,” and paragraphs 31–41 of its “Conclusions of Law,” the Planning Commission focused on air quality, dust, wind speeds, the adequacy of water supplies for dust control, water quality, and related issues. AR-640–49, AR-658–60. The Planning Commission, however, has no jurisdiction over any of these issues. The EQA tasks the AQD with regulating air quality considerations, and the DEQ Water Quality Division (“WQD”) with regulating water quality issues. The WSEO/Board of Control is solely tasked with permitting and regulating water rights. There is simply no role for the Planning Commission to play.

Moreover, the professed “facts,” as well as the attempted rendition of the “law,” are neither. The “facts” are not “facts”—they’re an encapsulation of the residents’ “not in my backyard” fears, and the “law” is not the “law” at all—but a misunderstanding about enforcement of and compliance with Wyoming’s EQA and Water Code.

3. Economic Analysis

The Planning Commission also addressed the “economics” of ASCI’s proposed project, relying upon a document submitted by the “Granite Canyon environmental committee.” *See* Order, ¶¶ 84–89, AR-651–52. That document is not an “economic analysis,” is blatant hearsay, and was never subjected to cross-examination. Having no opportunity to respond to that document during the July 12th hearing, ASCI subsequently addressed the claim of lost property values by providing the Planning Commission with

the August 7, 2018 Report from Harvey Economics (included as part of the Appendix; AR490–94).

Section 2-2-133 of the Land Use Regulations do not contemplate consideration of the type of information set forth in the document presented by the Granite Canyon environmental committee. The Planning Commission never should have considered it, let alone relied upon it to justify its decision.

C. The Planning Commission’s Decision Is Arbitrary, Capricious, an Abuse of Discretion, and Not in Accordance with Law

For all the reasons set forth above, it is clear the Planning Commission Decision is arbitrary, capricious, an abuse of discretion and not in accordance with law. Beyond exceeding its jurisdiction; beyond ignoring the evidence in the record, while taking as gospel an entirely inaccurate rendition of the facts and the law; and beyond ignoring the applicable legal standards; the Planning Commission chose to rely upon a “vision” document that is legally unenforceable. That is yet another reason why this Court must declare unlawful and set aside the Planning Commission Decision.

1. ASCI’s Site Plan Application Met All the Requirements of § 2-2-133

ASCI’s Site Plan Application met all the requirements of Section 2-2-133 of the Laramie County Land Use Regulations, a fact that was never really disputed during the Planning Commission proceedings. This fact was confirmed by the Planning staff (specifically Director Emmons) in his initial comments to the Planning Commission at the beginning of the July 12, 2018 public hearing. AR-364.

Perhaps there is no better evidence of how far afield the Planning Commission went in this case than in recognizing that at no point in its Decision did it address the only question before it—whether ASCI’s Site Plan Application complies with the specific elements of Section 2-2-133 of the Land Use Regulations. Oddly enough, the Planning Commission does not discuss the “site” of ASCI’s operations in its Decision at all, it only addresses ASCI’s existence and the use of its property, a use that is not only legal, but one that has already received all of the state and federal permits necessary to operate the quarry as proposed. Thus, while the Planning Commission does have some oversight over the “design” of ASCI’s facility, that seems to be the one area where its Decision is entirely silent. In short, ASCI’s Site Plan—the only attribute over which the Planning Commission had authority—appears to have been entirely irrelevant to the Commission.

2. The Planning Commission Rejected ASCI’s Site Plan Application Based on an Unenforceable “Vision” Document

The Planning Commission’s “Conclusions of Law” are set forth on pages 18–30 of its Decision. AR-652–65. While the Planning Commission has given some “lip service” to Section 2-2-133 of the Land Use Regulations (*i.e.*, the standard for a “site plan” review), the Decision that it issued is actually largely based upon the County’s “Comprehensive Plan,” which is not a zoning document at all. Based upon its interpretation of *that* document the Planning Commission concluded that “[t]he *use* proposed by the applicant in this matter is not consistent with the Laramie County comprehensive plan.” AR-657. (emphasis added). The Planning Commission also concluded that “[t]he proposed *use*

does not equitably or effectively balance economic vitality with the rural Center, residential agricultural nature of the area and environmental preservation.” *Id.* (emphasis added). As they often say: “things can only go downhill from here.”

