

DISTRICT COURT, WELD COUNTY, COLORADO
915 19th Street
Greeley, Colorado 80631

MOTHERLOVE HERBAL COMPANY, a Colorado Certified B Corporation, **INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC.**, a Colorado Nonprofit Corporation, **ROCKIN S RANCH LLC**, a Colorado Limited Liability Company, **JOHN CUMMINGS**, an Individual, **DAVID KISKER**, an Individual, **GARY OPLINGER**, an Individual, **WOLFGANG DIRKS**, an Individual, and **JAMES PIRAINO**, an Individual,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO (including all of the individual Commissioners in their official capacities: Chair Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steven Moreno, and Julie Cozad).

Defendant.

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▲ COURT USE ONLY ▲

Case No.

Division:

**COMPLAINT FOR RELIEF PURSUANT TO C.R.C.P. 106(a)(4) AND FOR
DECLARATORY RELIEF**

Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, David Kisker, Gary Oplinger, John Cummings, and James Piraino

(collectively, “Plaintiffs”), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, hereby submit their Complaint Pursuant to C.R.C.P. 106(a)(4) against the Defendant the Board of County Commissioners of Weld County (including all of the individual Commissioners in their official capacities, Chair Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steven Moreno, and Julie Cozad) (the “Weld County Commissioners”) and state as follows in support thereof:

NATURE OF THE ACTION

1. This is an action by owners and leaseholders in unincorporated Weld County and Larimer County that live and work on properties that surround and are adjacent to a 131-acre parcel, which until recently has primarily been used as agricultural farmland to grow alfalfa (the “Proposed Site”).¹ On August 12, 2015—over the objection of the Weld County Planning Commission, the recommendation of the staff of the Weld County Department of Planning Services, the opposition of every neighboring county and municipal government, and the vocal protest of dozens of neighboring land users—the Weld County Commissioners approved an Application for an Amendment to a Site Specific Development Plan and for a Use by Special Review Permit (the “Application,” which the Weld County Commissioners refer to as USR15-0027) filed by Martin Marietta, a Fortune 1000 company with corporate headquarters in North Carolina.

2. The approved Application permits Martin Marietta to construct and operate a massive concrete and asphalt production, processing, and distribution center on the Proposed Site. As set forth in its Application, Martin Marietta’s intended (and now approved) use of the Proposed Site includes the following (the “Proposed Use”):

- a. A 110-foot tall batch concrete plant;
- b. A 100-foot tall continuous (drum mix) asphalt plant powered by on-site natural gas electric generation;
- c. A rail spur that can accommodate 121-car trains completely stopping and delivering—over the course of eight hour unloading periods—full trainloads of aggregate and/or asphalt cement to the site up to three times per week;
- d. A materials processing facility for recycling and wholesale and retail sales of aggregate and other construction materials, including washing, screening, sorting, stockpiling, unloading, and loading of sand, rock, gravel, crushed stone, overburden, clay, and topsoil;

¹ The Proposed Site is depicted in relation to all of the Plaintiffs that now appear before this Court on the attached **Exhibit A** and **Exhibit B**.

- e. Storage of up to 680,000 cubic yards of construction materials, including sand, rock, gravel, aggregate, cement, and various additives; and
- f. Storage of up to 4.5 million gallons of asphalt cement, 24,000 gallons of emulsified asphalt cement, 37,000 gallons of diesel fuel, and 10,000 gallons of propane.

Beginning in 2017, Martin Marietta projects that the Proposed Use will generate 1,120 “site trips” per day and that this number will increase up to an estimated 2,260 “site trips” per day by 2035. As approved by the Weld County Commissioners, the cement and asphalt production, processing, and transloading (between rail and truck) facility may potentially operate twenty-four hours a day/seven days per week.²

3. Consistent with its existing zoning designation as agricultural land, the Proposed Site is not located within an industrial corridor. Rather, the Proposed Site is surrounded by single-family homes, working farmland, and light agribusinesses consistent with its rural setting. The Plaintiffs represent all of these surrounding, lower-impact land uses. Many of the Plaintiffs appeared before the Weld County Commissioners at the Weld County Commissioner’s August 12, 2015 hearing (the “Hearing”) and all of the Plaintiffs presented substantial evidence in opposition to the intensive and incongruous Proposed Use. Despite this unified and concerted opposition, the Weld County Commissioners approved the Application at the conclusion of the Hearing.

4. Now, the Plaintiffs timely appeal the Weld County Commissioner’s unlawful approval of the Application. As set forth below, the Weld County Commissioners abused their discretion in approving the Application for four principal reasons:

- (1) The Proposed Use is unlawful under the Weld County Code because (i) a continuous (drum mix) asphalt plant is not an authorized Use by Special Review on land within the A (Agricultural) Zone District; and (ii) the Proposed use is not related to onsite mining operations as required for Use by Special Review permit for a cement batch plant and transloading facility on land within the A (Agricultural) Zone District;
- (2) The decision to approve the Use by Special Review permit was arbitrary and capricious and not based upon competent evidence sufficient to satisfy each of the essential elements required under the Weld County Code. Specifically, the administrative record is devoid of any evidence that (i) Martin Marietta made any attempt to preserve Prime farmland; (ii) that

² The Proposed Use may have been altered slightly before it was approved at the “Hearing” (defined below). However, as of the date of filing of this Complaint, a “final” version of the approved Application has not been provided to the Plaintiffs despite several requests. Accordingly, the Plaintiffs describe the Proposed Use in terms of the amended version of the Application that was submitted to the Weld County Commissioners prior to the Hearing.

the Proposed Use is consistent with existing and future land uses near the Proposed Site; and (iii) that the Proposed Use will not severely impact the health, safety, and welfare of neighboring land users as a result of increased trucking and train traffic, dust, pollution, noise, light pollution, viewshed impacts, and odors that will result from the Proposed Use;

- (3) The quasi-judicial approval of the Application violated basic notions of due process because (i) the Weld County Commissioner's based their decision on irrelevant political considerations and not an application of the governing law to the site-specific facts and (ii) the appearance of impropriety resulting from at least one commissioner's refusal to disclose her obvious conflict of interest and bias in favor of the Application; and
- (4) The decision on the Application failed to consider the impact of the many additional proposed industrial uses in the immediate vicinity of the Proposed Site such that the Weld County Commissioners abused their discretion in failing to consider the total impact of these proposed land use changes, which are expected to irreparably injure the health, safety, and welfare of the Plaintiffs and irreversibly alter the character of the surrounding properties.

