

Board of County Commissioners

Agenda Report

Matters from Staff Agenda item # _____

Meeting Date: 12/20/16

Presenter: Sherry Daigle

Submitting Dept: Clerk

Subject: County Road Access

Contested Case 16-0011

Statement / Purpose: Debra Davis/Dennis Clark v. County Road Supervisor

Background / Description (Pros & Cons): The County Road Supervisor, Dave Gustafson, granted access to Jonathan P. Huser and Sharifa Suniga a driveway access onto County Road – South Park Ranch Road. The neighbor, Debra Davis and Dennis Clark have appealed that decision and have asked for the access onto the county road be denied or reconsidered. They are represented by Betsy Greenwood. The BCC decided to hear this issue without a hearing officer. There are 3 motions to hear today.

Motion to Intervene – the applicant for the access permit, Jonathan P. Huser and Sharifa Suniga are requesting to be allowed to intervene in the case and be a party to the case. They are represented by Matt Kim-Miller

Motion to Dismiss – the County Road Supervisor, through his attorney Keith Gingery, DCA, has filed a motion to dismiss the case. Huser/Suniga agree with that Motion to Dismiss and have joined that motion. Davis/Clark oppose that motion and desire for the hearing to be held at a later date.

Motion to Stay – The Access permit expires on June 3, 2017. Sharifa/Huser are asking for a stay to stop the tolling of time while this matter is resolved.

It is recommended that the Chair begin with the Motion to Intervene. If the Board agrees to allow Huser/Suniga to intervene as parties, then a motion should be made to grant that motion. First allow all the parties to speak to the matter.

Then move on to the Motion to Dismiss. Allow each party to speak for 5 – 10 minutes. (3 parties if you granted the Motion to Intervene prior to this motion). If you dismiss the case is over. If you decide to not dismiss, then you will need to move on to the Motion to Stay.

Motion to Stay. Allow each party to speak and then make a motion on whether you will grant a motion to stay.

If you did not dismiss the case in the second motion, you will need to set a date for the hearing.

Attachments: Appeal from Davis/Clark
Motion to Dismiss from County Road Supervisor
Motion to Intervene from Huser/Suniga
Brief in Support of Motion to Dismiss from Huser/Suniga
Reply Brief in Support of Contestee's Motion to Dismiss from Huser/Suniga
Motion to Stay from Huser/Suniga
Appellant's Response to Contestee's Motion to Dismiss from Davis/Clark

Docket # 16-0011

IN REGARD TO ACCESS DRIVEWAY PERMIT APPLICATION AND PERMIT #
22-25S-11; SOUTH PARK RANCH RD.

**APPEAL FOR DENIAL OR REQUEST FOR RECONSIDERATION BY DEBRA
DAVIS AND DENNIS CLARK PURSUANT TO TETON COUNTY LAND
DEVELOPMENT REGULATIONS ARTICLE 8 SECTION 8.8.3**

COME NOW, Debra Davis and Dennis Clark, Appellants herein, by and through their attorneys, Greenwood Law, LLC, by Elizabeth Greenwood, Inga L. Parsons, of Counsel, and Travis J. Bing, Associate, and hereby submit this Appeal pursuant to Article 8, Section 8.8.3 – Appeal of Administrative Decisions, of the Teton County Land Development Regulations (LDRs), based on all possible grounds available under law and LDRs including as follows:

1. JP Huser (herein “Huser”) submitted an Access Driveway Permit Application in Teton County; Permit # 22-25S-1 (hereinafter, “the Application”) on May 12, 2016. A copy of the Application is attached hereto as Exhibit A.
2. Appellants own property adjacent to Huser’s property and are aggrieved persons as defined under the LDRs. *See* 8.8.3 LDR
3. Huser included in the Application a map of the proposed access driveway.
4. The map submitted by Huser fails to meet the requirements set forth in the “Regulations and Information for Obtaining Access Driveway Permit”; including:
 - a. The map does not indicate what type of driveway the planned property will be used as; i.e. Private Residential, Commercial, Cultural and Institutional, or Minor.
 - b. The Regulations state that, “the sketch must show property lines and dimensions and existing access driveways.”

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Teton County Clerk By: <u>Mary Smith</u>	

- c. The map does not show property lines and dimensions, nor does it clearly show the existing access driveway.
 - d. The map attached to the Application does not show the entire property boundary of Huser's property, critically, where Huser's property borders the Appellants' property on the south end. *See* attached map of Huser's full property (Attached hereto and incorporated herein as Exhibit B).
5. Despite being adjacent property owners, Appellants were given no notice of the Application in any manner.
 6. The decision in this case had significant local and community impacts and should have required a mailed notice to adjacent property owners pursuant to 8.2.14.C as it would have benefitted from neighborhood comment and the neighborhood, especially adjacent owners, should have been alerted to the application as set forth in 8.2.9.C.
 7. Furthermore, Public Comment shall be reviewed by staff members as part of the application process. 8.2.6.A.1.4. LDRs
 8. Upon information and belief, public comment was not collected by staff as required.
 9. Certainly no comment was solicited from the Appellants, as adjacent landowners and most affected, who were completely unaware of the Application.
 10. The Application was approved on June 3, 2016 with hearing.
 11. Appellants were not advised of the granting of the Access Driveway Permit.
 12. The first time the Appellants became aware of the application and the granting of the Access Driveway Permit was when they received a phone call from Slade Ross, on September 16, 2016 requesting that the Appellants remove their dozer from the county easement as an access permit had been granted.

13. Under Section 8.8.3.B. of the LDRs, an appeal may be filed for any decision or interpretation of the Planning Director or County Engineer.
14. Under Section 8.8.3.A. of the LDRs, the purpose of an appeal is to allow for an aggrieved person affected by any decision or interpretation by the Planning Director or County Engineer to appeal the decision or interpretation to the Board of County Commissioners for a review of whether the decision or interpretation complies with the requirements of these LDRs.
15. Appellants, though adjacent landowners, were never given any notice of the Application.
16. The decision not to provide notice was in error.
17. The failure to collect public comment, specifically the adjacent property owners was in error.
18. The approval of the Application itself was in error.
19. Appellant had no notice of the Application or the granting of the permit until September 16, 2016, which was not formal notice but the result of a happenstance phone call.
20. The County did not provide any notice of the decision to the Appellants.
21. Therefore, the thirty-day appeal period should not commence until September 16, 2016, the date the Appellants first learned of the Permit.
22. It is therefore requested that this Appeal be allowed and that the Permit be stayed pending this appeal, that the decision be vacated and the Application sent back to the County Engineer for reconsideration, that Appellant be permitted to submit comment,

testimony and any other responses to the Application that was denied them through the failure to provide any Notice in any manner of the Application to Appellants though they are adversely affected adjacent landowners.

23. Appellants reserve the right to supplement this Notice at any time and hereby invokes any other basis for Appeal permitted by law.

WHEREFORE, Appellants request that the Board of Commissioners grant this Appeal, reversing the decision of the County Engineers in approving the aforementioned Permit, that this matter be sent back to the County Engineer for reconsideration, and that the Permit and any other proceedings regarding said Permit #22-25S-11 be stayed until a decision is made on this Appeal and for such other, and further relief as deemed just and necessary , and for such other and further relief as necessary to effect justice and due process in this matter.

Respectfully submitted this 30th day of September, 2016.



Elizabeth Greenwood (5-2081)
Inga L. Parsons, of Counsel (6-3786)
Travis J. Bing, Associate (7-5163)
Greenwood Law, LLC
PO Box 1479
Pinedale, WY 82941
(307) 367-6814

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2016, a true and correct copy of the foregoing was hand delivered to the County Engineer for Teton County Wyoming at the following address:

Teton County Engineer
Sean O'Malley
320 Kings Way
Jackson, WY 83001

Courtesy Copy mailed to:

JP Huser
P.O. Box 7860
Jackson, WY 83001

A handwritten signature in blue ink that reads "Jim Holland" followed by a stylized flourish. The signature is written over a horizontal line.



ACCESS DRIVEWAY PERMIT APPLICATION

For Office Use Only

DATE RECEIVED: 5/12/16	PERMIT # 22-25S-11 South Park Ranch Rd.
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PLEASE TYPE OR PRINT (IN INK ONLY)

OWNER(S): JONATHAN P (JP) HUSER & Sherifa Suniga

MAILING ADDRESS: PO Box 7860 JACKSON WY
CITY STATE/ZIP

E-MAIL ADDRESS: jonpaulhuser@gmail.com PHONE: 307.610.0443

APPLICANT: (Contact Person) J.P HUSER

If applicant is other than owner, a notarized Teton County Letter of Authorization must accompany this application. Only the owner or his/her authorized agent may sign either the application, correction list or permit.

MAILING ADDRESS: SEE ABOVE
CITY STATE/ZIP

E-MAIL ADDRESS: _____ PHONE: _____

DESIGN ENGINEER: UNKNOWN

MAILING ADDRESS: _____
CITY STATE/ZIP

E-MAIL ADDRESS: _____ PHONE: _____

CONTRACTOR: Unknown

MAILING ADDRESS: _____
CITY STATE/ZIP

E-MAIL ADDRESS: _____ PHONE: _____



SITE LOCATION: List all properties effected. (If not enough room please attach list.)

PHYSICAL ADDRESS: 4000 South Park Loop Road

SUBDIVISION: N/A

SECTION: 18 TOWNSHIP 40 N RANGE 116 W

PIDN(S) _____

COUNTY ROAD NO. 22-255 COUNTY _____ APPROXIMATELY _____ MILES _____ N.S.E.W.

FROM _____, FOR INGRESS OR EGRESS TO A Residence
CITY OR WELL DEFINED POINT RESIDENCE OR BUSINESS & TYPE

ACCESS DRIVE WIDTH 20 FEET, ON _____ OF COUNTY ROAD, IN _____
RURAL OR URBAN

PROPOSED DRIVEWAY SURFACE Gravel, DRAINAGE STRUCTURE _____
AND/OR VALLEY GUTTER TO BE LOCATED _____ FEET FROM THE
SIZE LENGTH TYPE

SHOULDER LINE. RIGHT-OF-WAY FROM CENTERLINE OF COUNTY ROAD _____ FEET.

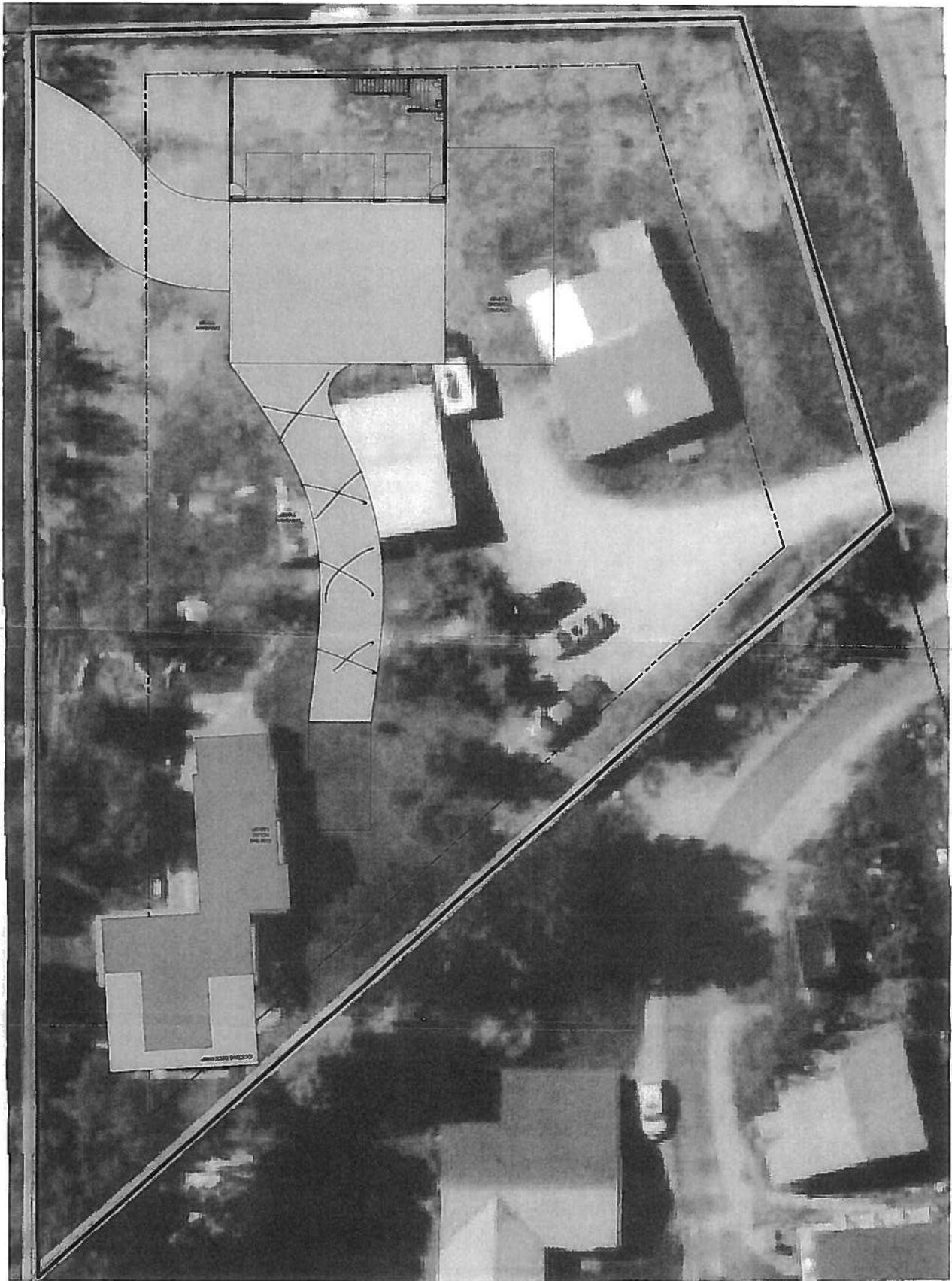
APPLICANT'S SIGNATURE, CERTIFICATE AND AUTHORIZATION:

Under penalty of perjury, I hereby certify that I have read this application and state that the information herein is correct and I swear that any information which may be hereafter given by me shall be truthful and correct. I agree to comply with all County regulations and State laws relating to the subject matter of this application and hereby authorize representatives of this County to enter upon the above mentioned property for inspection purposes. I, the Undersigned applicant, request permission to construct an access driveway on a County right-of-way at the location listed on this application and agree to the following:

1. Construct and maintain driveway in a safe manner so as not to interfere with or endanger public travel and to perform all work in a neat and workmanlike manner, using materials acceptable to the Teton County Road Department and that the right-of-way will be cleaned and left in a condition equal to or better than the original condition. The applicant will fully protect the traffic on the County road during construction covered hereunder by proper barricades, flagmen and/or lights, and to hold harmless the Teton County Road Department, its officers and employees from all damages, expenses, claims or liability arising out of any alleged damages of any nature to any person or property, due to the construction, performances or non-performance of work, or existence of said driveway.
2. No driveway shall be constructed such that there will be parking or servicing of vehicles on the County road right- of-way.
3. The profile grade of driveway shall be constructed as indicated on the attached sketch or plan and shall in no case be graded or maintained such that water will drain onto the highway travel surface.
4. This permit becomes VOID if construction is not completed within 365 days after the approval date below.
5. Grade slopes no greater than 4 to 1.
6. Additional Requirements: (1) Reclaim disturbed areas with topsoil and native seed mix. (2) Driveway surface must be paved to match existing road surface. (3) No culvert required for drainage.

[Signature] T.C. Road & Levee Mgr. [Signature] 6/3/16
DATE 5/12/16

SIGNATURE OF APPLICANT DATE



REGULATIONS AND INFORMATION FOR OBTAINING ACCESS DRIVEWAY PERMIT

A. PERMIT FORMS: Application for an access permit to construct any private driveway or to reconstruct or alter any existing driveway shall be made to the Teton County Road Manager. Application for access permit will be accepted only from an individual or partnership or corporation or other body recognized by law as owning all or the major interest in the property abutting the highway right-of-way or proposed highway.