3. Zoning Versus “Planning”

The Planning Commission misunderstood that difference between “zoning” and “planning.” “Zoning is the process that a community employs to legally control the use which may be made of property and the physical configuration of development upon the tracts of land located within its jurisdiction.” *Ford v. Board of County Commissioners of Converse County*, 924 P.2d 91, 94 (Wyo. 1996). “Planning is the establishment of an overall concept for the future physical development of the total area and services of the community. *Id.* “In Wyoming, counties have been granted broad authority to regulate the use of their lands *through the use of zoning plans and resolutions.*” *Crouthamel v. Board of Albany Cnty Commissioners*, 951 P.2d 835, 837 (Wyo. 1998) (emphasis added).

Comprehensive plans—such as the one adopted by Laramie County—however, “lack the legal effect of zoning laws and cannot be equated with comprehensive zoning in legal significance.” *Id.* at 838. “A comprehensive plan is generally a prerequisite for the adoption of zoning resolutions.” *Id.* But critically, “it is the proper zoning enactment which has the force and effect of law.” *Id.*

Section 1-3-101 of the Land Use Regulations defines the Comprehensive Plan as “[t]he general plan for land use, transportation, utilities, annexation, and community

facilities prepared and maintained by the Laramie County Planning Commission and the Laramie County Board of Commissioners. [It] [i]ncludes the adopted comprehensive master plan, and any adopted sub-area plan.” It is important to understand what the Comprehensive Plan is (what it is intended to do), and perhaps as importantly, what the Comprehensive Plan is not (zoning). Section 1.2, entitled “What is a Comprehensive Plan & How Can it be Used?,” provides that “[t]he 2016 Laramie County Comprehensive Plan is advisory in nature. It is intended as a type of ‘roadmap’ for the short-term and long-term growth and development of the County.” Comprehensive Plan at 7 (emphasis added). It is to provide “guidance” and may “influence” actions by the public and private sectors. *Id.* It is to “reflect[] who we are and what we want to happen with future growth in the County.” *Id.* It is to provide “vision, goals and strategy.” *Id.* at 6. Importantly, however, it has no force and effect of law.

Section 5 of the Comprehensive Plan is addressed to “Land Use & Development.” The “intent” of this “land use component” is to “establish a set of general recommendations regarding future development in the County. An underlying assumption of the Future Land Use Plan is that most areas of the County can, and should, accommodate a mix of compatible, yet different, land uses and activities.” *Id.* at 61 (emphasis added). Significantly: “The Future Land Use Plan Map is not a zoning map as discussed in W.S. Title 18, Chapter 5. The Land Use Plan Map is not a final determination of approval or prohibited uses.” *Id.* at 62 (emphasis added). “A principal assumption of this plan is that

the private market is in a better position to determine the appropriate location of a use. However, the Plan advances the notion that adjacent land uses must be made compatible through careful design and mitigation impacts, as well as observe natural resource, environmental, and physical constraints.” *Id.* (emphasis added).

The purpose of the site plan is to address these goals, if possible—not to shut down a particular project, especially a project that the County has no authority to prohibit (*i.e.*, gravel operations as per statute). The record in the Planning Commission proceedings shows that ASCI did in fact address each of these issues (compatibility, design, mitigation of impacts, natural resource issues, environmental considerations, and physical constraints) in its Site Plan. The Planning Commission ignored ASCI’s compliance with these “goals,” and essentially converted the Comprehensive Plan into a zoning document—resulting in agency action that was not in accordance with law.

The Comprehensive Plan designates ASCI’s property as being a “Rural Center” located in an “Ag & Rangeland “AGR”) area. *See* AR-655. The Comprehensive Plan (at page 66) provides the following guidance in relation to “Rural Centers”:

Rural centers are those areas where limited commercial and public services are available in outlying areas of the County. [...] Development in these areas should be considered at a scale appropriate to road access, water and sewer services, where accessible, and should include buffering or other methods to mitigate impacts to adjacent residential uses from commercial uses. (Emphasis added).

Please note the permissive use of the word “should,” rather than the mandate typically enforced by using the word “shall.”