As explained in detail below, each of these arguments provides an independent basis to conclude that the Weld County Commissioner's abused their discretion in approving the Application.

5. Accordingly, the Plaintiffs bring this action for judicial review pursuant to C.R.C.P. 106(a)(4) and respectfully request that this Court reverse the Weld County Commissioner's unlawful approval of Martin Marietta's Application to construct and operate a massive asphalt and cement production and processing facility virtually on top of a wildly successful organic farm, a future wedding and event center, and scores of established single-family homes. The Plaintiffs further seek Declaratory Relief, including a determination that the Proposed Use is unlawful under the Weld County Code.

JURISDICTION AND VENUE

6. The Proposed Site is located at 27486 County Road 13 in unincorporated Weld County.³

7. Jurisdiction is proper in this Court pursuant to C.R.C.P. 106 and C.R.C.P. 57. *See Margolis v. Dist. Court*, 638 P.2d 297, 305 (Colo. 1981) (explaining that land use decisions are quasi-judicial in nature).

³ According to the Application, the Proposed Site is more particularly described as part of the south half of Section 18, Township 5N, Range 67W (Weld County Assessor's Office Parcel Nos. 0957-18-3-00-044 and 0957-18-0-00-009).

8. This action is timely filed within twenty-eight days of the Hearing and approval of the Application, as required by C.R.C.P. 106(b).

9. Venue is proper before this Court pursuant to C.R.C.P. 98(a) because this is an action affecting real property in Weld County Colorado.

THE PARTIES

10. The Defendants the Weld County Board of County Commissioners (including all of the Commissioners in their official capacities) (the “Weld County Commissioners”) is the governing body of Weld County Colorado, a home rule County. *See generally* Art. III of the Weld County Home Rule Charter. *Id.* § 3-8. Pursuant to the Weld County Charter, the Weld County Commissioners are responsible for amending the Weld County Code. Pursuant to the Weld County Code, the County Commissioners are responsible for reviewing and resolving applications for Use by Special Review permits and amendments to Site Specific Development Plans. Weld County Code §§ 23-2-230, 23-8-50.⁴

11. All of the Plaintiffs own homes or businesses adjacent to or in the immediate vicinity of the Proposed Site.⁵

- a. Plaintiff Motherlove Herbal Company (“Motherlove”) is a Colorado Certified B Corporation based in Fort Collins, Colorado. For nearly three decades, Motherlove has operated as a small, family-owned business in Northern Colorado, developing and producing Certified Organic⁶ herbal products for pregnant and new mothers and infants. Motherlove is widely seen as an industry leader in developing and producing safe, Certified Organic products for nursing mothers and has experienced substantial growth in recent years. As a result of this growth, in recent years, Motherlove became concerned that it might exhaust the accessible supply of the specialized organic herbs used in its products (including blessed thistle, goats rue, and calendula) such that it might be unable to increase production to meet ever-increasing demand. In 2012, Motherlove decided to confront this potential challenge head on and

⁴ For the Court’s convenience, the Plaintiffs have attached copies of all sections of the Weld County Code that are relied upon herein as **Exhibit C**.

⁵ While Colorado common law provides that any adjacent landowner has automatic standing to challenge a quasi-judicial land use determination, *see Wells v. Lodge Props., Inc.*, 976 P.2d 321, 324 (Colo. App. 1998), it also grants standing to land users that will be injured by the proposed use, regardless of adjacency. *See, e.g., Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988), *cert. denied* (Colo. Feb. 6, 1989) (upholding the trial court’s finding that land users one-half mile from the proposed site had standing to challenge the approval of a concrete batch plant because the proposed use would injure the landowners through increased dust and traffic).

⁶ “Certified Organic” is a specialty label applied to products that adhere to strict criteria promulgated and enforced by the U.S. Department of Agriculture. As part of the certification process and its continued use of this label, Motherlove is subjected to regular inspections by the Colorado Department of Agriculture.

entered into a multiyear lease for a 120-acre farm in unincorporated Larimer County. Today, Motherlove has expended substantial resources to transform its leased property into a working organic herb farm capable of supplying the necessary, locally-sourced, sustainable, and Certified Organic herbs (as well as other organic fruits and vegetables) needed to produce many of its specialty products.

Prior to Martin Marietta's public announcement of its Proposed Use, Motherlove was exploring the possibility of dramatically extending its lease and expanding its operations at the farm to include educational workshops and demonstrations related to organic and sustainable horticulture. However, following Martin Marietta's announcement of its intended use for the Proposed Site—which at its closest point sits approximately 400 yards to the east of Motherlove's organic farm—Motherlove's near-term and long-term plans for the farm have been substantially disrupted. Motherlove's organic farm is depicted in relation to the Proposed Site on the attached **Exhibit A** as "Motherlove."