B. INFORMATION REQUIRED:

1. The location of the property must be identified clearly enough for the proposed site to be located in the field.
2. Complete names and addresses of the property owner or owners must be given on the application.
3. The planned property use must be indicated as one of the following:
 - a. **PRIVATE RESIDENTIAL DRIVEWAY.** A private residential driveway is defined as a driveway adjacent to a county highway to provide entrance to and/or exit from a residential dwelling for the exclusive use and benefit of those residing therein.
 - b. **COMMERCIAL DRIVEWAY.** A commercial driveway is defined as an entrance to and/or exit from any commercial, business or public establishment adjacent to a county highway.
 - c. **CULTURAL AND INSTITUTIONAL DRIVEWAYS.** A cultural or institutional driveway is defined as an entrance to and/or exit from churches, schools, hospitals, etc. Design requirements are the same as for commercial driveways.
 - d. **MINOR DRIVEWAY.** A minor driveway is defined as an entrance to and/or exit from a field, ranch or farm property, and not frequently used.
4. A **SKETCH SHOWING SUFFICIENT DIMENSIONS** shall be submitted with the application which clearly indicates the character and extent of the work proposed including:
 - a. The location of all existing or proposed building, stand, pumps, retaining walls, and other physical features which affect the driveway location.
 - b. The sketch must show property lines and dimensions and existing access driveways.
 - c. The sketch must show all drainage which affect the driveway location.
 - d. Off-street parking locations which may affect the driveway location.
 - e. The sketch must show the proposed access driveway.

C. MATERIALS: The grantee shall furnish all materials necessary for the construction of the entrances and appurtenances authorized by the permit. All materials shall be of satisfactory quality and shall be subject to the inspection and approval by the Teton County Road Department.

D. DRIVEWAY CONSTRUCTION: All new access driveways following approval of permit shall be constructed in conformance with the approved sketch.

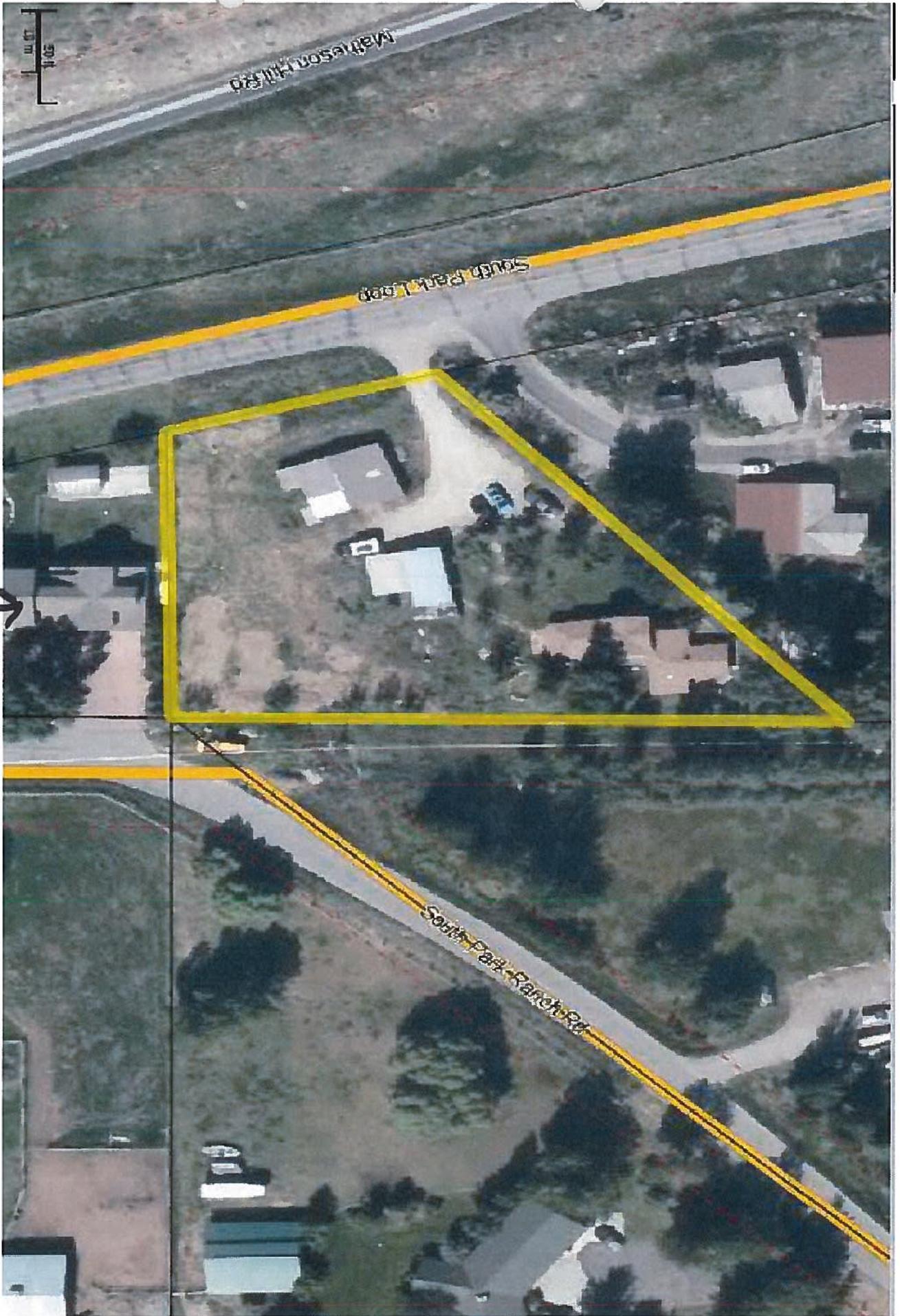
E. INSPECTION MAINTENANCE: Teton County Road Department reserves the right to inspect these installations at the time of const. and at all times thereafter, and to require such changes, maintenance and repairs as may at any time be considered necessary to provide protection of life and property on or adjacent to the roadway.

F. CHANGES IN EXISTING FACILITIES: No access driveway or other improvement constructed on the roadway right-of-way shall be relocated or its dimensions altered without a duly approved permit from the Teton County Road Department.

G. INDEMNIFICATION: The grantee shall hold harmless Teton County, its duly appointed agents, and employees against any action for personal injury or property damage sustained by reason of the exercise of his permit.

H. LIMITATION: These regulations shall apply on all roadways, other than full controlled access highways, under the jurisdiction of the Teton County Road Department.

I. SIGNS: The grantee shall not be permitted to erect any sign, either fixed or movable, on or extending over any portion of the roadway right-of-way, or conduct any business of any nature on the roadway right-of-way except for traffic control or public address signs as may be required by county.



Matheson Hill Rd

South Park Loop

South Park Ranchway



Clark's Property
Davis Property



Blumberg No. 5118

B

EXHIBIT

BEFORE THE BOARD OF COUNTY COMMISSIONERS

STATE OF WYOMING, COUNTY OF TETON

DEBRA DAVIS AND DENNIS CLARK,)
)
 Contestants,)
)
 v.)
)
 COUNTY ROAD SUPERVISOR OF)
 TETON COUNTY, WYOMING,)
)
 Contestee.)

Docket No. 16-0011

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Teton County Clerk By: <i>Mary Smith</i>	

CONTESTEE'S MOTION TO DISMISS

COMES NOW, the Teton County Road Supervisor by and through his undersigned counsel, Keith Gingery, Deputy County Attorney for the County of Teton, Wyoming, and hereby respectfully submits *Contestee's Motion to Dismiss* in the above-captioned matter, for dismissal of Contestants' specific claims as asserted in the *Appeal for Denial or Request for Reconsideration*, which is subject to dismissal under W.R.C.P. Rule 12(b)(1) for lack of jurisdiction over the subject matter, W.R.C.P. Rule 12 (b)(6), for failure to state a claim upon which relief can be granted, and failure to appeal in a timely manner under Teton County Land Regulation Section 8.8.3. Contestants' *Appeal for Denial or Request for Reconsideration* was delivered to the Teton County Attorney's Office on September 30, 2016 but was not filed with the Teton County Clerk. Contestee

is providing a response, but the response is not an admission of proper filing of the appeal or that an appeal is permissible in this case.

Facts

Teton County, Wyoming, a duly organized county of the State of Wyoming, has declared South Park Ranch Road as a County Road pursuant to Wyoming Statute §24-3-101 et seq.. Permission for access driveways onto County Roads are determined by the County Road Supervisor. In Teton County, Wyoming the County Road/Levee Supervisor serves as the County Road Supervisor. W.S. §18-3-701.

Application was made to the County Road Supervisor on May 12, 2016, by Jonathan P. Huser and Sharifa Suniga (hereinafter referred to as **Huser/Suniga**) as landowners of property located at 4000 South Park Loop Road, to allow a driveway access onto South Park Ranch Road. The Teton County Road Supervisor granted the application to allow the driveway from 4000 South Park Loop Road to access South Park Ranch Road on June 3, 2016. Both South Park Loop Road and South Park Ranch Road are county roads. Dennis Clark is the landowner of property located at 2255 South Park Ranch Road. Mr. Clark's property is to the south of the location where the Huser/Suniga driveway would enter upon South Park Ranch Road and would have no impact on Mr. Clark's use of South Park Ranch Road, since Mr. Clark's property is the first property accessed upon turning off of South Park Loop Road onto South Park Ranch Road. Title to Mr. Clark's property appears to be solely in the name of Dennis Clark, even though the Contestants claim that Debra Davis has a property interest in Mr. Clark's property also and have named her as a Contestant.

Teton County is presently constructing a bike/walk pathway along South Park Loop Road. Huser/Suniga were concerned that the bike/walk pathway would adversely affect their current driveway access onto South Park Loop Road. Huser/Suniga proposed to build a new driveway that would instead access onto South Park Ranch Road that is not impacted by the new bike/walk pathway. (**Exhibits A and B** attached hereto.)

Standard of Review

When a complaint, or in this case an *Appeal for Denial or Request for Reconsideration*, fails to meet the basic requirements of standing, jurisdiction, and statement of claims, a motion to dismiss may be filed, rather than an answer.

A motion to dismiss for failure to state a claim upon which relief can be granted under W.R.C.P. Rule 12(b)(6) is reviewed first by accepting the facts asserted in the *Appeal for Denial or Request for Reconsideration* to be true, and then viewing those alleged facts in the light most favorable to the Contestant. *Guy v. Lampert*, 362 P.3d 331, 335 (Wyo. 2015). A Rule 12(b)(6) motion to dismiss, “is the proper method for testing the legal sufficiency of the allegations and will be sustained when the complaint shows on its face that the plaintiff is not entitled to relief.” *Duncan v. Afton, Inc.*, 991 P.2d 739, 742 (Wyo. 1999); *Swinney v. Jones*, 199 P.3d 512, 515 (Wyo. 2008); *Dowlin v. Dowlin*, 162 P.3d 1202, 1204 (Wyo. 2007). In considering a Rule 12(b)(6) motion to dismiss, the court, and in this case the Teton County Board of County Commissioners, must focus on the allegations contained in the *Appeal for Denial or Request for Reconsideration* and

liberally construe those facts in the light most favorable to the Contestant. *Duncan* at 741-742; see also *Apodaca v. Safeway, Inc.*, 346 P.3d 21 (Wyo. 2015); *Stroth v. N. Lincoln Cnty. Hosp. Dist.*, 327 P.3d 121, 125 (Wyo. 2014).

Although granted sparingly, a motion to dismiss for failure to state a claim pursuant to W.R.C.P. Rule 12(b)(6) is the appropriate legal tool available for the Contestee to challenge the Contestants' appeal. *Robinson v. Pacificorp*, 10 P.3d 1133, 1135-36 (Wyo. 2000); see also *Apodaca* at 23. A complaint or appeal warrants dismissal if it is clear that the Plaintiff, in this case the Contestant, "cannot assert any facts that create entitlement to relief." *Swinney* at 515; see also *Simon v. Teton Cnty. Bd. of Realtors* 4 P.3d 197, 200.

Dismissal for lack of subject matter jurisdiction under W.R.C.P. Rule 12(b)(1), is warranted if the Board of County Commissioners determines it does not have the necessary authority. "Subject matter jurisdiction refers to the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Subject matter jurisdiction is essential to the exercise of judicial power. If a court does not have subject matter jurisdiction, it lacks any authority to proceed." *Circuit Court of Eighth Judicial District v. Lee Newspapers*, 332 P.3d 523, 533 (Wyo. 2014) (emphasis added) (quoting *Christiansen v. Christiansen*, 253 P.3d 153, 155 (Wyo. 2011) (internal citations omitted).

Argument

The Contestant's *Appeal for Denial or Request for Reconsideration* should be dismissed for lack of subject matter jurisdiction pursuant to W.R.C.P. Rule 12(b)(1), and for failure to state a claim upon which relief can be granted pursuant to W.R.C.P. Rule

12(b)(6). More specifically dismissal is necessary since the Contestants lacks standing, is not an "aggrieved person" and does not have an "substantial, immediate, and pecuniary", and further that the decisions of the County Road Supervisor are not appealable.

I. Not a Contested Case and no Authority under the Wyoming Administrative Procedures Act or the Teton County Land Development Regulations

A "contested case" is defined by Wyoming Statute §16-3-101(b)(ii) as a proceeding including but not restricted to ratemaking, price fixing and licensing in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . ." As stated in Diefenderfer v. Budd, 563 P.2d 1355 (Wyo. 1977), to be a "contested case" there must exist legal rights which under the law, are to be determined after an opportunity for a trial type hearing." In the case at hand the Contestant, Dennis Clark, has no existing legal rights to be determined. The Contestant has full access to South Park Ranch Road and the existence of another driveway on the same county road has no impact on the legal rights of the Contestant. Thus there is no subject matter for the Board of County Commissioners to exercise nor relief to be granted pursuant to the Wyoming Administrative Procedures Act. W.S. §16-3-101 et seq.

The Teton County Land Development Regulation's appeal process is based on and in compliance with the Wyoming Administrative Procedures Act. The Teton County Land Development Regulations have a procedure for appealing decisions of the County Engineer and County Planning Director in the context of Teton County Land Development Regulations. (LDR Section 8.8.3 Appeal of an Administrative Decision). Neither the County Engineer nor the County Planning Director made any administrative

decisions in the case at hand. A decision was made by the County Road Supervisor concerning the access to county road that is not governed by the Teton County Land Development Regulations. Use of LDR Section 8.8.3 as an avenue for an appeal of the County Road Supervisor is not appropriate.

County Roads are operated pursuant to the proprietary powers of the county rather than the regulatory authority of the county. Decisions of the County Road Supervisor regarding the access to County Roads is not a regulatory act subject to appeal by neighbors, rather it is a proprietary act as the legal custodian of the county road.

II. Contestant is not Aggrieved

The Contestee restates the argument of Section I that there is no subject matter jurisdiction or claim upon which relief can be granted, but if it is determined that this is a contested case and is governed by the Teton County Land Development Regulations, the Contestee argues that the appeal fails because the Contestant is not an aggrieved party. An appeal of an administrative decision must be in accordance with Section 8.8.3 of the LDRs, and the Teton County Board of County Commissioners, Rules for Contested Case Practice and Procedure, adopted February 4, 2003, Chapter 1, Section 2, which is consistent with and pursuant to the Wyoming Administrative Procedures Act, W.S. §§16-3-101 through 115.

The LDRs define an "aggrieved person" as follows:

An aggrieved person is a person who has a legally recognizable interest affected by the decision or interpretation. The interest shall be definite and tangible, and exceed the general interest in the community good shared by all persons. Generally, it must be substantial, immediate, and pecuniary." Section 8.8.3.G.1, LDRs.

This standing requirement is consistent with the statutory standard for judicial review of agency actions as authorized by W.S. §16-3-114(a), that allows persons to seek an appeal of an administrative decision who are "aggrieved or adversely affected in fact by a final decision" of that agency, pursuant to the Wyoming Administrative Procedures Act. W.S. §16-3-114(a).

The LDRs have defined "aggrieved persons" and the Contestant must comply with this administrative and jurisdictional rule for standing when bringing an appeal against the Planning Director or County Engineer. The standing and jurisdictional requirements of the LDRs are within the full purview of the Board of County Commissioners under the "primary jurisdiction doctrine." *Wyoming Dep't of Revenue v. Exxon Mobil Corp.*, 150 P.3d 1216, 1222 (Wyo. 2007).

The Wyoming Supreme Court explained that standing "is a legal concept designed to determine whether a party is sufficiently affected to insure that the court is presented with a justiciable controversy." *Jolley v. State Loan & Inv. Bd.*, 2002 WY 7, ¶ 6, 38 P.3d 1073, 1076 (Wyo. 2002); see also *Roe v. Board of County Commissioners, Campbell County*, 997 P.2d 1021, 1022 (Wyo.2000) (quoting *Memorial Hospital of Laramie County v. Department of Revenue and Taxation of State of Wyoming*, 770 P.2d 223, 226 (Wyo.1989)); see also *Washakie County School District Number One v. Herschler*, 606 P.2d 310, 316 (Wyo.1980). If a person lacks the requisite "personal stake in the outcome of a case," then the party is not an aggrieved person and therefore has no right to bring an appeal." *Cox v. City of Cheyenne*, 2003 WY 146, ¶ 9, 79 P.3d 500, 505 (Wyo. 2003).