The Comprehensive Plan has the following to say about “AGR” areas: “The Ag and Range Land are outlying areas of Laramie County. [...] Some areas with existing development may be appropriate for expansion, identified as rural centers. For example, the Harriman Road area in Southwestern Laramie County may be appropriate for additional residential uses and/or neighborhood services, keeping in mind that access to water may be difficult. Any new development in this area shall address water availability, public land access, cultural resources preservation, and road and connectivity. Ensuring minimal impacts to view sheds and wildlife are especially critical in the western portion of Laramie County.” *Id.* (emphasis added).

The foregoing “guidance” was decisive for the Planning Commission, being specifically quoted on pages 22–23 of its Decision. AR-651–652. In fact, based upon its review of the Land Uses Regulations and Comprehensive Plan, the Commission concluded that “[t]he use proposed by the applicant in this matter is not consistent with the Laramie County comprehensive plan.” AR-657. The Planning Commission also found that “[t]he proposed use does not equitably or effectively balance economic vitality with the rural Center, residential agricultural nature of the area and environmental preservation.” *Id.*

The area of Laramie County where the Lone Tree Creek Quarry would be located is not zoned. The Planning Commission has effectively created “zoning by fiat,” and attempted to place off limits any further mineral or gravel development in Western Laramie County. The Planning Commission’s act of using the “Comprehensive Plan” as the basis

for rejecting ASCI's Site Plan is an especially egregious abuse of power and authority. The Planning Commission's reliance on the Comprehensive Plan is "not in accordance with law" and must be set aside. The Planning Commission illegally relied upon the Laramie County Comprehensive Plan to support its rejection of ASCI's Site Plan Application.

The Planning Commission converted its site plan review into something much different. It expanded its review of ASCI's proposed Site Plan (*i.e.*, location of roads, stockpiles, buffers), into what can only be described as a "variance request" proceeding, based upon nonexistent zoning restrictions, and effectively concluding that ASCI's proposed operations are a "nuisance" because there are houses, a school and a fire station nearby. The Planning Commission is bound to follow the Site Application Regulations. It did not do so, instead conducting what can only be described a zoning and nuisance hearing. That Decision should be set aside as it is not in accordance with law. Counties in Wyoming are not allowed to regulate mineral operations by declaring them to be "nuisances."¹³ While Wyo.Stat. § 18-2-101(a)(viii) grants the county commissioners the power to "[d]eclare and abate nuisances which the commission determines to be a threat to health or safety as provided in W.S. 18-2-115[;]" Wyo.Stat. § 18-2-115 mandates that

¹³ The Planning Commission essentially concluded that ASCI's operations would constitute a "nuisance." The members of the public who spoke during the July 12th hearing also focused upon a "nuisance" theory.

county commissioners may do so only “by resolution, establish standards for determining when a site may be declared a nuisance [...]” (Emphasis added). Laramie County has not adopted a resolution declaring gravel mining a nuisance and may not use the Comprehensive Plan as an end-run around the requirements of Wyo.Stat. § 18-2-115.

For all the reasons discussed above, the Planning Commission Decision was arbitrary, capricious, an abuse of discretion and not in accordance with law. These descriptors apply to the Planning Commission Decision for yet another reason as well: it converted its review of ASCI’s Site Plan (*i.e.*, evaluating the footprint of the facility pursuant to Section 2-2-133) into a full-blown “nuisance” analysis in order to justify rejecting it. That approach was likewise arbitrary and capricious under the facts of this case, in the context of the issue before them, and given the Commission’s limited authority.

D. The Planning Commission’s Decision Is Without Observance of Procedure Required by Law

1. The Procedure Followed by the Planning Commission Was Fundamentally Flawed

The proceedings in this action were a mishmash between a regular townhall meeting and a contested case proceeding. The Planning Commission allowed that proceeding to turn into free-for-all whereby “expert” analysis was being submitted without any foundation or adherence to the regular rules of evidence and fair play. Certain individuals were allowed to present what can only be described as “expert testimony by surrogate,” and to address matters that were clearly outside their areas of expertise or even knowledge.