As Motherlove expressed at the Hearing before the Weld County Commissioners, where it spoke and presented evidence in opposition to the Application and the Proposed Use, Motherlove is gravely concerned that the Proposed Use will result in the introduction of heavy metals and other contaminants in the soil and water that it uses to cultivate its Certified Organic herbs and other crops. Because Motherlove is a Certified B Corporation, it has both an ethical and a legal obligation to ensure that the herbs it uses to create its products are non-toxic and are suitable for use by pregnant and nursing mothers and infants. Furthermore, Motherlove distributes its products around the world, and many of these markets—including California Canada, and the European Union—have stringent testing standards related to heavy metals to ensure that health products are safe for human use and consumption. As Motherlove explained to the Weld County Commissioners, Motherlove is concerned that Martin Marietta's Proposed Use is so inconsistent with Motherlove's existing, neighboring land use that Motherlove will be forced to terminate its lease and relocate its organic farm at a considerable loss. Motherlove would not do so lightly, as establishing a new farm requires a substantial investment of both money and time, but if the Proposed Use is permitted to go forward, Motherlove believes it may have no other choice than to abandon its existing agricultural land use.

- b. Plaintiff Rockin S Ranch is a Colorado limited liability company that was organized by Cheryl "Chris" Friede to pursue her dream of opening and operating a wedding and event venue on a 35-acre property that she owns in unincorporated Weld County. Ms. Friede has been working to develop the

Rockin S Ranch for almost four years and has invested a significant amount of time and money to develop a business plan and make improvements to the property, including cleanup, excavation, and complete architectural planning for the property's 1950's dairy barn and surrounding area. In June 2015, the Weld County Commissioners approved her site specific development plan and Use by Special Review permit, USR15-0028, for the Rockin S Ranch to be used as a wedding and event venue, including guest cabins for weddings and corporate retreats. Rockin S Ranch had intended to open in late spring of 2016. The Weld County Commissioners enthusiastically approved the Rockin S Ranch's application for Use by Special Review permit. As they commented on the administrative record, the Weld County Commissioners were pleased that Ms. Friede had taken advantage of Weld County's Small Business Incentive Program in developing the Rockin S Ranch's business plan and that the Rockin S Ranch had worked successfully with neighbors to mitigate any concerns of surrounding land users.

However, the Rockin S Ranch's plans have now been placed on hold indefinitely as a result of Martin Marietta's Application and the Weld County Commissioner's approval of the Proposed Use. The 35-acre parcel owned by Ms. Friede that was going to be used by Rockin S Ranch sits immediately adjacent to the eastern boundary of the Proposed Site. The location of Ms. Friede's property (to be used by Rockin S Ranch) is depicted on the attached **Exhibit A** as "Rockin S Ranch." As Ms. Friede expressed and confirmed with evidence at the Hearing, Rockin S Ranch is seriously concerned that the Proposed Use will destroy its vision for a serene and beautiful event space. As approved by the Weld County Commissioners, Rockin S Ranch believes that the Proposed Use will result in noise, traffic, light pollution, air pollution, odors, and visual impacts that will dramatically reduce the value of Rockin S Ranch's intended and approved land use. Rockin S Ranch has consulted with a number of local wedding and event planners, and all of these industry experts have confirmed that it will be difficult for Rockin S Ranch to operate a viable business if Martin Marietta proceeds with the Proposed Use at the Proposed Site. Both the price that Rockin S Ranch could charge for its space and the number of bookings it can expect to host will be substantially reduced if Martin Marietta proceeds with the Proposed Use. If the Proposed Use is permitted at the Proposed Site, Rockin S Ranch will be unable to move forward as planned to open its wedding and event venue on Ms. Friede's 35-acre parcel.

- c. Plaintiff John Cummings is an individual that owns approximately 95 acres of farmland in unincorporated Weld County that is located approximately 1000 feet to the southwest of the Proposed Site. The location of Mr. Cummings' property is depicted on the attached **Exhibit A** as the "Cummings Property."

Mr. Cummings' property contains several buildings including a single-family residence that was built in 2008. Mr. Cummings' property also contains approximately 95 acres of productive farmland where he grows corn, millet, and wheat. Mr. Cummings appeared and presented evidence at the Hearing in opposition to the Application. Mr. Cummings believes that the Proposed Use is inconsistent with existing and future land uses on and around the Proposed Site and that the Proposed Use will irreparably injure his right to the use and quiet enjoyment of his property, including his continued ability to farm his property.

- d. Plaintiff the Indianhead West Homeowners Association is a Colorado nonprofit corporation organized for the benefit and common governance of the homeowner's located in the western third of the Indianhead Estates Subdivision in unincorporated Weld County.⁷ The Indianhead West Homeowners Association is comprised of approximately thirty-two members that own lots and/or single-family residences within the western third of the Indianhead Estates Subdivision. The western third of the Indianhead Estates Subdivision sits immediately adjacent to the Proposed Site, and all of the members of the Indianhead West Homeowners Association own property that is approximately no more than a half mile from the Proposed Site. Further, the Indianhead West Homeowners Association owns approximately three acres of property that it maintains as open space that sits immediately adjacent to the Proposed Site. The location of the parcel owned by the Indianhead West Homeowners Association is depicted on the attached **Exhibit B** as "IHW HOA." Representatives of the Indianhead West Homeowners Association appeared and presented evidence at the Hearing in opposition to the Application. The Indianhead West Homeowners Association believes that the Proposed Use is inconsistent with existing and future land uses on and around the Proposed Site and that the Proposed Use will irreparably injure its members' rights to the use and quiet enjoyment of their property.
- e. Plaintiff David Kisker is an individual that owns and lives at property located in the Indianhead Estates Subdivision at 6681 Apache Road in unincorporated Weld County. Mr. Kisker's property and single-family residence are located within a half mile of the Proposed Site and Mr. Kisker is a member and director of the Indianhead West Homeowners Association, which owns property adjacent to the Proposed Site. The location of Mr. Kisker's property is depicted on the attached **Exhibit B** as "Kisker." Mr. Kisker has opposed

⁷ The Indianhead Estates Subdivision is a collection of approximately 100 single-family homes located on approximately one-acre lots in a neighborhood located near the intersection of U.S. 34 and County Road 13 (which is the border between Weld County to the east and Larimer County to the west) in unincorporated Weld County. The first homes were built in the Indianhead Estates Subdivision in the late-1970's and the subdivision has been used exclusively for residential purposes since that time.

the Application and the Proposed Use since it was first publicly announced in January 2015 and he participated extensively in the administrative proceedings before the staff of the Weld County Department of Planning Services and the Weld County Planning Commission. Mr. Kisker appeared and presented evidence at the Hearing in opposition to the Application. Mr. Kisker believes that the Proposed Use is inconsistent with existing and future land uses on and around the Proposed Site and that the Proposed Use will irreparably injure his right to the use and quiet enjoyment of his property.