The requirement for standing serves as a gatekeeper for persons seeking judicial review on an agency's action or decision. In order to raise an issue and appeal a decision, the Courts and in this case the Board of County Commissioners, are tasked to consider only those appeals from persons with a clear immediate, substantial, and pecuniary interest that will be affected or impacted by the action being appealed. *Hoke v. Moyer*, 865 P.2d 624, 628 (Wyo. 1993). The Contestant has not shown a clear immediate, substantial, and pecuniary interest, and is unable to do so, since standing is nonexistent and the alleged decision or interpretation is not a final appealable decision, as explained further below.

In *Miller v. Wyoming Dept. of Health*, 275 P.3d 1257, 1260 (Wyo. 2012), the Wyoming Supreme Court stated that “judicial review of an agency action or inaction is “only for those persons ‘aggrieved or adversely affected in fact’ by the challenged action.” Quoting *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1076 (Wyo. 2002). *Id.* The *Miller* court states that both causation and injury in fact are required for judicial review of an agency action. *Miller* at 1262. “The interest which will sustain a right to appeal must generally be substantial, immediate, and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient.” *Id.* at 1261. Quoting *L. Slash X Cattle Company, Inc. v. Texaco, Inc.*, 623 P.2d 764, 769 (Wyo.1981). The appellants in *Miller* who disputed blood alcohol content tests and wanted the tests declared invalid, had not suffered an injury or been aggrieved since their drivers' licenses had not been suspended – there was no final decision to appeal.

The same is true in this case. The Contestant has not been aggrieved by a driveway permit being issued for a property near his property. The Contestant does not

allege in the appeal any injury or how this driveway would impact them. When there is no injury in fact – there is nothing to appeal, and therefore no right to an appeal. The Contestant fails to meet the prerequisite and threshold test of standing under Section 8.8.3.A. of the LDRs, consistent with Wyoming case law and the Wyoming Administrative Procedures Act.

There is no legitimate basis to appeal the driveway access permit. The Contestant has failed to state any injury and even if they did amend their filings to add injuries, the appeal would fail. Similar to the situation in *Miller*, Contestant’s potential alleged harms or grievances are nothing more than “future, contingent, or merely speculative interests,” which the Wyoming Supreme Court has declared do not qualify under the legal doctrine of standing.

III. Failure to File in a Timely Manner

Contestant reasserts the argument made in Section I that that there is no subject matter jurisdiction or claim upon which relief can be granted, but if it is determined that this is a contested case and is governed by the Teton County Land Development Regulations, the Contestant argues that the Contestant failed to file their appeal in a timely manner. Pursuant to Teton County Land Development Regulations Section 8.8.3 an appeal must be submitted within 30 days of decision or interpretation being issued.

The Driveway Access Permit in this case was approved on June 3, 2016. The appeal in this case was delivered to the Teton County Attorney’s Office on September 30, 2016, but it does not appear to have been filed yet with the Teton County Clerk as of today’s date, October 19, 2016.

The County Road Supervisor requested that Huser/Suniga stake the proposed driveway so the neighbors could see exactly where the driveway would be going.

Exhibits C through E clearly show the stakes and on **Exhibit E** the actual permit can be seen posted on the property as of June 14, 2016, the date of the photos in Exhibit C, D and E. (**Exhibits C through E** attached hereto).

It appears that the Contestant was aware of the permit being issued in early June especially since stakes were prominently displayed along with the permit, next door to the Contestant.

CONCLUSION

For the foregoing reasons stated herein, the Contestee respectfully requests that pursuant to W.R.C.P. Rules 12(b)(1) and 12(b)(6), the Teton County Board of County Commissioners, Rules for Contested Case Practice and Procedure, and the LDRs, that the Board of County Commissioners of Teton County, Wyoming do hereby dismiss the Contestants' *Appeal for Denial Or Request for Reconsideration* for lack of subject matter jurisdiction, for failure to state a claim upon which relief may be granted, and for not filing in a timely manner.

RESPECTFULLY SUBMITTED this 19th day of October, 2016.



Keith Gingery (# 6-2947)
Deputy County Attorney
Teton County Attorney's Office
Teton County, Wyoming
P.O. Box 4068
180 South King Street
Jackson, WY 83001
(307) 733-4012

Attorney for Contestee, Teton County
Road Supervisor

CERTIFICATE OF SERVICE

I, Keith Gingery, do hereby certify that I sent a true and correct copy of the foregoing document, postage prepaid by U.S. Mail and/or via email on this 19th day of October, 2016, to the following addresses:

Elizabeth Greenwood
Inga Parsons
Travis Bing
Greenwood Law, LLC
P.O. Box 1479
Pinedale, WY 82941

Attorneys for Contestant

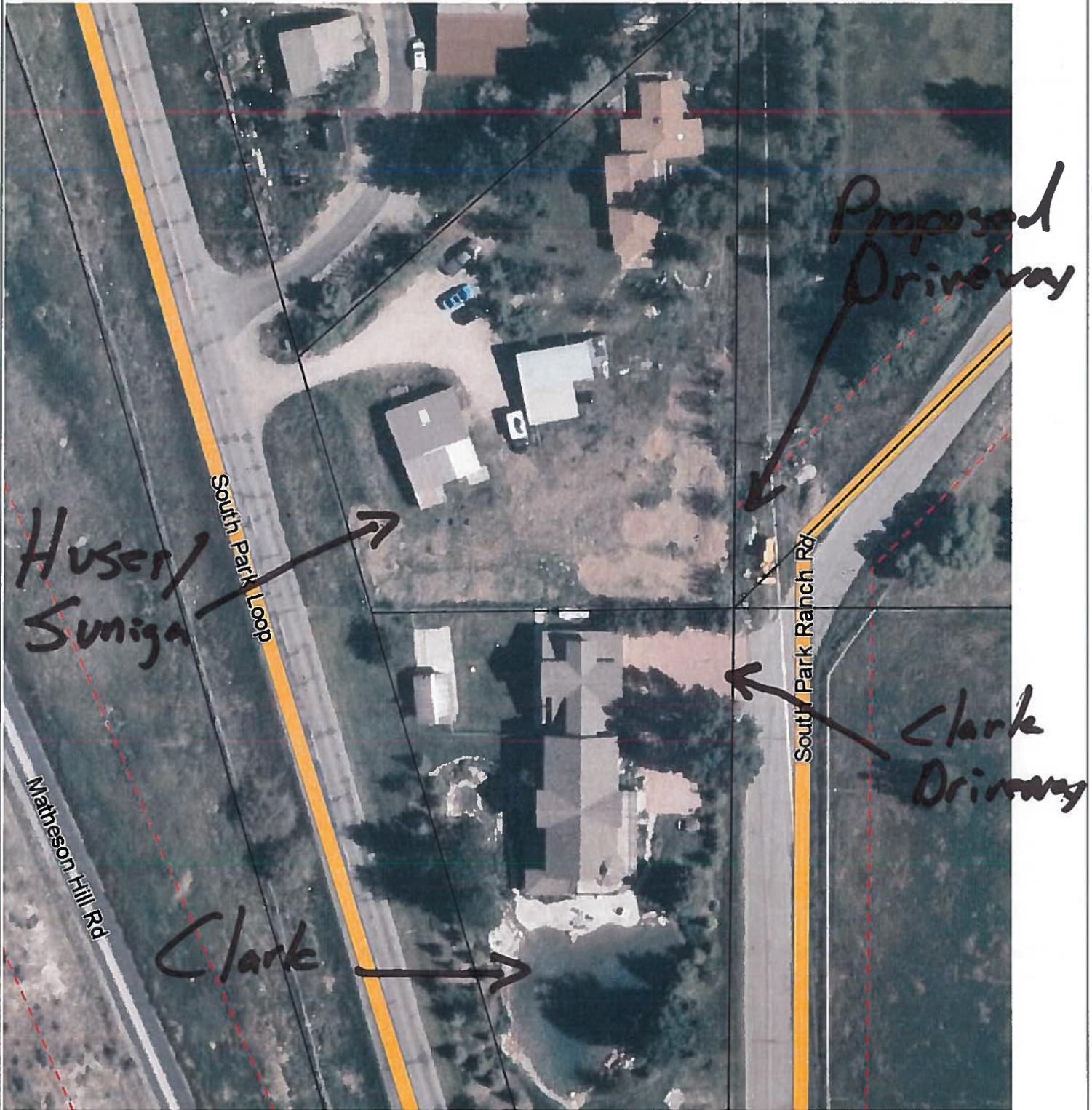


Keith Gingery

Teton County Wyoming MapServer



Teton County Wyoming MapServer



tabbilar

EXHIBIT

B

IMG_1848.JPG

Picture properties [More](#)

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Dimensions: 640 x 480 pixels
Size: 118 KB
Modified: 10/6/2016 11:19:01 AM
Location: C:\Users\KM_Moore\AppData

Camera properties [More](#)

Camera Model: iPhone 6
Date Taken: 6/14/2016 2:10:39 PM



EXHIBIT
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C

IMG_1847.JPG

Picture properties

[More](#)

Type: JPG File

Dimensions: 640 x 480 pixels

Size: 129 KB

Modified: 10/6/2016 11:19:01 AM

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Description:

Camera properties

[More](#)

Camera Model: iPhone 6

Date Taken: 6/14/2016 2:10:28 PM



EXHIBIT
0

IMG_1849.JPG

Picture properties

[More](#)

Type: JPG File

Dimensions: 640 x 480 pixels

Size: 159 KB

Modified: 10/6/2016 11:19:01 AM

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Description:

Camera properties

[More](#)

Camera Model: iPhone 6

Date Taken: 6/14/2016 2:10:48 PM



EXHIBIT
E

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
TETON COUNTY, WYOMING**

DEBRA DAVIS and DENNIS CLARK,)
)
Contestants,)
)
v.)
)
COUNTY ROAD SUPERVISOR OF)
TETON COUNTY, WYOMING,)
)
Contestee,)
)
and)
)
JONATHAN P. HUSER and SHARIFA)
SUNIGA,)
)
Applicant-Intervenors.)

Docket No. 16-0011

Received:	RCVJ NQV3'16PM4:11
Number: 003	
Teton County Clerk By: <i>Mary Smith</i>	

MOTION TO INTERVENE

Jonathan P. Huser (aka JP Huser) and Sharifa Suniga (the “**Applicant-Intervenors**” or “**Huser/Suniga**”), by and through their undersigned counsel and pursuant to Wyoming Rule of Civil Procedure 24 and the Teton County Rules for Contested Case Practice and Procedure, hereby respectfully submit their Motion to Intervene in the pending appeal and allege as follows:

BACKGROUND

1. One half of the Contestants, Dennis Clark owns the property at 2255 South Park Ranch Road, Jackson, Wyoming (the “**Clark Property**”).

2. Huser/Suniga own property at 4000 South Park Loop Road, Jackson, Wyoming (the “**Huser/Suniga Property**”). See Affidavit of JP Huser, ¶3, attached as Exhibit 1.

3. The Clark Property and the Huser/Suniga Property share a common boundary. Huser Aff. ¶9.

4. Pursuant to an Access Driveway Permit issued by the Teton County Road and Levee Manager on June 3, 2016, Huser/Suniga are permitted to realign the driveway on the Huser/Suniga Property so that it accesses South Park Ranch Road instead of South Park Loop Road (the “**Permit**”). Huser Aff. ¶4-8.

5. The realigned driveway would not cross the Clark Property. Huser Aff. ¶10.

6. Huser/Suniga have commenced construction of the realigned driveway and incurred substantial costs in that construction. Huser Aff. ¶8.

7. The Permit that Huser/Suniga applied for benefits the Huser/Suniga Property and Huser/Suniga. Huser Aff. ¶4.

8. The Contestants have appealed various matters in relation to the Permit, challenging that: (1) insufficient notice of the Permit application was given to Contestants, (2) the Permit should not have been approved, and (3) the Contestants did not have notice of the Permit. The Contestants have sought that the Permit be stayed, that the Permit issuance be vacated, and that the Contestants be allowed to comment on the Permit.

9. Applicant-Intervenors have contacted counsel for the County Road Supervisor of Teton County, Wyoming who does not oppose this motion.

10. Applicant-Intervenors have repeatedly contacted counsel for Contestants who, for a period of weeks, has been unable to determine whether Contestants oppose this motion.

STANDARD FOR INTERVENTION SATISFIED

11. Wyoming Rule of Civil Procedure 24(a)(2) provides the standard for intervention as of right. “Intervention of right is construed broadly in favor of intervention.” *Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 185 P.3d 34, 39 (Wyo. 2008). Per Rule 24 and Wyoming case law, an applicant must satisfy a three-part test to be entitled to intervention as of right, in addition to making a timely application. Wyo. R. Civ. P. 24(a)(2); *Northfork Citizens for Responsible Development v. Bd. of Cnty. Comm’rs of Park Cnty.*, 228 P.3d 838, 856 (Wyo. 2010). First, the applicant must claim an interest in the subject of the action. *Id.* This interest is distinguished from a “merely contingent interest, an interest shared by members of the public at large, or a mere concern in the outcome.” *Concerned Citizens*, 185 P.3d at 40. Second, the applicant is “so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest.” Wyo. R. Civ. P. 24(a)(2); *Northfork*, 228 P.3d at 856. And third, the applicant’s interest is not adequately represented by existing parties. Wyo. R. Civ. P. 24(a)(2); *Northfork*, 228 P.3d at 856.

12. Huser/Suniga satisfy these three requirements.

13. *First*, Huser/Suniga have an interest in the subject of this action. As the direct applicants for the Permit and as owners of land to which the Permit relates, Huser/Suniga have

property rights in the Permit and have property rights and other interests that will be affected by the outcome of this litigation. Huser Aff. ¶1-8.

14. The Permit constitutes a “License” as defined in the Wyoming Administrative Procedure Act (the “**Wyoming APA**”), W.S. § 16-3-101(b)(iii), in that “License” is defined as including “the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, but it does not include a license required solely for revenue purposes.”

15. The Contestants are seeking the revocation of the Permit. Under the Wyoming APA, “No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.” W.S. § 16-3-113(c).

16. Thus, Applicant-Intervenors are an indispensable party under Wyo. R. Civ. P. 19. An indispensable party is one that claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may, as a practical matter, impair or impede the person’s ability to protect that interest. Wyo. R. Civ. P. 19(a)(2). Here, as the licensee whose license is now challenged, Applicant-Intervenors are indispensable parties and must either be permitted to intervene and joined as a defendant in this litigation, or the case must be dismissed.

17. *Second*, the outcome of this appeal may impair or impede Huser/Suniga's ability to protect their interests in the Permit and related property rights, as described above. If the Contestants are successful in challenging the issuance of the Permit or in having the Permit rescinded, then Huser/Suniga's property rights will be directly compromised and the decision will directly impair and impede Huser/Suniga's ability to protect their interests.

18. *Third*, the Teton County Road Supervisor cannot adequately represent Huser/Suniga's interests. Factors considered in determining whether an applicant's interest will be adequately represented include "1) whether the interest of a present party is such that the party will undoubtedly raise the same arguments as the intervenor; 2) whether the present party is capable and willing to make such arguments; and 3) whether the intervenor would offer any necessary elements to the proceedings that the existing parties would neglect." *Concerned Citizens*, 185 P.3d at 40.

19. In this action, there is no present party that can adequately represent the interests of Huser/Suniga. Here, the County Attorney's office is not likely to raise the same arguments as Huser/Suniga. Huser/Suniga have had to work hard to advance each step in the issuance of the Permit and to defend the issuance of the Permit. The County's interest as the easement holder and as the administrator of roads and pathways generally in the County differ greatly from the Applicant-Intervenors' property rights and on-the-ground knowledge of their property and neighboring roads.

20. Moreover, the Teton County Road Supervisor will not likely be willing or capable to make arguments related to the property interests of Huser/Suniga's in the Permit and in the Huser/Suniga Property. For example, in the context of the federal rule regarding intervention as of right, it is presumed that the intervenor's burden to show inadequate representation is met where a government agency may be required to defend both public and private interests.¹ See e.g. *WildEarth Guardians v. Natl. Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) ("We have repeatedly recognized that it is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor."); *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002); see *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011).

21. In sum, Huser/Suniga's interests are markedly different from those of the Teton County Road Supervisor. While the Teton County Road Supervisor has an interest in protecting its process and decisions, an adverse ruling by this Board will not affect the Teton County Road Supervisor in the same way as it will affect Huser/Suniga, the owners who were issued the Permit and whose property interests stand to be directly and significantly affected or repealed.