The most egregious aspect of this situation is the fact that the Planning Commission, rather than simply listening to the concerns expressed, and informing the public of the scope of its authority—chose to rely upon uninformed and insupportable accusations as the basis for its Decision. For example, the Planning Commission relied upon the statements of “[o]ne individual speaking in opposition” to distort the actual statutory and regulatory law that governs ASCI’s operations. *See* AR-637–38. The Planning Commission’s reliance upon that “one individual” was a catastrophic mistake that permeated every aspect of its Decision, resulting in the Commission’s punishing ASCI for relying upon the LMO process provided for in the State of Wyoming’s Land Quality Statutes. The Planning Commission chose to listen to that “one individual” rather than analyze the Environmental Quality Act itself and veered off into substituting its own judgment for that of DEQ.

2. The Planning Commission Improperly Considered Elements Outside of the Site Plan Review Process

“An administrative agency must follow its own rules and regulations or face reversal of its action.” *Wilson Advisory Comm. v. Bd. of County Comm’r*, 2012 WY 163, ¶¶22, 292 P.3d 855, 862 (Wyo. 2012). ASCI met every single applicable requirement of the Laramie County Land Use Regulations, most specifically those in relation to the County’s authority to review site plans (Section 2-2-133). This fact was confirmed by Director Emmons: “All site required documents were provided. Site meets the requirements of Section 2-2-133(d) of the Laramie County Land Use Regulations. The Land Uses Regulations have no specific regulations to quarry uses.” AR-364. At no point have these statements of

fact been refuted or challenged—including in the Planning Commission’s Decision.

The Land Use Regulations require certain components to be included with a site plan. If a proposed site plan addresses those components, the Commission has little discretion. The site plan review is not a free-for-all discretionary exercise whereby the Commission may prohibit a particular use of unzoned property based on whatever may tickle their fancy, but is instead an administrative function whereby the Commission looks to the site plan application to determine whether the documents in front of them conform to the requirements of Section 2-2-133 of the Regulations.

The public role in site plan review is likewise not intended to be a “free-for-all” whereby neighbors may make any allegation that they choose, regardless of factual or legal validity. While members of the public clearly have the right to voice their concerns, the Planning Commission cannot turn those “concerns” into facts with a simple statement of “it must be so because someone said it.” The Commission must still apply a minimum standard of evidentiary reliability to protect ASCI’s due process rights as well.

The Planning Commission cannot simply ignore the evidence presented by ASCI because the neighboring landowners disagree, yet that is exactly what the Planning Commission did here as is evident by the Decision it issued. The Planning Commission must also be mindful of the scope of its authority—and ensure that its forum for public grievances doesn’t tempt the Commission into exercising authority that it doesn’t have. In this case the only “facts” and legitimate legal analysis were provided by ASCI, and the

concerns of neighboring landowners do not change that reality.

The entire process must be and should have been framed around the purpose of the site plan review, which is to ensure that the “design” of a particular development meets the “General Site Plan Requirements.” The Land Use Regulations’ reference to “protect[ing] the health, safety, and welfare of Laramie County residents” must be interpreted within the context of site plan review. The “General Site Plan Requirements” in other words, have been adopted for the very purpose of ensuring that the “design” or “site plan” of any such project protects the health, safety and welfare of the residents. Meeting the elements of the site plan review process as defined by the County ensures protection of these interests.

The County’s form for submitting a proposed site plan includes a space for each of the “elements” set forth in Section 2-2-133. That application form—designed by the County, mandated by the County, and judged by the County—contains the sum total of the information to be evaluated by the Planning Commission when reviewing such application. There is no “catch-all” element in the Regulations that grants to the Commission the authority to consider any other issue of significance or concern that it may consider to be of tangential interest in evaluating the site plan. The Planning Commission does not have the discretion to consider factors that are not listed in Section 2-2-133—including those that were determinative in the denial of ASCI’s Site Plan Application.

In short, the site plan regulation instructs an applicant as to the information (*i.e.*, the “elements”) that it must provide. The elements to be considered by the Planning

Commission are defined. The Planning Commission’s role is to review those elements. Importantly, none of those “elements” focuses on public opposition to a proposed project. More significantly here, the “elements” that the Commission considered in its Decision—the “elements” that formed the basis for the denial of ASCI’s Site Plan Application—are not part of the site plan review process set forth in Section 2-2-133. When the Planning Commission considers factors beyond the elements in the regulation, it fails to provide sufficient notice to applicants as required by due process. The Commission “went rogue” and denied ASCI’s application based upon local opposition—not on whether ASCI “designed” its facility to conform to the requirements of Section 2-2-133.