- f. Plaintiff Gary Oplinger is an individual that serves as a trustee for the Oplinger Gary L Trust, which owns property located in the Indianhead Estates Subdivision at 27687 Hopi Trail in unincorporated Weld County. Mr. Oplinger resides at the single-family residence on this property, which is immediately adjacent to the land owned by the Indianhead West Homeowners Association property that is adjacent to the Proposed Site. Mr. Oplinger is a member of the Indianhead West Homeowners association and lives within less than 400 feet of the Proposed Site. The location of Mr. Oplinger's property is depicted on the attached **Exhibit B** as "Oplinger." Mr. Oplinger appeared and presented evidence at the Hearing in opposition to the Application. Mr. Oplinger believes that the Proposed Use is inconsistent with existing and future land uses on and around the Proposed Site and that the Proposed Use will irreparably injure his right to the use and quiet enjoyment of his property.
- g. Plaintiff Wolfgang Dirks is an individual that serves as a trustee for the Dirks Family Trust, which owns real property located in the Indianhead Estates subdivision at 6825 Apache Road in unincorporated Weld County. Mr. Dirks resides in a single-family residence on this property and is a member and the president of the Indianhead West Homeowners Association, which owns property immediately adjacent to the Proposed Site. Mr. Dirks's residence is within approximately 400 feet of the Proposed Site. The location of Mr. Dirks's property is depicted on the attached **Exhibit B** as "Dirks." Mr. Dirks wrote several letters to the Weld County Commissioners and presented substantial evidence in opposition to the Application. Mr. Dirks believes that the Proposed Use is inconsistent with existing and future land uses on and around the Proposed Site and that the Proposed Use will irreparably injure his right to the use and quiet enjoyment of his property.
- h. Plaintiff James Piraino is an individual that serves as a trustee for the Piraino Family Trust, which owns real property located in the Indianhead Estates subdivision at 27660 Hopi Trail in unincorporated Weld County. Mr. Piraino resides in a single-family residence on this property and is a member of the Indianhead West Homeowners Association, which owns property immediately adjacent to the Proposed Site. Mr. Piraino's residence is within approximately

400 feet of the Proposed Site. The location of Mr. Piraino's property is depicted on the attached **Exhibit B** as "Piraino." Mr. Piraino appeared and presented evidence at the Hearing in opposition to the Application. Mr. Piraino believes that the Proposed Use is inconsistent with existing and future land uses on and around the Proposed Site and that the Proposed Use will irreparably injure his right to the use and quiet enjoyment of his property.

12. As more particularly described throughout this Complaint, all of the Plaintiffs have suffered an injury-in-fact as a result of the Weld County Commissioner's August 12, 2015 approval of the Application. These injuries are both economic and non-economic and are unique to individuals and organizations that own property, live, and/or operate a business adjacent to or within close proximity to the Proposed Site. These injuries will cause deleterious impacts on the all of the Plaintiffs' health, safety, and welfare, including but not limited to the following:

- a. Increased trucking traffic to and from the Proposed Site, including 1,120 new "site trips" per day in 2016 and increasing to an estimated 2,260 "site trips" per day by 2035;
- b. Increased rail traffic to, from, and in close proximity to the Proposed Site, including upwards of three fully loaded 121-car trains per week entering and exiting the Proposed Site and crossing nearby roads;
- c. Increased and localized air pollution as a result of the Proposed Use, including odors, dust, and noxious emissions;
- d. Increased noise pollution resulting from the Proposed Use, which permits Martin Marietta to engage in operations twenty-four hours per day and seven days per week;
- e. Increased and localized water and soil pollution;
- f. Increased light pollution resulting from the Proposed Use, which permits Martin Marietta to engage in operations twenty-four hours per day and seven days per week;
- g. Diminution of the quality of existing viewsheds, including the construction of at least nine towers that will be at least 100 feet tall;
- h. Diminution of property values;
- i. Substantially increased risk of an industrial fire that cannot be extinguished by existing fire response services that presently serve the Proposed Site; and

- j. The irreparable alteration of the character and land use intensity of the Proposed Site, including the destruction of existing productive Prime farmland, and the surrounding area, such that future industrial uses proposed within this primarily agrarian area are more likely to be permitted and approved.

STANDARD OF REVIEW

13. Government actions are reviewed pursuant to C.R.C.P. 106 for an abuse of discretion. *See generally Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54, 285 P.3d 986 (Colo. 2012); *Hewitt v. State Civil Serv. Comm.*, 167 P.2d 961, 963 (Colo. 1946); *Gallegos v. Garcia*, 155 P.3d 405 (Colo. App. 2006); *Venard v. Dept. of Corr.*, 72 P.3d 446 (Colo. App. 2003).

14. A government action taken in violation of applicable law constitutes a *per se* abuse of discretion. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004).

15. A government abuses its discretion when its decision is not reasonably supported by competent evidence within the administrative record. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo. 2008). "Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* at 900.