22. There is also the possibility that the Teton County Road Supervisor and Contestant will settle this matter in a manner detrimental to the interests of Huser/Suniga. If not permitted to intervene, there will be no way for Huser/Suniga to protect themselves and their

¹ "Because the Wyoming Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, federal court interpretations of their rules are highly persuasive in our interpretation of the corresponding Wyoming rules." E.g. *Windham v. Windham*, 348 P.3d 836, 842 (Wyo. 2015). Wyoming Rule of Civil Procedure 24(a) and its federal counterpart are, in all substantive respects, identical. See Fed. R. Civ. P. 24(a).

interests. The Teton County Road Supervisor must represent the overarching broad interests of the County, by litigation or settlement, and cannot adequately represent the different, and significant interests of Huser/Suniga, who are in the best position to offer arguments and necessary evidence to protect their own interests.

23. Finally, Rule 24(a)(2) also requires that an application be timely. Determining whether an application for intervention is timely filed is within the discretion of the trying agency. *Vill. Rd. Coal. v. Teton Cnty. Hous. Auth.*, 298 P.3d 163, 167 (Wyo. 2013). Factors that should be considered include “the extent of the prejudice that the existing parties to the litigation may suffer as a result of the applicant’s failure to seek intervention” earlier and “the extent of the prejudice that the applicant for intervention may suffer if the application is denied.” *Id.* Considering these factors, this Motion is timely. Here, Huser/Suniga file this motion within a month of the date the Contestants’ appeal was actually filed with the Teton County Clerk (its necessary filing place), before a hearing officer has been appointed, and before Contestants have answered the Motion to Dismiss filed by the Teton County Road Supervisor.

24. If the Motion is granted, Huser/Suniga will abide by all briefing schedules set by the Board and its participation will not affect that schedule. For these reasons, the Motion is timely.

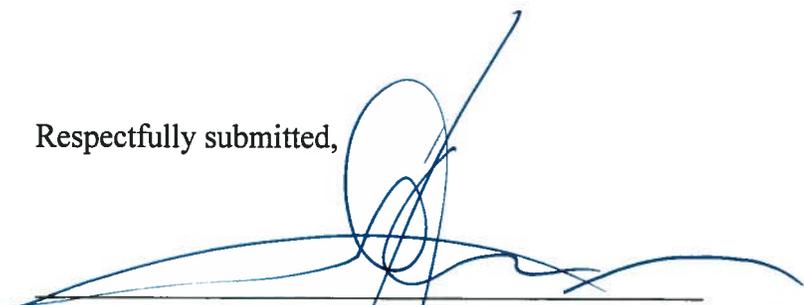
25. If this Board determines Huser/Suniga are not entitled to intervention as of right, Huser/Suniga ask the Board to grant them permissive intervention. Rule 24 provides that a court may, upon timely application, allow a party to intervene in an action when the proposed

intervenor's "claim or defense has a question of fact or law in common with the main action." Wyo. R. Civ. P. 24(b)(2); *Concerned Citizens*, 185 P.3d at 41-42. Here, Huser/Suniga's Permit is the actual subject of Contestants' appeal, which is the only issue in this case. Further, Huser/Suniga's participation will ensure that the Board has the benefit of a clear and complete set of facts and legal arguments. In determining whether to permit intervention under Rule 24(b), a trying agency must also consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Wyo. R. C. P. 24(b)(2). As noted above, Moose Huser/Suniga's participation in this action will not cause any additional delays and they will abide by all briefing schedules set by the Court.

WHEREFORE, for the foregoing reasons, Huser/Suniga respectfully request that the County grant their Motion to Intervene and allow Huser/Suniga to appear as full parties.

DATED November 3, 2016.

Respectfully submitted,



Matt Kim-Miller, WY State Bar # 7-5041
Hadassah M. Reimer, WY State Bar #6-3825
HOLLAND & HART LLP
P.O. Box 68
Jackson WY 83001
Phone: (307) 739-9741
Facsimile: (307) 739-9744
mwkimmiller@hollandhart.com

ATTORNEYS FOR APPLICANT-
INTERVENORS, JONATHAN P. HUSER and
SHARIFA SUNIGA

CERTIFICATE OF SERVICE

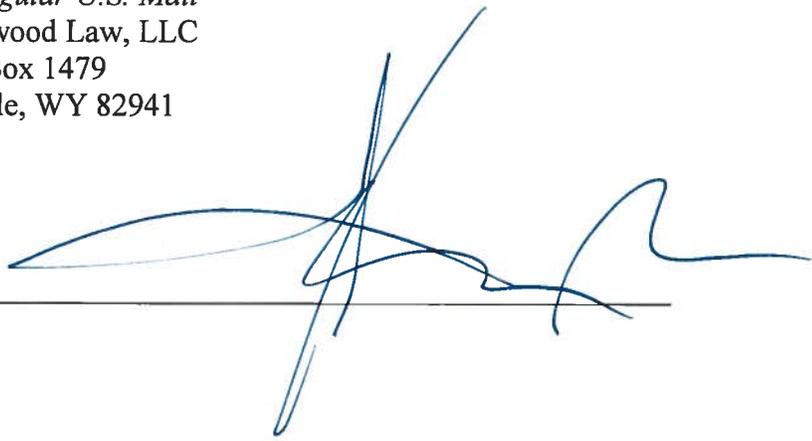
I hereby certify that on November 3, 2016, a true and correct copy of the foregoing document was served upon the following persons by the methods indicated below.

By Hand Delivery
Sherry L. Daigle
County Clerk
Teton County, Wyoming
200 S. Willow Street
Jackson, WY 83001

*By E-mail kmgingery@wyoming.com
and Regular U.S. Mail*
Keith M. Gingery
Teton County Attorney's Office
P.O. Box 4068
Jackson, WY 83001

*By E-mail egreenwood@wyoming.com
and Regular U.S. Mail*
Greenwood Law, LLC
P. O. Box 1479
Pinedale, WY 82941

By: _____





BEFORE THE BOARD OF COUNTY COMMISSIONERS

TETON COUNTY, WYOMING

DEBRA DAVIS and DENNIS CLARK,)
)
 Contestants,)
)
 v.)
)
 COUNTY ROAD SUPERVISOR OF)
 TETON COUNTY, WYOMING,)
)
 Contestee,)
)
 and)
)
 JONATHAN P. HUSER and SHARIFA)
 SUNIGA,)
)
 Applicant-Intervenors.)

Docket No. 16-0011

AFFIDAVIT OF JP HUSER

STATE OF WYOMING)
) ss.
 COUNTY OF TETON)

I, JP Huser, being first duly sworn according to law, depose and say as follows:

1. I am over twenty-one years of age, and have personal knowledge of the matters stated herein.
2. I am also known as Jonathan P. Huser and Jonathan Paul Huser.

Basic Facts

3. My wife, Sharifa Suniga, and I together own the property at 4000 South Park Loop Road,¹ Jackson, Wyoming (the “**Huser/Suniga Property**”) shown on **Exhibit A**.
4. On June 3, 2016, I was issued an Access Driveway Permit by the Teton County Road and Levee Manager, which is attached as **Exhibit B** (the “**Permit**”).
5. The area where the driveway is to be located is indicated on the fourth page of the Permit at **Exhibit B** and is referred to in this Affidavit as the “**Relocated Driveway Area**.”

¹ Because both South Park Loop Road and South Park Ranch Road are involved, italics are used to distinguish these roads.

6. The Permit allows me to realign the driveway on the Huser/Suniga Property so that it accesses South Park *Ranch* Road instead of South Park *Loop* Road, as is shown on the Permit.

7. I sought the Permit because driveway access onto South Park *Ranch* Road is safer and does not require a turn made into higher speed traffic. There is a material difference in accessing the busy arterial, South Park *Loop* Road, as opposed to the residential South Park *Ranch* Road.

8. I also sought the Permit because as part of Teton County's pathways program, Teton County is constructing a bike and pedestrian pathway along the western boundary of my property, along South Park *Loop* Road. Therefore, in the near future, if I were to continue to have driveway access on South Park *Loop* Road, I would have to cross the pathway and its higher level of bike and pedestrian traffic and my driveway would have to be engineered into the pathway. Continued access through the bike and pedestrian traffic would detrimentally affect public safety and the value of my property because of decreased privacy and increased potential for accidents with pedestrians and bicycles.

9. I commenced construction of the relocated driveway during the last two weeks of June 2016. As of approximately June 30, 2016, I have made driveway-related expenditures in the approximate amount of \$4,000, which include staking and surveying, grading, moving trees, moving berm material and purchasing and renting materials and equipment in preparing for and constructing a realigned driveway as contemplated by the Permit. This number does not include time attributable to my own work on the driveway.

10. On information and belief, the Contestants, Debra Davis and Dennis Clark, live at 2255 South Park *Ranch* Road (the "**Clark Property**"), which Clark Property borders and is just to the south of the Huser/Suniga Property.

11. As re-aligned, the driveway from the Huser/Suniga Property will access South Park *Ranch* Road, which is a publicly maintained County road by virtue of various easements. The South Park *Ranch* Road right of way encumbers the property that is just to the northeast of the Clark Property and which is owned, on information and belief, by Bruce M. Bolden, at 2225 South Park *Ranch* Road (the "**Bolden Property**") as shown on **Exhibit A**.

Progress of Permit Application

12. I made the initial Access Driveway Permit Application to the Teton County Road Supervisor to realign my driveway on January 6, 2016 by submitting a permit application to the Teton County Road and Levee Department. The January date is visible on the **Exhibit B** Permit on the second page – that January date was marked off by the County.

13. I had a number of discussions with County staff in relation to the January application.

14. At the suggestion of Deputy County Attorney, Keith Gingery, in January 2016, I sought to speak with Mr. Bolden. After numerous attempts to contact Mr. Bolden, in early February 2016, I was able to speak about the driveway realignment with April Bolden, who on information and belief, is the spouse of Mr. Bolden.

15. On February 25, 2016, I received a letter from James Lubing, as the attorney for Mr. Bolden, asserting that I had no right to realign the driveway over the Bolden Property and threatening to sue if I placed a driveway across the Bolden Property in the County right-of-way.

16. On May 12, 2016, I called the Road and Levee Department to re-initiate the processing of the permit and they dated the previously submitted permit a revised date of May 12, 2016. See the second page of **Exhibit B**.

17. On or around May 13, 2016, I was told by the Teton County Road and Levee Department that in order to have a driveway realignment permit issued, I would need to have the location of the County easement surveyed and marked.

18. I contacted and engaged Nelson Engineering to survey and mark the County easement.

19. On or about May 17, 2016, I discussed the driveway realignment with Mr. Clark.

20. On May 22, 2016, Nelson Engineering marked the County easement.

21. On May 22, 2016, fairly quickly after Nelson Engineering completed marking the County easement, I observed Mr. Clark arriving at his house. I also observed Mr. Clark and Mrs. Davis exiting their house collectively, and while viewing the staked Relocated Driveway Area, Mrs. Davis loudly proclaiming something that appeared to evidence that they had noticed the driveway having been staked.

22. On June 3, 2016, the Permit was issued by the Teton County Road and Levee Manager.

23. In the southwest corner of the Bolden Property, a yellow wheel loader is often parked in the County's right-of-way area of South Park *Ranch* Road. **Exhibit C** shows pictures from the Teton County GIS website <http://maps.greenwoodmap.com/tetonwy/mapserver/map?tab=asearch> from the years 2007, 2009 and 2015.

24. After a long absence, on June 4, 2016, the yellow wheel loader returned to the southwest corner of the Bolden Property, and a "no trespassing" sign was placed near the yellow wheel loader by someone. The wheel loader and no-trespassing sign are visible in the first picture on **Exhibit D**.

25. On information and belief, Mr. Clark or an affiliated entity of Mr. Clark owns the yellow wheel loader that is depicted **Exhibit D**, and which returned from parts unknown on June 4, 2016 to be parked in the South Park *Ranch* Road easement.

26. On or about June 13, 2016, I staked the Relocated Driveway Area, as it crossed the Bolden Property, with wood lath stakes and pink ribbon. By the end of the day, the lath stakes were removed and placed in the pile of refuse and various materials in the southwest corner of the Bolden Property.

27. On or about June 13, 2016, I posted the Permit on the edge of my Huser/Suniga Property. The Permit posting is visible in the last picture attached on **Exhibit D**, which photograph was taken on June 14, 2016—it is the page-sized paper posted near the bucket of the wheel loader, to the left of the outhouse.

28. On or about June 14, 2016, I replaced the lath stakes that had been removed with metal "T-posts" that had pink spray paint and pink flagging. These metal T-posts" and flagging are visible in the photographs attached as **Exhibit D**. I took these photographs on June 14, 2016.

29. On or June 14, 2016, a second "no trespassing" sign was placed near the yellow wheel loader by someone.

30. On or about June 15, 2016, I discussed the metal T-post staking of the Relocated Driveway Area with Mr. Clark. Mr. Clark expressed that he did not like the metal T-posts because of neighborhood concerns that children would be hurt by the posts.

31. On or about June 16, 2016, I replaced the metal T-posts with wood lath stakes, to comply with the request of Mr. Clark.

32. On June 24, 2015, I had a conversation with Mr. Clark about having him move the wheel loader and Mr. Clark told me that I would have to speak with Mr. Bolden, who apparently had the only key to the wheel loader.

33. On or about June 26, 2016, I removed the common fence that was located between the Huser/Suniga Property and the Bolden Property. Mr. Bolden then arrived and told me, through threatening language, that there will be "fireworks" if I proceed to construct the relocated driveway in the Relocated Driveway Area, to the extent the County's easement crosses the Bolden Property.

34. Because the wheel loader has not been removed and because of the threats of neighbors, I have not proceeded with constructing the relocated driveway.

35. I have, however, been in frequent contact since the summer with the Teton County Road and Levee Department and the Teton County Attorney's office (and some contact with the County Sheriff) to try and have the wheel loader removed so I could proceed with further driveway construction.

36. By being delayed in constructing the relocated driveway, I have suffered damages. If I were able to construct the relocated driveway at the same time that Teton County constructed the pathway along the western boundary of my property in June and July 2016, Teton County would have to complete any revegetation and regrading of disturbed areas where the old (South Park *Loop* Road driveway) had been located. Because I have been prevented from completing the driveway relocation by the actions of my neighbors, I understand, based on conversations with Brian Schilling at Teton County, I will be required to pay for the revegetation and regrading on my own.

37. The County assigned me, on June 22, 2016, the changed address of 2235 South Park *Ranch* Road and within a couple of weeks after that, I placed a mailbox, with the 2235 South Park *Ranch* Road address on it, on South Park *Ranch* Road.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

Further Affiant sayeth naught.

DATED this 3rd day of November, 2016.

JP Huser
JP Huser

STATE OF WYOMING)
) SS.
COUNTY OF TETON)

On this 3rd day of November, 2016, subscribed and sworn to before me personally appeared JP Huser, to me personally known, who has read the foregoing Affidavit and knows the contents thereof and the facts are true to the best of his knowledge.