“Rudimentary justice requires that those subject to the law must have the means of knowing what it proscribes.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.Chi.L.Rev. 1175, 1179 (1989). The “law” here required ASCI to comply with Section 2-2-133 in exchange for receiving approval of its Site Plan. The Planning Commission’s decision to consider factors outside of the site plan review requirements, to elevate someone’s “concerns” over and above objective facts and the requirements of the Land Use Regulations, and to consider things clearly outside of its jurisdiction, violate ASCI’s fundamental due process right to know what “law” was going to be applied.

In summary, the Commission and/or Director were required to approve ASCI’s Site Plan once it was determined that ASCI sufficiently included all the elements required by Section 2-2-133. Its decision to deny ASCI’s application violates the County’s own

Regulations and is therefore *not* in accordance with law and must be set aside.

E. The Planning Commission's Decision Is Contrary to Constitutional Right, Power, Privilege, and Immunity

ASCI has important property rights that are protected by the Wyoming and United States Constitutions, both of which impose due process limitations on the County's exercise of its police powers. The Fifth and Fourteenth Amendments to the United States Constitution, and Art. 1, § 6 of the Wyoming Constitution, mandate that no person shall be deprived of life, liberty *or property* without due process of law. The Planning Commission, however, ignored these important constitutional rights and constraints by enforcing a "vision" or "guidance" document as though it had the full force and effect of law. It did so despite the fact that ASCI's lands are located in an unzoned area of the County. The Planning Commission, in other words, converted a planning document into a zoning overlay (without complying with any of the statutory requirements for doing so), and thereby deprived ASCI of its property rights without due process and just compensation.

The foregoing is made manifest by simply comparing and contrasting "zoning" with "planning" to understand the differences between them. In zoning cases Wyoming has generally interpreted its due process provision in a manner parallel to the federal provisions. *See, e.g., Board of County Commissioners of Teton County v. Teton County Youth Services, Inc*, 652 P.2d 400, 414 (Wyo. 1982). "[T]he due process clause has both a procedural and a substantive aspect. *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938)." According to the Court in *Board of Cnty. Commers of Teton Cnty. v. Crow*, 65 P.3d 720,

727 (Wyo. 2003). Because zoning ordinances are in derogation of the common law, and because they operate to deprive property owners of a use thereof that would otherwise be unlawful, the general rule is to construe zoning ordinances strictly in favor of the property owner.” *Snake River Brewing Co., Inc. v. Jackson*, ¶ 11, 39 P.3d 397, 404 (Wyo. 2002).

While properly adopted zoning ordinances are strictly construed *in favor of* the property owner, they are at least legally enforceable. In contrast, “comprehensive plans,” such as the one at issue here, have no legal effect, cannot be “enforced” against a landowner, and cannot form the basis for denying a site plan application that otherwise complies with every aspect of Laramie County’s Land Use Regulations.

In short, the Planning Commission does not even have the “backstop” of attempting to enforce a zoning ordinance against ASCI as no such zoning exists. It is therefore beyond question that the Planning Commission Decision, relying as it does on an unenforceable “planning” or “vision” document, is an outright deprivation of ASCI’s property and due process rights. This Court must declare the Planning Commission’s Decision to be unlawful and must set it aside.

CONCLUSION

The Planning Commission Decision denying ASCI’s Site Plan Application is legally and factually indefensible. ASCI respectfully requests this Court to enter an Order holding unlawful and setting aside the Planning Commission Decision, and remanding this matter back to the Planning Director with instructions to comply with Wyoming law.

Dated this 21st day of July 2020

/s/ Harriet M. Hageman

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July 2020, a true and correct copy of the foregoing APPELLANT/PETITIONER ASPHALT SPECIALTIES CO., INC.'S OPENING BRIEF was served electronically through the Wyoming Supreme Court C-Track Electronic Filing System (CTEF) to the following:

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I have accepted the terms for e-filing and hereby certify that the foregoing document, as submitted in electronic form, has been scanned for and is free of viruses. Additionally, I certify that all required privacy redactions have been made.

/s/ Harriet M. Hageman
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