16. A quasi-judicial decision must provide for due process and adhere to fundamental principles of fairness. *See generally Churchill*, 2012 CO 54, 285 P.3d 986; *see also Canyon Area Residents v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 908 (Colo. App. 2006). The hearing process must be conducted in an atmosphere evidencing fairness in the adjudication of matters before a board. *Id.*

APPLICABLE WELD COUNTY LAW

Zoning and Land Use under the Weld County Code

17. The land use laws applicable to unincorporated Weld County are set forth in Chapters 22 through 27 of the Weld County Code. Relevant here, Chapter 22 of the Weld County Code provides a Comprehensive Plan for unincorporated Weld County and Chapter 23 of the Weld County Code sets forth the zoning scheme that governs land uses in unincorporated Weld County.

18. In the present matter, the Proposed Site is zoned within the "A (Agricultural) Zone District."

19. Article III of Chapter 23 of the Weld County Code sets forth the permissible uses within such a zone. Specifically, land within the A (Agricultural) Zone District is

[C]onsidered a valuable resource which must be protected from adverse impacts resulting from uncontrolled and undirected business, industrial and residential land USES. The A (Agricultural) Zone District is established to maintain and promote agriculture as an essential feature of the COUNTY. The A (Agricultural) Zone District is intended to provide areas for the conduct of agricultural activities and activities related to agriculture and agricultural production without the interference of other, incompatible land USES The A (Agricultural) Zone District regulations are established to promote the health, safety and general welfare of the present and future residents of the COUNTY.

Weld County Code § 23-3-10.⁸

20. Consistent with this purpose, the uses permitted by right within the A Zone District are limited to agricultural and related, complimentary uses such as the cultivation and storage of crops, the grazing of livestock, the construction of single-family dwellings, and the siting of a mobile home. *See id.* § 23-3-20. The A Zone District also presumptively permits certain public uses (e.g., use as a police station, park, or foster home) as well as oil and gas production facilities. *Id.*

21. In stark contrast to the uses permitted within the A (Agricultural) Zone District, the Weld County Code provides the following description of permissible uses within Industrial Zone Districts:

The purpose of the Industrial Zone Districts is to provide protective zones for the DEVELOPMENT and operation of industrial USES. The regulations contained herein have been established so as to provide a healthful operating environment for industry; to protect industry from the encroachment of COMMERCIAL and residential USES which may be adverse to the operation and expansion of such industry; to protect industries within the district from the adverse effect of other, incompatible industries; **to reduce to a minimum the impact of industries on surrounding, nonindustrial land USES to prevent detrimental impacts which may negatively affect the future USE or DEVELOPMENT of ADJACENT properties or the general**

⁸ As an aid to readers, the Weld County Code uses all capital letters to signify that a word is defined elsewhere in the Weld County Code (e.g. “USES” and “COUNTY,” *supra*).

NEIGHBORHOOD as defined in Chapter 22 of this Code; and to promote the health, safety and general welfare of the present and future residents of the COUNTY.

Id. § 23-3-300 (emphasis added).

Uses By Special Review within the A (Agricultural) Zone District

22. In contrast to these uses by right, the Weld County Code does potentially permit more intensive uses of lands within the A Zone District. *See id.* § 23-3-40. These possible uses include mineral resource development facilities, agricultural wholesalers/support businesses, recreational facilities, and public utilities.

23. Relevant here, section 23-3-40.A permits the following possible uses by special review:

A. **Mineral resource development facilities including:**

1. OIL AND GAS STORAGE FACILITIES.
2. OIL AND GAS SUPPORT AND SERVICE.
3. Open pit MINING and materials processing, subject to the provisions of Article IV, Division 4 of this Chapter.
4. **Asphalt and concrete batch plants.**
5. Coal gasification facilities.
6. MINING or recovery of other mineral deposits located in the County, subject to the provisions of Article IV, Division 4 of this Chapter.
7. **TRANSLOADING.**

(Emphasis added.)

24. Although the Weld County Code contemplates certain enumerated intensive land uses within the A Zone District, it also creates an intensive review process for such Uses by Special Review in light of the potentially significant and incongruous impacts of such atypical uses. *See generally* Weld County Code §§ 23-2-200 *et seq.* This process includes substantial application requirements

25. Section 23-2-200.A of the Weld County Code explains:

Uses by Special Review are USES which have been determined to be more intense or have a potentially greater impact than the Uses Allowed by Right in a particular zone district. Therefore, Uses by Special Review require additional consideration to ensure that they are established and operated in a manner that is compatible with existing and planned land USES in the NEIGHBORHOOD.⁹ The additional consideration or regulation of Uses by Special Review, and the application to a Use by Special Review of Performance, Design and Operations Standards listed both herein and for applicable USES from any zone district, are designed to protect and promote the health, safety, convenience and general welfare of the present and future residents of the COUNTY.

Because a Use by Special Review permit requires a demonstration with compatibility with the “NEIGHBORHOOD,” the Weld County Code grants standing to any landowner with the “NEIGHBORHOOD” that seeks to challenge the proposed Use by Special Review.

26. Any party that wishes to file an application for a Use by Special Review permit must first schedule a application review meeting with the staff of the Department of Planning Services. *Id.* § 23-2-210. The staff must then prepare comments for use by the Planning Commission addressing all applicable applications of the Weld County Code. *Id.*

27. In general, an application for a Use by Special Review permit must first be reviewed by the Planning Commission before the Planning Commission’s recommendation is to be “forwarded to and considered by the Board of County Commissioners.” *Id.* § 23-2-200.B. The Planning Commission must hold a public hearing to consider the application for the Use by Special Review permit. *Id.* § 23-2-220. The applicant has the burden of proof to convince the Planning Commission that the application for the Use by Special Review complies with all applicable provisions of the Weld County Code. *Id.* Specifically, the applicant must demonstrate compliance with the Design Standards set forth in section 23-2-240 of the Weld County Code and the Operation Standards set forth in section 23-2-250 of the Weld County Code as well as the following seven factors::

1. That the proposal is consistent with Chapter 22 of this Code and any other applicable code provision or ordinance in effect.