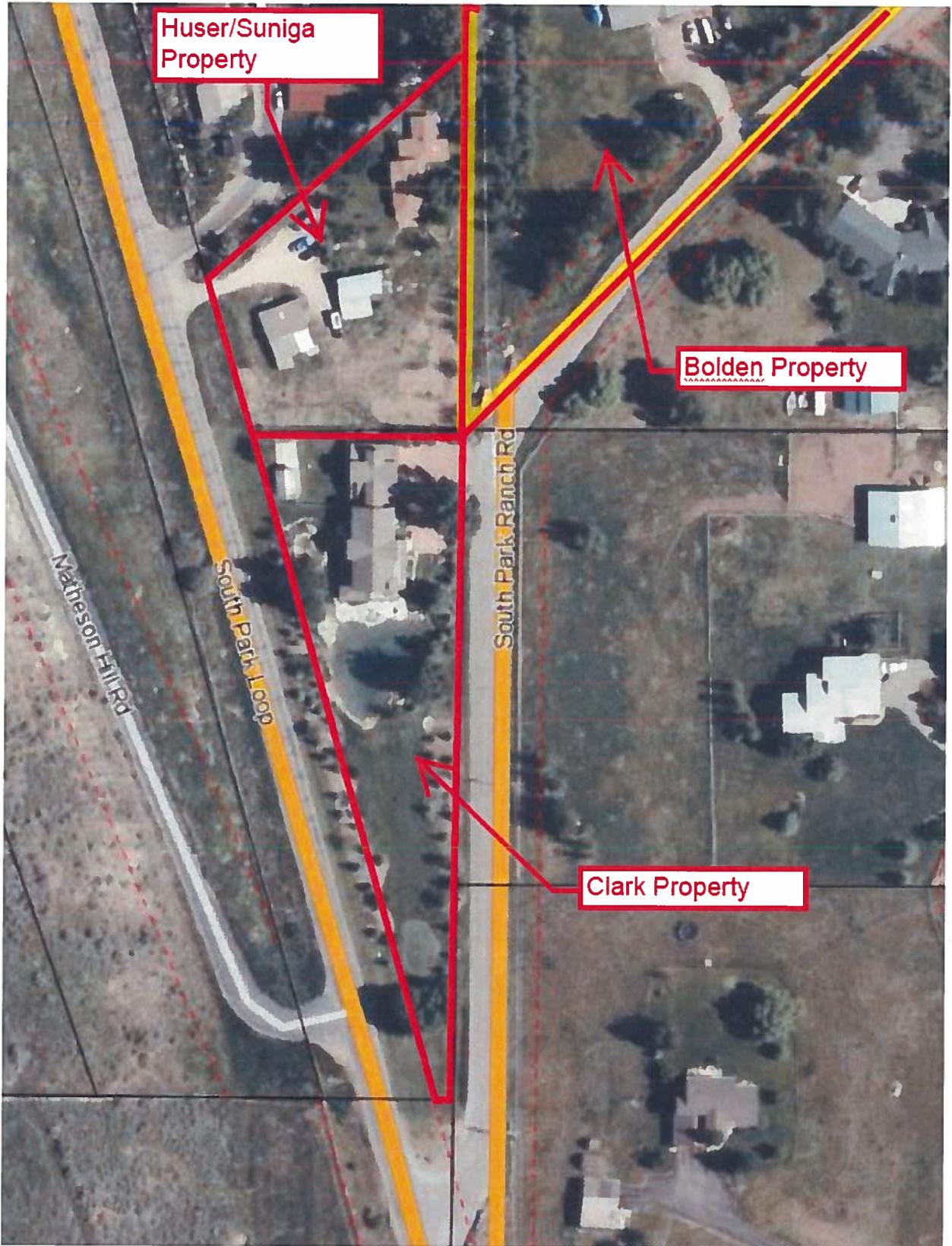
Witness my hand and official seal.

[Seal]

Matthew W. Kim-Miller
Notarial officer
My Commission Expires: 8/19/17



Exhibit A
Huser/Suniga Property, Clark Property, Bolden Property



**Exhibit B
Permit**

See attached



ACCESS DRIVEWAY PERMIT APPLICATION

For Office Use Only

DATE RECEIVED: 5/12/16	PERMIT # 22-25S-11 South Park Ranch Rd.
---------------------------	--

PLEASE TYPE OR PRINT (IN INK ONLY)

OWNER(S): JONATHAN P (JP) HUSER & Sherifa Suniga

MAILING ADDRESS: P.O. Box 7860 Jackson WY
CITY STATE/ZIP

E-MAIL ADDRESS: jonpaulhuser@gmail.com PHONE: 307.690.0443

APPLICANT: (Contact Person) J.P. HUSER

If applicant is other than owner, a notarized Teton County **Letter of Authorization** must accompany this application. Only the owner or his/her authorized agent may sign either the application, correction list or permit.

MAILING ADDRESS: SEE ABOVE
CITY STATE/ZIP

E-MAIL ADDRESS: _____ PHONE: _____

DESIGN ENGINEER: UNKNOWN

MAILING ADDRESS: _____
CITY STATE/ZIP

E-MAIL ADDRESS: _____ PHONE: _____

CONTRACTOR: Unknown

MAILING ADDRESS: _____
CITY STATE/ZIP

E-MAIL ADDRESS: _____ PHONE: _____

SITE LOCATION: List all properties effected. (If not enough room please attach list.)

PHYSICAL ADDRESS: 4000 South Park Loop Road

SUBDIVISION: N/A

SECTION: 18 TOWNSHIP 40 N RANGE 116 W

PIDN(S)

COUNTY ROAD NO. 22-255 COUNTY _____ APPROXIMATELY _____ MILES _____ N.S.E.W.

FROM _____, FOR INGRESS OR EGRESS TO A Residence
CITY OR WELL DEFINED POINT RESIDENCE OR BUSINESS & TYPE

ACCESS DRIVE WIDTH 20 FEET, ON _____ OF COUNTY ROAD, IN _____
RURAL OR URBAN

PROPOSED DRIVEWAY SURFACE Gravel, DRAINAGE STRUCTURE

AND/OR VALLEY GUTTER TO BE LOCATED _____ FEET FROM THE
SIZE LENGTH TYPE

SHOULDER LINE. RIGHT-OF-WAY FROM CENTERLINE OF COUNTY ROAD _____ FEET.

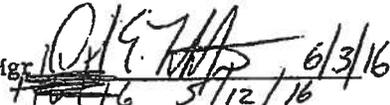
APPLICANT'S SIGNATURE, CERTIFICATE AND AUTHORIZATION:

Under penalty of perjury, I hereby certify that I have read this application and state that the information herein is correct and I swear that any information which may be hereafter given by me shall be truthful and correct. I agree to comply with all County regulations and State laws relating to the subject matter of this application and hereby authorize representatives of this County to enter upon the above mentioned property for inspection purposes. I, the undersigned applicant, request permission to construct an access driveway on a County right-of-way at the location listed on this application and agree to the following:

1. Construct and maintain driveway in a safe manner so as not to interfere with or endanger public travel and to perform all work in a neat and workmanlike manner, using materials acceptable to the Teton County Road Department and that the right-of-way will be cleaned and left in a condition equal to or better than the original condition. The applicant will fully protect the traffic on the County road during construction covered hereunder by proper barricades, flagmen and/or lights, and to hold harmless the Teton County Road Department, its officers and employees from all damages, expenses, claims or liability arising out of any alleged damages of any nature to any person or property, due to the construction, performances or non-performance of work, or existence of said driveway.
2. No driveway shall be constructed such that there will be parking or servicing of vehicles on the County road right-of-way.
3. The profile grade of driveway shall be constructed as indicated on the attached sketch or plan and shall in no case be graded or maintained such that water will drain onto the highway travel surface.
4. This permit becomes VOID if construction is not completed within 365 days after the approval date below.
5. Grade slopes no greater than 4 to 1.
6. Additional Requirements: (1) Reclaim disturbed areas with topsoil and native seed mix. (2) Driveway surface must be paved to match existing road surface. (3) No culvert required for drainage.



T.G. Road & Levee Mgr

 6/3/16
5/12/16

SIGNATURE OF APPLICANT

DATE

REGULATIONS AND INFORMATION FOR OBTAINING ACCESS DRIVEWAY PERMIT

A. PERMIT FORMS: Application for an access permit to construct any private driveway or to reconstruct or alter any existing driveway shall be made to the Teton County Road Manager. Application for access permit will be accepted only from an individual or partnership or corporation or other body recognized by law as owning all or the major interest in the property abutting the highway right-of-way or proposed highway.

B. INFORMATION REQUIRED:

1. The location of the property must be identified clearly enough for the proposed site to be located in the field.
2. Complete names and addresses of the property owner or owners must be given on the application.
3. The planned property use must be indicated as one of the following:
 - a. **PRIVATE RESIDENTIAL DRIVEWAY.** A private residential driveway is defined as a driveway adjacent to a county highway to provide entrance to and/or exit from a residential dwelling for the exclusive use and benefit of those residing therein.
 - b. **COMMERCIAL DRIVEWAY.** A commercial driveway is defined as an entrance to and/or exit from any commercial, business or public establishment adjacent to a county highway.
 - c. **CULTURAL AND INSTITUTIONAL DRIVEWAYS.** A cultural or institutional driveway is defined as an entrance to and/or exit from churches, schools, hospitals, etc. Design requirements are the same as for commercial driveways.
 - d. **MINOR DRIVEWAY.** A minor driveway is defined as an entrance to and/or exit from a field, ranch or farm property, and not frequently used.
4. A **SKETCH SHOWING SUFFICIENT DIMENSIONS** shall be submitted with the application which clearly indicates the character and extent of the work proposed including:
 - a. The location of all existing or purposed building, stand, pumps, retaining walls, and other physical features which affect the driveway location.
 - b. The sketch must show property lines and dimensions and existing access driveways.
 - c. The sketch must show all drainage which affect the driveway location.
 - d. Off-street parking locations which may affect the driveway location.
 - e. The sketch must show the proposed access driveway.

C. MATERIALS: The grantee shall furnish all materials necessary for the construction of the entrances and appurtenances authorized by the permit. All materials shall be of satisfactory quality and shall be subject to the inspection and approval by the Teton County Road Department.

D. DRIVEWAY CONSTRUCTION: All new access driveways following approval of permit shall be constructed in conformance with the approved sketch.

E. INSPECTION MAINTENCE: Teton County Road Department reserves the right to inspect these installations at the time of const. and at all times thereafter, and to require such changes, maintenance and repairs as may at any time be considered necessary to provide protection of life and property on or adjacent to the roadway.

F. CHANGES IN EXISTING FACILITIES: No access driveway or other improvement constructed on the roadway right-of-way shall be relocated or its dimensions altered without a duly approved permit from the Teton County Road Department.

G. INDEMNIFICATION: The grantee shall hold harmless Teton County, it's duly appointed agents, and employees against any action for personal injury or property damage sustained by reason of the exercise of his permit.

H. LIMITATION: These regulations shall apply on all roadways, other than full controlled access highways, under the jurisdiction of the Teton County Road Department.

I. SIGNS: The grantee shall not be permitted to erect any sign, either fixed or movable, on or extending over any portion of the roadway right-of-way, or conduct any business of any nature on the roadway right-of-way except for traffic control or public address signs as may be required by county.

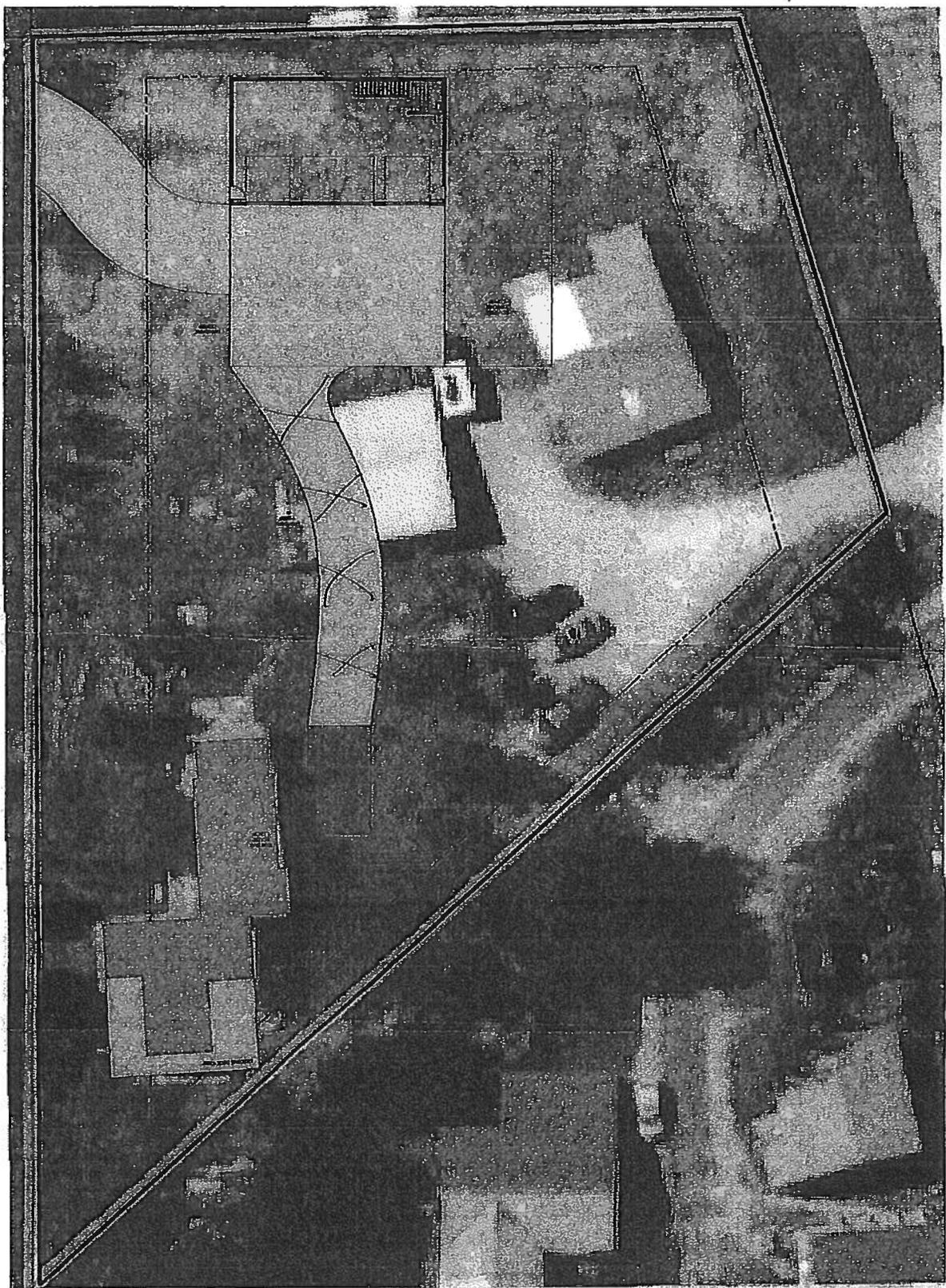


Exhibit C
Wheel Loader

2007



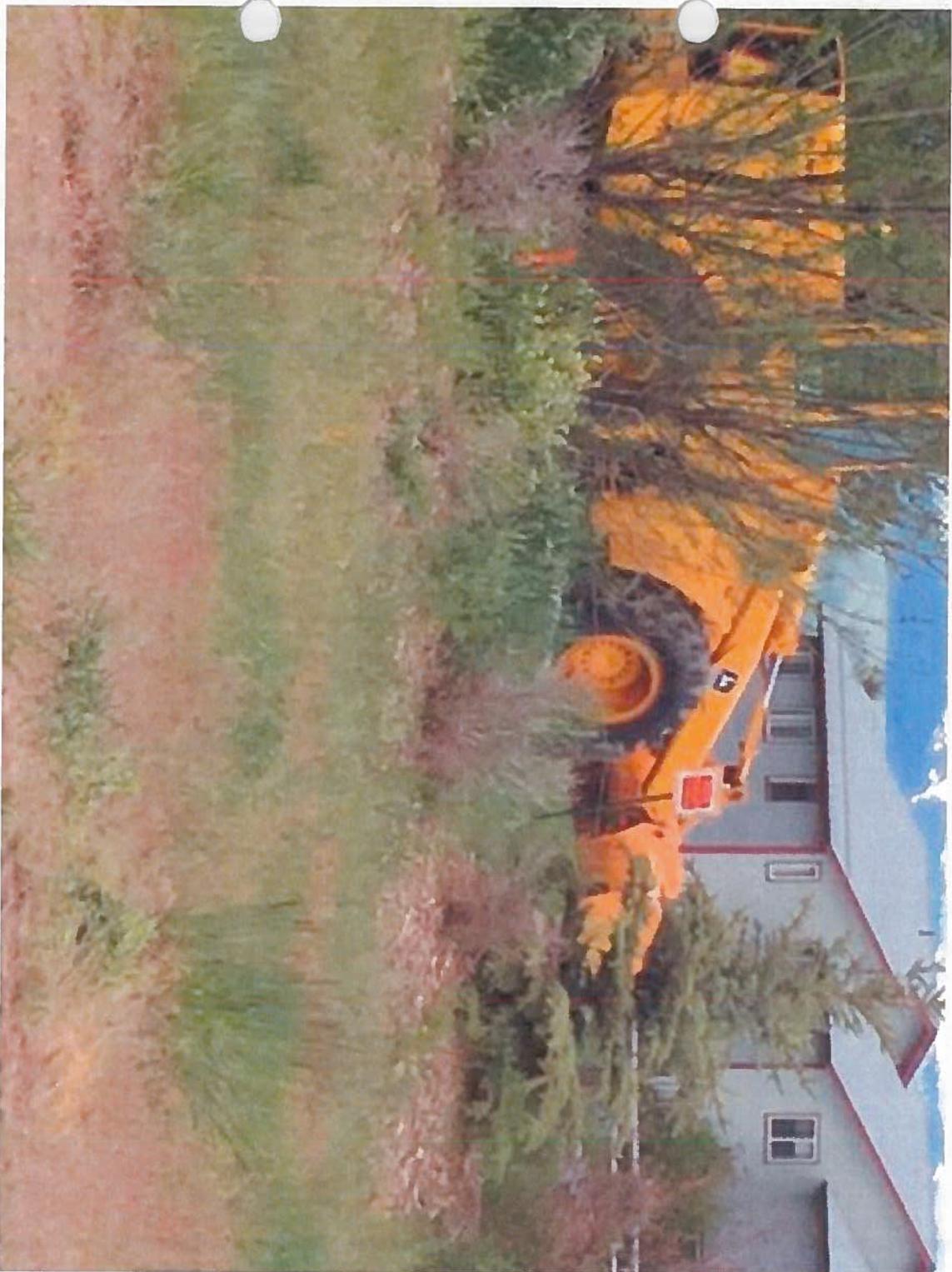
2009



2015



Exhibit D
Photographs



IMG_1825.JPG

Picture properties

[More](#)