⁹ Section 23-1-90 of the Weld County Code defines “NEIGHBORHOOD” as “When used in this Chapter in reference to a particular LOT, the word NEIGHBORHOOD is intended to describe in a general way the land area which is in the vicinity of the LOT in question and which will be affected to a greater extent than other land areas in the COUNTY by USES which exist on the LOT or are proposed for it. A NEIGHBORHOOD always includes LOTS which are ADJACENT to the LOT under consideration and, depending upon the land USE in question, may include more remote areas as well.”

2. That the proposal is consistent with the intent of the district in which the USE is located.
3. That the USES which would be permitted will be compatible with the existing surrounding land USES.
4. That the USES which would be permitted will be compatible with future development of the surrounding area as permitted by the existing zoning and with the future development as projected by Chapter 22 of this Code or MASTER PLANS of affected municipalities.
5. That the application complies with Article V of this Chapter if the proposal is located within the Overlay District Areas identified by maps officially adopted by the COUNTY.
6. That if the USE is proposed to be located in the A (Agricultural) Zone District, the applicant has demonstrated a diligent effort has been made to conserve PRIME FARMLAND in the locational decision for the proposed USE.
7. That there is adequate provision for the protection of the health, safety and welfare of the inhabitants of the NEIGHBORHOOD and the COUNTY.

Id.

28. Following the Planning Commission's official recommendation, the Weld County Commissioners must also hold a public hearing on the application. *Id.* § 23-2-230. The Weld County Commissioners must analyze the application to ensure that it complies with the same seven factors that govern the Planning Commission's earlier recommendation on the application. *Id.* As with the review by the Planning Commission, an applicant bears the burden of proof to demonstrate compliance with the Design Standards set forth in section 23-2-240 of the Weld County Code and the Operation Standards set forth in section 23-2-250 of the Weld County Code as well as the following seven factors:

1. That the proposal is consistent with Chapter 22 of this Code¹⁰ and any other applicable code provision or ordinance in effect.

¹⁰ Chapter 22 of the Weld County Code contains Weld County's Comprehensive Plan for land use development. Among other guiding principles, the Comprehensive Plans provides that land uses must have "Respect for [Weld County's] Agricultural Tradition." Weld County Code § 22-1-120.B. Further, section 22-2-20 enumerates goals for existing agricultural lands within Weld County. One of these goals is that "County land use regulations should support commercial and industrial uses that are directly related to, or dependent upon, agriculture, to locate within the agricultural areas, when the impact to surrounding properties is minimal, or can be mitigated, and where

2. That the proposal is consistent with the intent of the district in which the USE is located.
3. That the USES which would be permitted will be compatible with the existing surrounding land USES.
4. That the USES which would be permitted will be compatible with future development of the surrounding area as permitted by the existing zoning and with the future development as projected by Chapter 22 of this Code or MASTER PLANS of affected municipalities.
5. That the application complies with Article V of this Chapter if the proposal is located within the Overlay District Areas identified by maps officially adopted by the COUNTY.
6. That if the USE is proposed to be located in the A (Agricultural) Zone District, the applicant has demonstrated a diligent effort has been made to conserve PRIME FARMLAND in the locational decision for the proposed USE.¹¹
7. That there is adequate provision for the protection of the health, safety and welfare of the inhabitants of the NEIGHBORHOOD and the COUNTY.

Id. § 23-2-230.

29. Relevant to the present challenge, with regards to the Design Standards set forth in section 23-2-240 of the Weld County Code, an applicant must demonstrate that “[a]dequate fire protection measures are available on the site for the STRUCTURES and facilities permitted.” Further, “Uses by Special Review in the A (Agricultural) Zone District shall be located on the least prime soils on the property in question unless the applicant can demonstrate why such a location would be impractical or infeasible.” *Id.* § 23-2-240.A.11.

adequate services are currently available or reasonably obtainable.” *Id.* § 22-2-20.G.1. Further, “[c]onversion of agricultural land to nonurban residential, commercial and industrial uses should be accommodated when the subject site is in an area that can support such development, and should attempt to be compatible with the region.” *Id.* § 22-2-20.G.2. Finally, section 22-2-20 of the Weld County Code expressly incorporates a “Right to Farm,” which stated: “Agricultural users of the land should not be expected to change their long-established agricultural practices to accommodate the intrusions of urban users into a rural area.”

¹¹ See also C.R.S. § 35-3.5-101 (“It is further recognized that units of local government may adopt ordinances or pass resolutions that provide additional protection for agricultural operations consistent with the interests of the affected agricultural community, without diminishing the rights of any real property interests.”).

30. Also pertinent to this matter, under the Operations Standards, an applicant bears the burden of proof to demonstrate the following with regards to the proposed special use:

- A. The operation of the USES shall comply with the noise standards enumerated in Section 25-12-101, C.R.S.
- B. The operation of the USES shall comply with the air quality regulations promulgated by the Colorado Air Quality Control Commission.
- C. The operation of the USES shall comply with the water quality regulations promulgated by the Colorado Water Quality Control Commission.
- D. The USES shall comply with the following lighting standards:
 - 1. Sources of light, including light from high-temperature processes such as combustion or welding, shall be shielded so that light rays will not shine directly onto ADJACENT properties where such would cause a nuisance or interfere with the USE on the ADJACENT properties; and
 - 2. Neither direct nor reflected light from any light source may create a traffic hazard to operators of motor vehicles on PUBLIC or private STREETS and no colored lights may be used which may be confused with or construed as traffic control devices.

Weld County Code § 23-2-250.

31. The Weld County Commissioners' decision on the application may only be based upon the Planning Commission file and the information presented to the Weld County Commissioners' public hearing on the application. *Id.*

32. Furthermore, “[w]here reasonable methods or techniques are available to mitigate any negative impacts which could be generated by the proposed USE upon the surrounding area, the Board of County Commissioners may condition the decision to approve the Special Review Permit upon implementation of such methods or techniques and may require sufficient performance guarantees to be posted with the COUNTY to guarantee such implementation.” *Id.*

33. Any approved Use by Special Review must be accompanied by an approved Site Specific Development Plan that is consistent with the requirements set forth in Title VIII to Chapter 23. The Board of County Commissioners “may approve a SITE SPECIFIC DEVELOPMENT PLAN upon such terms and conditions as may reasonably be necessary to protect the public health, safety and welfare. *Id.* § 23-8-50.B.

FACTUAL ALLEGATIONS

The Application and Planning Commission Review

34. Martin Marietta first announced its Proposed Use for the Proposed Site in January 2015.

35. The Proposed Site (as defined above) is a 131-acre parcel in unincorporated Weld County Parcel that is situated with the A (Agricultural) Zone District. The primary existing use of the Proposed Site is as productive Prime farmland used to cultivate alfalfa. The Proposed Site has continuously been used as productive farmland for more than a century and has been designated by Weld County itself as part of the county's network of "Farmlands of National Importance." The Proposed Site is surrounded by Prime farmland, single-family residences on large lots, and other low intensity business uses. The Plaintiffs, which includes nearby homeowners, a specialty organic farm, and a proposed dairy farm themed event center, are representative of all of the existing land uses within close proximity to the proposed site.

36. Martin Marietta's Proposed Use (which has been amended in slight superficial ways since its initial public announcement) includes the construction and operation of the following (defined above as the "Proposed Use"):

- a. A 110-foot tall batch concrete plant;
- b. A 100-foot tall continuous (drum mix) asphalt plant powered by on-site natural gas electric generation;
- c. A rail spur that can accommodate 121-car trains completely stopping and delivering—over the course of eight hour unloading periods—full trainloads of aggregate and/or asphalt cement to the site up to three times per week;
- d. A materials processing facility for recycling and wholesale and retail sales of aggregate and other construction materials, including washing, screening, sorting, stockpiling, unloading, and loading of sand, rock, gravel, crushed stone, overburden, clay, and topsoil; and
- e. Storage of up to 680,000 cubic yards of construction materials, including sand, rock, gravel, aggregate, cement, and various additives and
- f. Storage of up to 4.5 million gallons of asphalt cement, 24,000 gallons of emulsified asphalt cement, 37,000 gallons of diesel fuel, and 10,000 gallons of propane.

Beginning in 2017, Martin Marietta projects that the Proposed Use will generate 1,120 “site trips” per day and that this number will increase up to an estimated 2,260 “site trips” per day by 2035. As approved by the Defendant, the cement and asphalt production, processing, and transloading (between rail and truck) facility may operate twenty-four hours a day/seven days per week.

37. Martin Marietta’s public announcement of its Proposed Use at the Proposed Site was immediately met with substantial opposition from neighboring land users at an initial community outreach meeting in January 2015.

38. Martin Marietta’s Application claims that its Application seeks permission to use the Proposed Site for “[a]n aggregate transloading facility with concrete batch plant and an asphalt plant operations [*sic*] as well.” There is nothing in the Application that indicates that the Proposed Use will be in any way related to “mineral resource development facilities” as required under the Weld County Code. In fact, the aggregate will be delivered from a quarry that Martin Marietta owns in Wyoming—it is this faraway site that will actually be used as a mineral resource development facility.

39. Further, the Application and supporting materials make clear that the Proposed Use will not include an asphalt batch plant (which, if it meets all of the requirements set forth in section 23-2-230, may be authorized an authorized Use by Special Review within an A (Agricultural) Zone District pursuant to section 23-3-40.A of the Weld County Code) but rather will include a continuous (drum mix) asphalt plant that is capable of operating for longer periods of time and can produce substantially more asphalt than an asphalt batch plant. *See* Texas Dept. of Transportation, Pavement Design Guideline, at pp. 6-13, -14 (rev. Jan. 2011), *available at* http://onlinemanuals.txdot.gov/txdotmanuals/pdm/manual_notice.htm (last visited Sept. 8, 2015) (excerpt attached hereto as **Exhibit D**).

40. During the application review process, the staff of the Weld County Planning Services (the “Staff”) solicited the input of surrounding governments as required by section 23-2-330 of the Weld County Code. As incorporated in the final Staff Report (attached hereto as **Exhibit E**), the Staff received the following responses from neighboring governments:

- a. The Town of Johnstown adopted a resolution that states, in part, “if [the Proposed Use] is permitted it would create undesirable, offensive and harmful consequences, inconsistent with the Town of Johnstown’s long-range planning and inconsistent with the best growth and development along the U.S. Highway 34 corridor”;
- b. The Town of Windsor and the City of Greeley submitted agency comments in opposition to the Proposed Use because it is “incompatible with this particular vision that the Town of Windsor and City of Greeley have developed for this area. The [Proposed Use] is an intensive industrial use unsuited for the nature

of this corridor and its impacts likely cannot be fully mitigated. Furthermore, approval of this Use by Special Review, as proposed, would likely establish a sprawling and overly-intense land use pattern for future development of the corridor”; and

- c. Larimer County submitted comments that oppose the Application because the Proposed Use “represents a significant change to the area with regards to traffic, noise, dust and odors, to mention a few. While this area of our County¹² is comprised of a variety of agricultural, rural residential and non-residential uses, compatibility of land uses should still be at the heart of consideration when making a determination of the appropriateness of the proposed use and the mitigation of potential impacts.”

The application was referred to five neighboring governments (Loveland, Johnstown, Windsor, Greeley, and Larimer County) and all five jurisdictions responded that the Proposed Use is incompatible with the present and future uses in the surrounding area. Ex. E, at p. 7.

41. The locations of the five jurisdictions surrounding the Proposed Site (and which unanimously opposed the Application) are depicted on the attached **Exhibit F**. The Proposed Site is adjacent to Larimer County, within approximately a half mile of Johnstown and Windsor, and within less than three miles of Loveland and Greeley.