Type: JPG File

Dimensions: 640 x 480 pixels

Size: 122 KB

Modified: 10/6/2016 11:19:01 AM

Location: C:\Users\KM_Moore\AppData

Description:

Camera properties

[More](#)

Camera Model: iPhone 6

Date Taken: 6/4/2016 3:13:42 PM



IMG_1847.JPG

Picture properties

More

Type: JPG File

Dimensions: 640 x 480 pixels

Size: 129 KB

Modified: 10/6/2016 11:19:01 AM

Location: C:\Users\KM_Moore\AppData

Description:

Camera properties

More

Camera Model: iPhone 6

Date Taken: 6/14/2016 2:10:28 PM



IMG_1848.JPG

Picture properties

[More](#)

Type: JPG File

Dimensions: 640 x 480 pixels

Size: 118 KB

Modified: 10/6/2016 11:19:01 AM

Location: C:\Users\KM_Moore\AppData

Description:

Camera properties

[More](#)

Camera Model: iPhone 6

Date Taken: 6/14/2016 2:10:39 PM



IMG_1849.JPG

Picture properties

More

Type: JPG File

Dimensions: 640 x 480 pixels

Size: 159 KB

Modified: 10/6/2016 11:19:01 AM

Location: C:\Users\KM_Moore\AppData

Description:

Camera properties

More

Camera Model: iPhone 6

Date Taken: 6/14/2016 2:10:48 PM

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
TETON COUNTY, WYOMING**

DEBRA DAVIS and DENNIS CLARK,)
)
 Contestants,)
)
 v.)
)
 COUNTY ROAD SUPERVISOR OF)
 TETON COUNTY, WYOMING,)
)
 Contestee,)
)
 and)
)
 JONATHAN P. HUSER and SHARIFA)
 SUNIGA,)
)
 Applicant-Intervenors.)

Docket No. 16-0011

ORDER GRANTING APPLICANT-INTERVENORS' MOTION TO INTERVENE

THIS MATTER comes before the Board of County Commissioners of Teton County (“**Board**”) on the Motion to Intervene filed by Applicant-Intervenors, Jonathan P. Huser and Sharifa Suniga, and the Board, having reviewed the Motion to Intervene, and being fully advised in the premises, GRANTS the Motion to Intervene.

IT IS HEREBY ORDERED THAT:

Jonathan P. Huser and Sharifa Suniga are permitted to intervene as a matter of right in this case as Applicant-Intervenors.

Dated: _____.

Board of Teton County Commissioners

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
TETON COUNTY, WYOMING**

DEBRA DAVIS and DENNIS CLARK,)
)
Contestants,)
)
v.)
)
COUNTY ROAD SUPERVISOR OF)
TETON COUNTY, WYOMING,)
)
Contestee,)
)
and)
)
JONATHAN P. HUSER and SHARIFA)
SUNIGA,)
)
Applicant-Intervenors.)

Docket No. 16-0011

Received:		RCVD NOV 3 16 PM 4:12
Number:	004	
Teton County Clerk By: <i>Mary Smith</i>		

BRIEF IN SUPPORT OF MOTION TO DISMISS

Jonathan P. Huser (aka JP Huser) and Sharifa Suniga (the “**Applicant-Intervenors**” or “**Huser/Suniga**”), by and through their undersigned counsel and pursuant to Wyoming Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted) and the Teton County Rules for Contested Case Practice and Procedure, hereby respectfully submit their Brief in Support of Motion to Dismiss, in support of the Motion to Dismiss filed by the Contestee on October 19, 2016 (“**Contestee’s Motion to Dismiss**”). Though this brief is not a response nor is it an admission of proper filing of the appeal in this matter or that an appeal is permissible in this matter:

Facts

In addition to facts set forth in Constestee’s Motion to Dismiss (which Applicant-Intervenors join and support), Applicant-Intervenors state the following facts:

1. Subsequent to the issuance of the driveway permit, Huser/Suniga expended material sums of money in reliance upon the issuance of the permit, including on construction activities that gave constructive notice of the driveway that is the source of this appeal. *See* Affidavit of JP Huser, ¶8, which is concurrently filed with this brief.

2. The driveway was marked prior to issuance of the permit on May 22, 2016, and was again staked on June 13, 2016 and June 14, 2016.

3. Construction on the driveway commenced in June 2016.

4. Constructive notice means “Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice presumed by law to have been acquired by a person and thus imputed to that person.” Black’s Law Dictionary (10th ed. 2014).

5. The marking, staking and commencement of construction all constitute constructive notice of the driveway. Thus, concurrent with the issuance of the permit, the Clarks had constructive notice, or had constructive at some point in June 2016.

6. The Clarks also interacted with Huser in relation to issuance of the permit, knew of the staking of the driveway and also caused or permitted the blockading of the driveway with a wheel loader owned by the Clarks, all in June 2016. Huser Aff. ¶¶8, 11-31.

7. Thus, the Clarks also had actual notice of Huser’s application for the permit and the issuance of the permit.

Argument

In addition to the argument set forth in Constestee’s Motion to Dismiss (which Applicant-Intervenors join and support, except to the extent set forth below), Applicant-Intervenors make the following arguments:

1. Teton County’s Land Development Regulations (“LDRs”) do not provide an appeal right for the issuance of a driveway permit by the Road and Levee Department. The LDRs provide that an “aggrieved person affected by any decision or interpretation by the Planning Director or County Engineer” may appeal. LDR § 8.8.3(A).

2. The statute of limitations for that appeal right is 30 days. LDR §8.8.3 provides that an aggrieved party “[m]ust submit [their appeal] within 30 days of decision or interpretation being appealed.”

3. The LDRs also provide that “Appeals shall be governed by the contested case rules adopted by the County pursuant to the Wyoming Administrative Procedures Act.” LDRs § 8.8.3(F).

4. The Teton County Rules for Contested Case Practice and Procedure provide that in “all contested cases, the parties shall file all original documents, pleadings and motions with the County Clerk” and such papers shall be served on all other parties. Teton County Rules for Contested Case Practice and Procedure, Chapter 1, Section 1(A).

5. Even assuming that an appeal right for this driveway permit does exist under the LDRs, Contestant did not timely file an appeal. The permit was issued on June 3, 2016 and the appeal was only filed with the Teton County Clerk on October 19, 2016¹—that filing was 138 days after the permit was issued, 108 days beyond the 30-day appeal deadline.

¹ The appeal was delivered to the County Engineer on September 30, 2016, but delivery of the appeal to the engineer does not satisfy the filing requirement of filing with the County Clerk. The materiality of this failure is visible in the following example: if one wanted to file a lawsuit against a private party before a statute of limitation expired, the lawsuit would need to be filed in the proper court before the statute of limitation expired, and then served on the parties involved. Mere delivery of the appeal to the County Engineer did nothing, and this appeal was only filed with the County Clerk on October 19, 2016.

6. The 30-day appeal deadline acts as a statute of limitation. “The very purpose of a statute of limitations is to require diligence and prevent parties from sleeping on their rights.” *Nuhome Investments, LLC v. Weller*, 81 P.3d 940, 945 (Wyo. 2003). Under Wyoming law, the statute of limitations is triggered “when the plaintiff knows or has reason to know of the existence of a cause of action.” *Amoco Production Co. v. EM Nominee Partnership Co.*, 2 P.3d 534, 542 (Wyo. 2000). “The statute begins to run from the first time claimants are chargeable with information which should lead them to believe they have a claim.” *Rawlinson v. Cheyenne Bd. of Public Utilities*, 17 P.3d 13, 16 (Wyo. 2001).

7. Failure to file an appeal within the required time period means that the Board has no authority to hear the appeal, i.e., the Board has no subject matter jurisdiction. *See Antelope Valley Improvement v. State Board of Equalization*, 992 P.2d 563, 566 (Wyo. 1999) (“Timely filing of a request for administrative review of an agency decision is mandatory and jurisdictional.”); *Frenzel v. State*, 154 P.3d 349, 350 (Wyo. 2007) (“[M]ore than thirty days had passed since entry of the order being appealed. Thus, the appeal being untimely, this Court does not have jurisdiction to hear it.”); *Merit Energy Co. v. Department of Revenue*, 313 P.3d 1257, 1263 (Wyo. 2013) (“Merit had thirty days in which to appeal these decisions and did not do so. We affirm the district court’s decision affirming the SBOE’s dismissal of Merit’s appeal as untimely.”); *Padilla v. State*, 91 P.3d 920, 921 (Wyo. 2004) (“If an appeal is untimely, the court lacks jurisdiction, and the appeal must be dismissed.”).

8. Failure to comply with an appeal deadline creates an incurable jurisdictional defect. The Appellants’ appeal of the permit issuance decision was filed 108 days after the expiration of the appeal deadline stated in Section 8.8.3 of the LDRs.

9. Even if the appeal deadline were measured by actual notice or constructive notice to the Clarks (rather than just the issuance of the permit), the Clarks failed to timely appeal. As described in the Huser Affidavit, in June 2016, the Clarks actually knew of the issuance of the permit and the construction of the relocated driveway, and the various posting and staking and construction on the Huser/Suniga Property provided constrictive notice of the driveway permit's issuance. The Clarks had actual and constructive notice months ago.

10. “Generally, if a party does not receive actual notice of the issuance of the permit, the party receives constructive notice that a building permit has been issued when construction begins. However, the commencement of construction is not the only way a permit holder can give notice of the permit to neighboring landowners and thereby begin the appeal period. The permit holder may ‘devise some method of his own for ensuring that members of the public will be chargeable with knowledge of the permit and his building intentions, such as posting a visible and informative sign on the property prior to construction.’” *Fox v. Park City*, 200 P.3d 182, 189-90, fn 35 (Utah 2011), quoting *Arkae Dev., Inc. v. Zoning Bd. of Adjustment*, 312 N.W.2d 574, 577 (Iowa 1981) (“[W]hen construction begins pursuant to a permit and this activity is visible to the public, an objector is chargeable with knowledge of the permit even though he himself does not learn of the construction or the permit until later.”). Construction that becomes visible from a roadway or adjoining properties is sufficient to constitute constructive notice. See *In Re: Appeal of Broad Mountain Development Co.*, 2011 WL 768655 (Pa. Commw. Mar. 7, 2011).

11. By having both actual and constructive notice, the Clarks had a duty of inquiry and their appeal right ran from such notice. See *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass. App. Ct. 850, 859 (2008) (A party has constructive notice when the evidence is

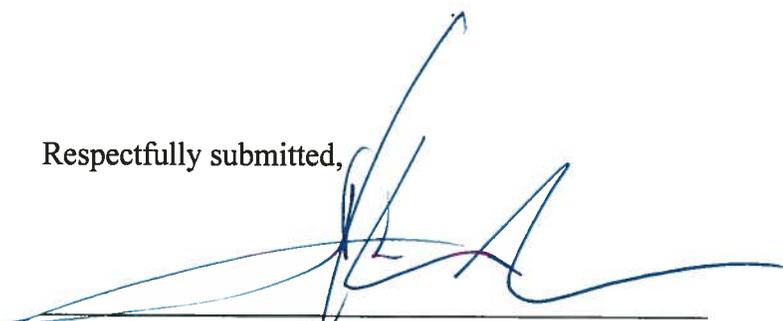
“sufficient to place on [that party] a duty of inquiry” regarding the building permit’s issuance.). See also *Connors v. Annino*, 460 Mass. 790 (2011) (holding “that where the aggrieved party has adequate notice of the building permit’s issuance, he or she is required to appeal to the appropriate zoning board of appeals within thirty days of the permit’s issue date. . .”). *Fox*, 200 P.3d at 187 (Utah 2011) (“[W]e join other courts in concluding that the interests of both the permit holder and the neighboring landowners are best balanced by the rule that the appeal period begins when the aggrieved party has actual or constructive knowledge of the issuance of the permit”).

12. If the Clarks are given an unlimited appeal period, it eviscerates the rights of Huser/Suniga. “Clearly, when a landowner has been granted a permit to make a particular use of his land, he is entitled to know when that decision will become final and no longer be subject to review or reversal by the board. Only in such circumstance may such a landowner feel secure in putting the land to the use granted him by the permit. It is equally true that those who object to the granting of a permit are entitled to know within what period of time they must appeal” *Hardy v. Zoning Bd. of Review*, 321 A.2d 289, 292 (R.I. 1974).

13. The Clarks are seeking to expand a 30 day appeal period so that they have the special treatment of more than three times again the appeal period set forth in the LDRs. This appeal is inappropriate and should be dismissed with prejudice.

DATED: November 3, 2016.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'M. Kim-Miller', written over a horizontal line.

Matt Kim-Miller, WY State Bar # 7-5041
Hadassah M. Reimer, WY State Bar #6-3825
HOLLAND & HART LLP
P.O. Box 68
Jackson WY 83001
Phone: (307) 739-9741
Facsimile: (307) 739-9744
mwkimmiller@hollandhart.com

ATTORNEYS FOR APPLICANT-
INTERVENORS, JONATHAN P. HUSER and
SHARIFA SUNIGA

CERTIFICATE OF SERVICE

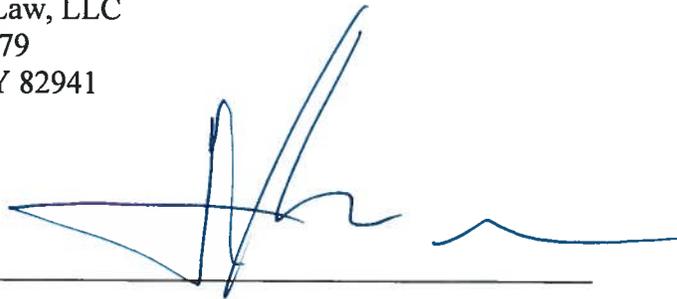
I hereby certify that on November 3, 2016, a true and correct copy of the foregoing document was served upon the following persons by the methods indicated below.

By Hand Delivery
Sherry L. Daigle
County Clerk
Teton County, Wyoming
200 S. Willow Street
Jackson, WY 83001

*By E-mail kmgingery@wyoming.com
and Regular U.S. Mail*
Keith M. Gingery
Teton County Attorney's Office
P.O. Box 4068
Jackson, WY 83001

*By E-mail egreenwood@wyoming.com
and Regular U.S. Mail*
Greenwood Law, LLC
P. O. Box 1479
Pinedale, WY 82941

By: _____

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be the name of the person certifying the service.

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
TETON COUNTY, WYOMING**

DEBRA DAVIS and DENNIS CLARK,)
)
Contestants,)
)
v.)
)
COUNTY ROAD SUPERVISOR OF)
TETON COUNTY, WYOMING,)
)
Contestee,)
)
and)
)
JONATHAN P. HUSER and SHARIFA)
SUNIGA,)
)
Applicant-Intervenors.)

Received:	RCVD DEC 17 16 PM 3:40
Number:	005
Teton County Clerk By:	<i>[Signature]</i>

Docket No. 16-0011

**APPLICANT-INTERVENORS' REPLY BRIEF IN SUPPORT OF CONTESTEE'S
MOTION TO DISMISS**

COMES NOW, Jonathan P. Huser (aka JP Huser) and Sharifa Suniga (the “**Applicant-Intervenors**” or “**Huser/Suniga**”), by and through their undersigned counsel, Holland & Hart, and for this Reply Brief in Support of Contestee’s Motion to Dismiss, state as follows:

1. The Board is faced with determining which one of two alternative appeal paths is required for the Clarks to follow: either (1) the Clarks have no appeal right before the County Board, and the Clarks should have appealed this directly to the District Court, or (2) the Clarks have an appeal right under the LDRs before this Board. But, either way, the Clarks have failed to timely appeal within a 30 day period and their appeal must be dismissed.

a. **Alternative Situation #1: There is no appeal right to the Board of County Commissioners, but there is an appeal right to court.** The position of the Contestee, the County Road Supervisor of Teton County, is that there is no appeal right

to the Board of County Commissioners. If so, then the only appeal right that the Clarks have is a direct appeal right to the district court in Teton County under W.S. § 16-3-114(a) of the Wyoming Administrative Procedure Act (the “APA”). The APA provides that, subject to exhausting administrative remedies, any person aggrieved or adversely affected by “agency” action or inaction is entitled to judicial review in the district court. W.S. § 16-3-114(a) The term “agency” means the County and any department, division, officer or employee of the County, which would include the County Road Supervisor. W.S. § 16-3-101. If this is the case, then the APA states that the procedure for a district court appeal is set forth in the Rules of Appellate Procedure, which have Rule 12: “Judicial review of administrative action.”

i. **The Rules of Appellate Procedure have a deadline to file of 30 days after agency action:** Rule 12.04 of the Rules of Appellate Procedure requires that appeals be filed within a 30 day deadline. The rule reads: “In a contested case, or in an uncontested case, even where a statute allows a different time limit on appeal, the petition for review shall be filed within 30 days after service upon all parties of the final decision of the agency or denial of the petition for a rehearing, or, if a rehearing is held, within 30 days after service upon all parties of the decision.” W.R.A.P. Rule 12.04(a). Although Rule 12 speaks of service of notice to the parties, the 30 day timeline applies to administrative actions like the issuance of a permit as well. A request for review “must be within thirty days of such action or of notice of such action or of the time the person becomes aggrieved or adversely affected by such action, whichever is latest.” *Stagner v. Wyoming State Tax Comm’n*, 642 P.2d 1296 (Wyo. 1982)

(addressing seizure of cigarettes by the State Tax Commission appealed directly to court).

ii. **The result of Alternative Situation #1 is that this case must be dismissed because of a lack of jurisdiction.** If there is no appeal right at the Board of County Commissioner level, then the Board has no jurisdiction to hear this matter and it must be dismissed. Only the district court can hear this case. Further, the Clarks will be dismissed at the district court level because they did not file within the 30 day period: “Timely filing of a petition for review is mandatory and jurisdictional.” *Department of Revenue and Taxation v. Irvine*, 589 P.2d 1295, 1301 (Wyo. 1979).

b. **Alternative Situation #2: There is an appeal right to the Board of County Commissioners under the LDRs that must be undertaken before any appeal to court.** The LDRs provide that “An appeal may be filed for any decision or interpretation of the Planning Director or County Engineer. The appealed decision or interpretation must be formally documented (e.g. a permit approval, formal interpretation).” LDR 8.8.3(B). So, in order for this to be appealable under the LDRs, the June 3, 2016 Access Driveway Permit by the County Road Supervisor must be something attributable to either the Planning Director or the County Engineer. The Access Driveway Permit was signed by the “T.C. Road & Levee Mgr.” Attached as **Exhibit A** is an organizational chart of Teton County that we believe to be reasonably current.¹ The scope of the County Engineer’s duties are set forth in Section 8.10.3 of the LDRs, where the County Engineer has various authority and duties as to engineering issues, grading, erosion control and stormwater management, certain specific applications

¹ Obtained from: <www.tetonwyo.org/bcc/docs/Teton%20County%20Org.%20Chart%20071116.pdf> on 12/1/16.

(which do not include Access Driveway Permits in the list) and to prepare standard drawings and details for public improvements in Teton County.

i. **The deadline to file with the County Clerk in Alternative Situation #2 is within 30 days of agency action:** Per the LDRs, a person making the appeal “Must submit within 30 days of decision or interpretation being appealed.” Under LDR Section 8.2.8, copies of all decisions of the County Engineer or Planning Director are available at the offices of the Planning Department for review during normal business hours. The appeal timeline is measured from the decision or interpretation.

ii. **If this appeal is governed by Alternative Situation #2, then the result is that this case must be dismissed because of the late filing.** The Clarks did not file their appeal within 30 days of the June 3, 2016 issuance of the Access Driveway Permit. They filed it on October 19, 2016, which was 108 days late.

2. The Clarks blew their appeal deadline by three months, and rather than follow the applicable legal standards for the timing of appeals, the Clarks’ seek to have their appeal timeline determined by when they received “actual notice.”

3. That is, the Clarks’ feel that their appeal period should be measured from when the Clarks actually, subjectively, in their own minds became aware of the issuance of the Access Driveway Permit.

4. The Clarks’ desired “actual notice” is not the applicable standard, rather, “constructive notice” is the standard.

a. The term “actual notice” means “Notice given directly to, or received personally by, a party.” Black’s Law Dictionary (10th Ed. 2014).

b. The term “constructive notice” means: “Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; notice presumed by law to have been acquired by a person and thus imputed to that person. — Also termed legal notice.” Black’s Law Dictionary (10th Ed. 2014).

5. To the extent that the Clarks’ appeal rights are triggered from when they had constructive notice, the Clarks had constructive notice at some point in June 2016. In June, Huser/Suniga had posted a building permit, posted and painted various types of stakes indicating the driveway and, most importantly, commenced construction of the driveway by grading, moving trees, moving berms and locating materials and equipment on the Huser/Suniga property. See JP Huser Affidavit previously submitted. Thus, by the end of July the Clarks’ appeal period had expired—30 days had passed since they had constructive notice.

6. “A person has notice of a fact under four circumstances: if he or she (1) knows the fact, or (2) has reason to know it, or (3) should know it or (4) has been given notification of it,” and “notice of the issuance of [a] permit” and “[t]he time to appeal [begins] on the date of commencement of construction.” *St. ex rel. Brookside v. Jefferson Bd.*, 388 NW 2d 593, 598-99 (Wis. 1986). Neighbors “had actual or constructive notice” of the issuance of a building permit when construction begins. *Tausanovitch v. Town of Lyme*, 722 A.2d 914, 916 (N.H. 1998). “Actual knowledge, or reason to know of [a building permit's] issuance, was had ... when construction began.” *Trenkamp v. Township of Burlington*, 406 A.2d 218, 227 (N.J. Super 1979). In *Munroe v. Zoning Bd. of Appeals*, 802 A.2d 55, 61 (Conn. 2002), a neighbor received notice of a landowner’s building permit to construct a second story addition on garage when the owner began demolition of his garage.

7. Somewhere between 24%² and 41.3%³ of Teton County's housing stock is vacant, most of which is due to second homes. If we measured appeal periods from when actual notice was obtained by a person, we would have an unworkable system.

First and foremost, actual notice is not a requirement under the [Pennsylvania municipal planning code]. Second, to hold otherwise would create an absurd result. Thus, absentee landowners could enjoy a longer appeal period than those residing near development. Similarly, landowners temporarily absent from an area by reason of employment, vacation, or pressing family business would enjoy differing periods within which to challenge a permit. The resulting lack of predictability would make it impossible for a developer to know when it was safe to incur construction costs.

Berryman v. Wyoming Borough Zoning Hearing Bd., 884 A.2d 386, 389-90 (Pa. Cmwlth. 2005).

8. Per the Clarks' filed Response, the Clarks supposedly only had actual notice when Lt. Slade Ross of the Teton County Sheriff's office called on September 16, 2016 asking that the Clarks remove their wheel loader/dozer from the county easement, as it was blocking the Huser/Suniga's driveway relocation area. *See* Clarks' Response, p. 2. The Clarks claim as to actual notice is refuted by the detailed Affidavit of JP Huser, and the Clarks' claim seems peculiar in light of the coincidence that on June 4, 2016, one day after the issuance of the permit, the Clarks' wheel loader/dozer and a "no trespassing" sign appeared in the County easement right of way—right where the Huser/Suniga new driveway was to be located.

9. The Clarks had constructive notice of this permit in June 2016, yet they waited until October to file their appeal. Huser/Suniga have made substantial expenditures in reliance on the issuance of the Access Driveway Permit, the permit appeal period has run and they have

² 2010 Blue Ribbon Panel on Workforce Housing staffed by the Teton County Housing Authority, p. 10, available at < <http://www.tetonwyo.org/house/topics/housing-studies/252660/>> as of 12/1/16.

³ Wyoming Department of Administration & Information, Economic Analysis Division, Wyoming County Profiles 2015, available at http://eadiv.state.wy.us/Wy_facts/Teton2015.htm as of 12/1/16.

vested rights in the Access Driveway Permit. *Snake River Brewing Co. v. Town of Jackson*, 39 P.3d 397, 406-07 (2002). Any revocation of the permit now would be an unconstitutional taking.

For the foregoing reasons, the Clarks' appeal should be dismissed with prejudice.

DATED: December 1, 2016.

Respectfully submitted,



Matt Kim-Miller, WY State Bar # 7-5041
Hadassah M. Reimer, WY State Bar #6-3825
HOLLAND & HART LLP
P.O. Box 68
Jackson WY 83001
Phone: (307) 739-9741
Facsimile: (307) 739-9744
mwkimmiller@hollandhart.com

ATTORNEYS FOR APPLICANT-
INTERVENORS, JONATHAN P. HUSER and
SHARIFA SUNIGA

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, a true and correct copy of the foregoing document was served upon the following persons by the methods indicated below.

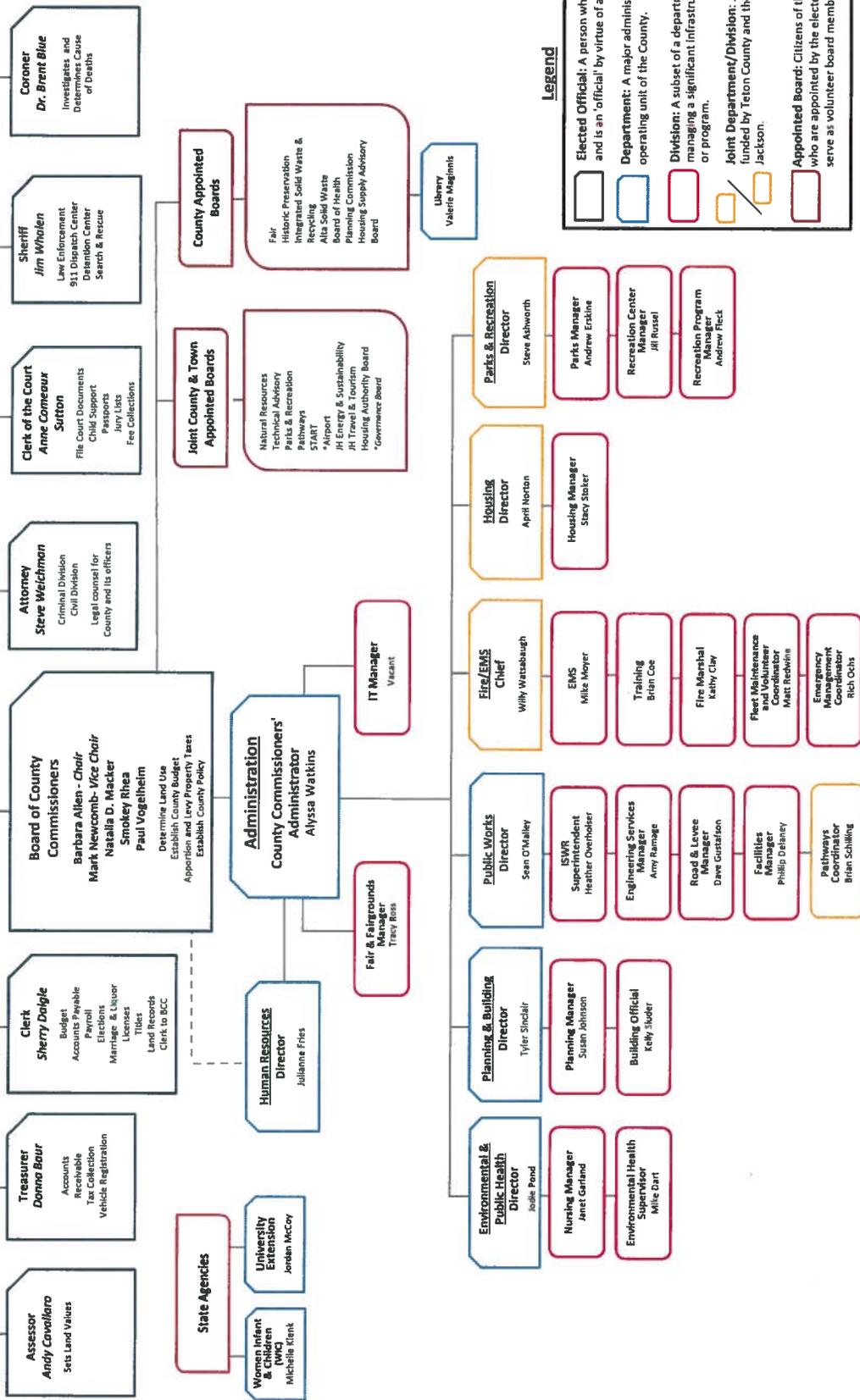
By Hand Delivery
Sherry L. Daigle
County Clerk
Teton County, Wyoming
200 S. Willow Street
Jackson, WY 83001

By E-mail kmgingery@wyoming.com
and Regular U.S. Mail
Keith M. Gingery
Teton County Attorney's Office
P.O. Box 4068
Jackson, WY 83001

By E-mail egreenwood@wyoming.com
and Regular U.S. Mail
Greenwood Law, LLC
P. O. Box 1479
Pinedale, WY 82941

By: 

Teton County Organization Chart



Legend

- Elected Official: A person who won office and is an "official" by virtue of an election.
- Department: A major administrative or operating unit of the County.
- Division: A subset of a department managing a significant infrastructure need or program.
- Joint Department/Division: Jointly funded by Teton County and the Town of Jackson.
- Appointed Board: Citizens of the community who are appointed by the elected body to serve as volunteer board members.

BEFORE THE BOARD OF COUNTY COMMISSIONERS

TETON COUNTY, WYOMING

DEBRA DAVIS and DENNIS CLARK,)
)
 Contestants,)
)
 v.)
)
 COUNTY ROAD SUPERVISOR OF)
 TETON COUNTY, WYOMING,)
)
 Contestee,)
)
 and)
)
 JONATHAN P. HUSER and SHARIFA)
 SUNIGA,)
)
 Applicant-Intervenors.)

Received: RCVD DEC17 16PM 3:41
Number: 006
Teton County Clerk By: [Signature]

Docket No. 16-0011

MOTION TO STAY

COMES NOW, Jonathan P. Huser (aka JP Huser) and Sharifa Suniga (the “**Applicant-Intervenors**” or “**Huser/Suniga**”), by and through their undersigned counsel, Holland & Hart, and for this Motion to Stay, state as follows:

On or about September 30, 2016, Debra Davis and Dennis Clark (the “**Clarks**”) sought to file an appeal for denial or request for reconsideration in regard to Access Driveway Permit Application and Permit No. 22-25S-11 (the “**Permit**”), which was in relation to the property owned by Huser/Suniga at 4000 South Park Ranch Road. The Contestants’ appeal was not correctly filed with the Teton County Clerk in September, and was actually filed with the Teton County Clerk on October 19, 2016.

The Permit states “4. This permit becomes VOID if construction is not completed within 365 days after the approval date below.” The approval date for the Permit was June 3, 2016 and thus the expiration date would be June 3, 2017.

As is described and depicted in the Affidavit of JP Huser previously submitted in this appeal, on June 4, 2016, which was the day after the Permit was issued on June 3rd, the wheel loader/dozer owned by the Clarks was parked in County easement in the very same spot where the driveway of Huser/Suniga was to be relocated. Affidavit of JP Huser, ¶ 24-28, 31-35. The wheel loader/dozer blocked Huser/Suniga from completing the driveway. *Id.* The Clarks admit that this is their wheel loader/dozer. *See* Clarks’ Response to Contestee’s Motion to Dismiss, p. 2. Mr. Huser repeatedly contacted the Teton County Road and Levee Department, the Teton County Attorney’s office and the County Sheriff in order to have the wheel loader/dozer moved so that he could proceed with the driveway construction. Affidavit of JP Huser, ¶ 35. On approximately November 28, 2016, the Clarks moved the loader/dozer from the County easement. Merely because of this action by the Clarks, Huser/Suniga are entitled to a stay of the expiration of the Permit.

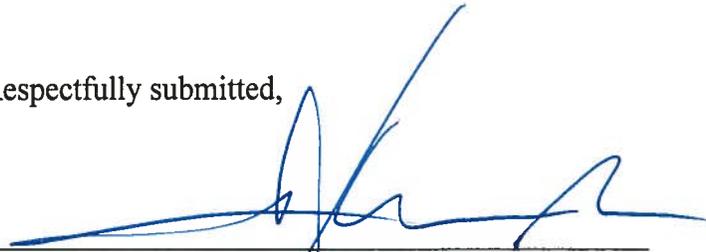
Further, the appeal of the Clarks was made under the Teton County Land Development Regulations. The LDRs provide that “[an] appeal shall stay all further action related to the subject appeal, unless a stay would cause imminent peril to life or land.” Section 8.8.3.C. Of course, this stay request does not cause imminent peril to life or land. Regardless of whether or not this appeal is properly brought under the LDRs or whether or not it will be dismissed, this appeal is governed by the terms of the LDRs, which mandate a stay be imposed.

To the extent that it is argued that the LDRs' stay provision does not apply here, then Rule of Appellate Procedure 12.05 is instructive as to standards. Rule 12.05 provides that "[t]he reviewing court may order a stay upon appropriate terms. If the stay involves an order preventing an agency . . . from committing or continuing an act or course of action, the provisions of Rule 65, Wyo. R. Civ. P., relating to injunctions apply." In this case, the Board of County Commissioners is acting as a reviewing body/court. Wyo. R. Civ. P. 65 sets out the rules for injunctions, which are a remedy within a court's/reviewing body's equitable discretion. See *Weiss v. Pederson*, 933 P.2d 495 (Wyo. 1997), *overruled on other grounds by White v. Allen*, 65 P.3d 395 (Wyo. 2003). The purpose of an injunction such as a stay "is to preserve the status quo until the merits of an action can be determined." *Weiss v. State ex rel. Danigan*, 434 P.2d 761, 762 (Wyo. 1967).

WHEREFORE, Huser/Suniga respectfully request that a stay of the expiration of the Permit be imposed. Huser/Suniga request the stay be imposed for a time period equal to the span of (a) June 4, 2016 (the date the Clarks moved their loader into the County easement) to (b) the date this appeal is resolved. Thus, if this action is dismissed by an order entered December 20, 2016, the permit expiration would be extended 199 days (June 4 to December 20). Or, at the least the stay should be for a period equal to the days between (a) the October 19, 2016 filing date of this action and (b) the resolution of the appeal—this alternative stay period would be for a period of 62 days (October 19 to December 20) if this appeal were dismissed on December 20, 2016.

DATED December 1, 2016.

Respectfully submitted,



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ATTORNEYS FOR APPLICANT-
INTERVENORS, JONATHAN P. HUSER and
SHARIFA SUNIGA

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, a true and correct copy of the foregoing document was served upon the following persons by the methods indicated below.

By Hand Delivery
Sherry L. Daigle
County Clerk
Teton County, Wyoming
200 S. Willow Street
Jackson, WY 83001

*By E-mail kmgingery@wyoming.com
and Regular U.S. Mail*
Keith M. Gingery
Teton County Attorney's Office
P.O. Box 4068
Jackson, WY 83001

*By E-mail egreenwood@wyoming.com
and Regular U.S. Mail*
Greenwood Law, LLC
P. O. Box 1479
Pinedale, WY 82941

By:  _____

BEFORE THE BOARD OF COUNTY COMMISSIONERS

TETON COUNTY, WYOMING

DEBRA DAVIS and DENNIS CLARK,)
)
 Contestants,)
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 v.)
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 COUNTY ROAD SUPERVISOR OF)
 TETON COUNTY, WYOMING,)
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)
 and)
)
 JONATHAN P. HUSER and SHARIFA)
 SUNIGA,)
)
 Applicant-Intervenors.)

Docket No. 16-0011

ORDER GRANTING APPLICANT-INTERVENORS' MOTION TO STAY

THIS MATTER having come before the Board of County Commissioners of Teton County (“Board”) on the Motion to Stay filed by Applicant-Intervenors, Jonathan P. Huser and Sharifa Suniga, and the Board, having reviewed the Motion to Stay, and being fully advised in the premises, GRANTS the Motion to Stay.

IT IS HEREBY ORDERED THAT:

The Motion to Stay is GRANTED. The expiration of the Access Driveway Permit Application and Permit No. 22-25S-11 (the “Permit”), is STAYED from the original Permit expiration date of June 3, 2017, for a period equal to the amount of days between (a) June 4, 2016 [*alternatively*: October 19, 2016] and (b) the resolution of this appeal.

Dated: _____.

Board of Teton County Commissioners

Application”) on May 12, 2016. The Appellants (“Clarks” herein) own property adjacent to Huser’s property and are aggrieved persons as defined under the LDRs. *See* 8.8.3 LDR. Huser included in the Application a map of the proposed access driveway. The map submitted by Huser fails to meet the requirements set forth in the “Regulations and Information for Obtaining Access Driveway Permit” as set forth in the Appeal. Despite being adjacent property owners, the Clarks were given no notice of the Application in any manner.

The Application was approved on June 3, 2016, without hearing. The Clarks were not advised of the application or granting of the Access Driveway Permit. The first time the Clarks became aware of the Application and the granting of the Access Driveway Permit was when they received a phone call from Slade Ross, on September 16, 2016, requesting that the Clarks remove their dozer from the county easement as an access permit had been granted. The Clarks filed the Appeal within thirty days of becoming aware of the permit.

The County as Contestee, filed a *Motion to Dismiss the Appeal for Denial or Request for Reconsideration by Debra Davis and Dennis Clark Pursuant to Teton County Land Development Regulations Article 8 Section 8.8.3*. Jonathan P. Huser and Sharifa Suniga, as Applicants, applied to Intervene on November 3, 2016 and filed a *Brief in Support of Motion to Dismiss*. The *Motion to Intervene* remains pending. An Objection to the Motion to Intervene will be filed by the Clarks under separate cover.

II.

MOTION TO DISMISS IS DRASTIC AND INAPPROPRIATE IN THIS CASE

In a W.R.C.P. 12(b)(6) motion to dismiss, the reviewing body accepts the facts stated as true and view them in the light most favorable to the moving party. A motion to dismiss is not appropriate unless it is certain from the face of the document that the party cannot assert *any fact*

which would entitle him to relief. *Stroth v. North Lincoln County Hosp. Dist.*, 2014 WY 81, ¶ 6, 327 P.3d 121, 125 (Wyo.2014) (emphasis added). Dismissal under W.R.C.P. 12(b)(6) is a drastic remedy, which should be granted sparingly, and is appropriate only when it is certain the plaintiff cannot assert any facts that would entitle him to relief. *Simon v. Teton Bd. of Realtors*, 4 P.3d 197, 200 (Wyo.2000).

The law and facts on this issue preclude a dismissal. Even the County's own motion relies on a contrary view of the facts in its argument, including when the Clarks were aware of the permit and whether there would be any impact, which alone precludes dismissal as well as summary judgment.

III.

CLARKS' APPEAL OF DECISION IS NECESSARY AND PROPER

The Wyoming Administrative Procedure Act (WAPA), §§ 16-3-101 through 115 (LexisNexis 2015) governs proceedings involving administrative agencies. Section 16-3-114(a), which generally follows the Model State Administrative Procedures Act, provides for judicial review of agency action: (a) Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, *or by other agency action or inaction*, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review in the district court. Section 16-3-114(a) (emphasis added). It would be preposterous to have a decision that was unreviewable by administrative appeal when it is reviewable by judicial action. Nor can the County get around this by simply claiming, as they attempt to do, that this is a County Road Supervisor which

precludes review. “Agency” means any authority, bureau, board, commission, department, division, officer or employee of the state, a county, city or town or other political subdivision of the state, except the governing body of a city or town, the state legislature, the University of Wyoming, the judiciary and the consensus revenue estimating group as defined in W.S. 9-2-1002.

Similarly, the only reason there was no “contested case” is because the Clarks were unaware of the application for the permit or the decision regarding the permit until September, or they would have contested it from the first. Wyo. Stat. Ann. §§ 16–3–107 through 16–3–112 (LexisNexis 2011) provide for contested case hearings. “Contested case” is defined as a “proceeding including but not restricted to ratemaking, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” It defies due process that an agency can claim the action was not contested when there was no notice of the action to the adjacent landowner who would have contested the permitting.

By definition, if there is no notice given to affected parties then that precludes relief. The County’s view of the definition is much too narrow and intended to restrict rights and a fair hearing by those affected. Asserting, without authority, that this was not an agency decision because it was not an administrative decision, ignores the definition of agency which includes officer or employee of a county. It also ignores the concession in the Facts by the County that Teton County made the decision acting through the County Road Supervisor. *See* County Br. at 2.

IV.

PROPRIETARY VERSUS REGULATORY DISTINCTION INAPPLICABLE

The County asserts, without reference to statute, ordinance or other authority that this is a proprietary decision not a regulatory decision and therefore not subject to review. (County Br. at 6). In their law review article “The Governmental-Proprietary Distinction in Constitutional Law”, the University of Georgia law professor authors advise that “[t]he governmental-proprietary distinction has led a stormy life. Courts have characterized it as “illusory,” a “quagmire,” a rule of law that is inherently unsound,” and as a talismanic formula that results in “unenlightening characterizations of States’ activities.” *Wells and Hellerstein* “The Governmental-Proprietary Distinction in Constitutional Law”, Virginia Law Review (1980) http://digitalcommons.law.uga.edu/fac_artchop/379 (herein Wells & Hellerstein) at 1073 (footnote and other citations omitted).

The law professor authors go on to point out that “Commentators have branded the distinction as “probably one of the most unsatisfactory known to the law,” and have questioned its internal coherence and have dismissed it as irrelevant in constitutional decisions. *Id.* See, also, 2A McQuillin, Municipal Corporations § 53.72 (3rd ed.) (“[the governmental-proprietary] distinction has resulted in inconsistent and highly artificial judicial distinctions in its application to municipal activities. The inequities and incongruities resulting from attempts to fit particular conduct into one or the other of these two categories has made the doctrine unsound and unworkable”); *Indian Towing Co. v. United States*, 350 U.S. 61, 65, 76 S.Ct. 122, 100 L.Ed. 48 (1955) (declining to apply the distinction in the context of the Federal Torts Claim Act and characterizing the distinction as “inherently unsound”).

Moreover, the distinction traditionally related to issues of immunities and the interaction of federal versus state immunities under the Eleventh Amendment. In the context of immunities courts have observed that, “[g]overnmental entities acting in a proprietary function opens the

County up to liabilities. Only governmental entities acting in furtherance of a proprietary function will be subject to liability under ordinary principles of tort law.” *See Heeran v. Long Island Power Authority*, 36 N.Y.S. 165 (2016). In other words, whether it is governmental or proprietary does not affect the ability to appeal but the application of immunity.² The County’s use of this distinction should have no impact on whether the case can be appealed.

V.

APPEAL IS TIMELY AND PROPERLY FILED

The County concedes that the statute begins when the party is charged with knowledge. *See* County Br. at ¶ 6. The Clarks make clear that they were not aware until September and filed their appeal within thirty days. Any sign that was posted was posted behind the porta potty and there is no evidence that the Clarks saw the sign or the staking or were aware of the purpose of the staking. On the contrary, the first time the Clarks were aware was when they went to move the dozer. To the extent this is a factual question it cannot be decided by a motion to dismiss or even summary judgment.

Put simply, there is no “sleeping on rights” as asserted by the County, as the Clarks were unaware. The Clarks have advised that they did not have notice of the permitting and there is no suggestions or allegation by the County that actual notice of the permitting was given them either before or after the decision. A motion to dismiss is inappropriate where it turns on a contested fact.³

² Given the County’s position, it would seem that the Clarks could seek a claim against the supervisor’s action under principles of tort without regard to immunity if the action is proprietary as claimed by the County rather than a government function.

³ The Applicant/Intervenors have asserted that there was constructive and actual notice which is factually contested by the Clarks.

With respect to the insinuation that the Appeal was not properly filed, the Appeal was taken to the County Clerk for filing and the Clarks were advised that it had to be filed specifically with the County Agency. As a result, the Clarks were not permitted to file with the County Clerk and appropriately filed the document as instructed by the County Clerk.

VI.

CLARKS ARE AGGRIEVED PARTY

The Clarks have standing and constitute aggrieved persons as alleged in the Appeal. Specifically “in the context of zoning or land use planning, [a]n aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest that is or will be affected by the action of the zoning authority in question. An individual having standing must have a definite interest exceeding the general interest in community good shared in common with all citizens.” E.C. Yokley, 4 *Zoning Law and Practice* § 24–3 at 194 (4th ed.1979) (footnote omitted) (cited in *Hoke v. Moyer*, 865 P.2d 624,628 (Wyo. 1993)).

The Clarks are adjacent to the property on the side where the driveway is being relocated. The driveway negatively impacts their adjacent property where the driveway is now immediately next to the Clark’s property where businesses are being run through that driveway which causes additional traffic and negatively impacts the Clark’s property values.

This is not the situation as in *Jolle v. State Loan and Investment Board*, 2002 WY 7, 38 P.3d 1073 (Wyo. 2002), a case cited by the County (see County Br. at 7), where the issue was a claim that a County Board’s decision to change a public meeting schedule from monthly to bimonthly did not make the Appellant an aggrieved party because only potential or possible harms were stated. There is actual harm to the adjacent property.

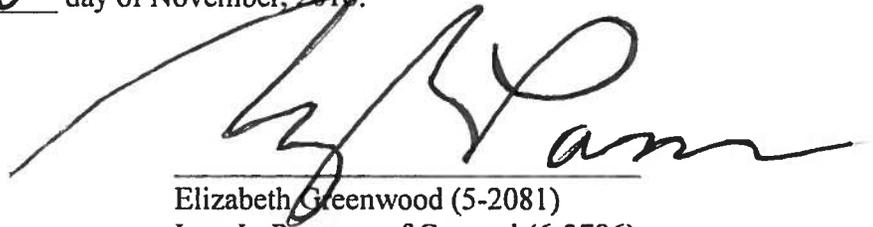
The Wyoming Supreme Court has decided a number of cases involving questions of standing in zoning and/or land use actions which support the Clarks' position. In *Hoke*, 865 P.2d at 628, the Court determined that the appellant had standing to contest the Teton County Board of County Commissioners' decision allowing a higher density zoning category for a subdivision adjacent to his property. In finding standing, the Court said that doubling the density on the adjacent property raised "a number of perceptible harms for a property owner which are different than the harm to the general public, such as increased traffic and congestion." *Id. See also Hirschfield v. Bd. of County Comm'rs of County of Teton*, 944 P.2d 1139, 1143 (Wyo.1997) (holding landowners had standing to challenge an agency decision which would have the effect of doubling the housing density previously allowed on adjoining land). In *Northfork Citizens for Responsible Development v. Park County Bd. Of County Com 'rs*, 2008 WY 88, 189 P.3d 260 (Wyo. 2008), the litigants, who lived on property adjacent to a proposed subdivision, established standing by showing potential harm that exceeded the general public's interest. They asserted the proposed land use change would increase the housing density on the adjacent land and violated other county land use regulations, including open space requirements, which could interfere with their scenic views and have adverse impacts on their ability to observe and enjoy the wildlife on their own properties. 2008 WY 88, ¶¶ 13–14, 189 P.3d at 263–65. In *Cox v. City of Cheyenne*, ¶ 14, 79 P.3d 500, 506 (Wyo. 2003), the Wyoming Supreme Court determined that adjoining landowners had standing to challenge a municipality's annexation decision that would increase housing density, leading to increased traffic and congestion and health and safety concerns.

VII.

CONCLUSION

For the foregoing reasons, it is respectfully requested that that the Contestee's *Motion to Dismiss* be DENIED. It is also requested that should the interpleader action filed by the Huser/Sunigas be granted, that this Response be applied equally to that interpleader action, with leave to amend and supplement should that interpleader action be granted, and for such other and further relief as this Tribunal deems just and necessary.

Respectfully submitted this 10th day of November, 2016.



Elizabeth Greenwood (5-2081)
Inga L. Parsons, of Counsel (6-3786)
Travis J. Bing, Associate (7-5163)
Greenwood Law, LLC
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Pinedale, WY 82941
(307) 367-6814

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of November, 2016, a true and correct copy of the foregoing was served upon the following persons by the method indicated below:

By Regular US Mail:

Sherry L. Daigle
Teton County Clerk
Teton County Wyoming
200 S. Willow St.
Jackson, WY 83001

By Regular US Mail and Email:

Teton County Engineer
c/o Keith Gingery
Chief Deputy County Attorney
Teton County Wyoming
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