42. Following the application review process, the Staff issued a report strongly recommending the denial of the Application. Among the many findings in the Staff Report, the Staff concluded the following:

- a. The Proposed Use will remove approximately 90 acres of Prime farmland in violation of section 22-2-20.G.1 – A.Policy 7.1, which requires that uses by special review in the A Zone District should be “directly related to, or dependent upon, agriculture.” Ex. E, at 6.
- b. The Proposed Use will have substantial impacts on surrounding land uses, including dust, noise, and odors, which will “interfere with the neighbors ability to have peaceful enjoyment of their property.” *Id.*
- c. “The placement of a heavy industrial use, such as Martin Marietta is proposing, is a disturbance to the existing residential area and is not compatible with the existing land uses or the vision of this region. This area is a gateway into Weld County and the land uses in this area should reflect this significance to the residents of- [*sic*] and visitors to Weld County.” *Id.* at 7.

¹² Although the Proposed Site is in Weld County, it is directly adjacent to Larimer County.

- d. The Proposed Use will result in a substantial increase in traffic and a resulting increase in safety risks: “[t]he increased traffic increases the potential for accidents between trucks & cars and trucks & trains. The impact of the traffic will adversely impact the roadway facilities in the area.” *Id.* at 8.
- e. The Proposed Use is inconsistent with existing uses as evidenced by the substantial number of communications that Staff received in opposition to the Application from neighboring land users. *Id.* at 9.

43. In light of the foregoing, the Staff concluded “that the negative impacts are such that there are no conditions that could be placed on this [Proposed Use] that would ensure the compatibility with the surrounding existing land uses.” *Id.* at 11.

44. The Staff Report is incorporated into the administrative record, *see* Weld County Code §§ 23-2-20.B.2, -30.A, and provides substantial evidence that Martin Marietta failed to meet its burden to demonstrate the many factors required for approval of a use by special review permit under the Weld County Code.

45. The Planning Commission held its public hearing to consider the Application on July 21, 2015. At the conclusion of this hearing and in light of the Staff Report, the Planning Commission decided to formally recommend that the Weld County Commissioners deny the Application.

The Hearing Before the Weld County Commissioners

46. The Weld County Commissioners held a public hearing (the “Hearing” as defined above) on the Application on August 12, 2015. The vast majority of the individuals that appeared to participate in the Hearing were opposed to the Application. The primary proponents of the application were an attorney for Martin Marietta and Pamela French Hora, a consultant from Tetra Tech. Upon information and belief, the vast majority of the remaining supporters that appeared to advocate in favor of the Application were Martin Marietta employees or are otherwise likely to reap personal economic benefits from the Proposed Use.

47. The opponents presented competent evidence of the following at the Hearing:
- a. The Application is inconsistent with the Weld County Comprehensive Plan set forth in Chapter 22 of the Weld County Code because:
 - i. It requests permission to engage in a special use that is unrelated to and does not compliment agricultural uses.
 - ii. The increased trucking and train traffic, dust, odors, noise, and pollution that will result from the Proposed Use are detrimental to the health, safety, and welfare of the surrounding land users in violation of

Chapter 22 of the Weld County Code and none of these substantial externalities are mitigated by the Proposed Use as approved. Specifically, Martin Marietta's air quality study, traffic impact study, and property value impact study were all deeply flawed and wholly unreliable.

- iii. There is no adequate fire protection for the Proposed Use, which will require fire services that the local fire district is incapable of providing, as required by Chapter 22. Weld County Code § 22-2-20.H.5.
 - iv. The Proposed Use acutely threatens the "Right to Farm" of both Plaintiff Motherlove and Plaintiff Cummings, as the Proposed Use may increase pollution loads to a level that makes it impossible for neighboring land users to safely and economically continue to farm their land in violation of Chapter 22 of the Weld County Code. *See id.* 22-2-20, "Weld County Right to Farm Statement" ("Agricultural users of the land should not be expected to change their long-established agricultural practices to accommodate the intrusions of urban users into a rural area.").
- b. The Proposed Use is inconsistent with the current land uses at and around the Proposed Site.
 - c. The Proposed Use is inconsistent with the proposed future land uses surrounding the Proposed Site, as confirmed by the unanimous opposing of consulting jurisdictions.
 - d. Martin Marietta made no showing of any effort to preserve Prime farmland as required by section 23-2-230.B.7 of the Weld County Code.
 - e. The Proposed Use is incompatible with the Design Standards and the Operation Standards because of the deleterious impacts that will result from the proposed use including increased traffic, dust, odors, pollution, and noise and depressed property values.

These six points correspond directly with six of the seven essential elements that the Weld County Commissioners were required to find to approve the Application consistent with section 23-2-230.B of the Weld County Code.¹³

48. In contrast, the proponents did not provide any competent evidence to rebut any of the opponent's arguments.

¹³ Only six of the seven essential elements are applicable to the Application, because the Proposed Site is not located within an "Overlay District Area" and thus does not implicate the essential elements set forth in section 23-2-230.B.5 of the Weld County Code.

49. Specifically, Martin Marietta did not present any evidence that it had made “diligent effort to conserve Prime agricultural land” on the Proposed Site.

50. Further, the map that Martin Marietta used to depict existing surrounding land uses was both inaccurate and grossly misleading. When both the opponents and Staff challenged the accuracy of the existing land use map that Martin Marietta presented to the Weld County Commissioners, they were quickly silenced by the Weld County Commissioners and the erroneous map was admitted into the administrative record.

51. As confirmed by evidence presented by the opponents (including several of the Plaintiffs), Martin Marietta’s presentation at the Hearing relied upon erroneous studies of the air quality, traffic, and land value impacts that will result from the Proposed Use.

52. The opponents also requested and presented evidence to support the need for and feasibility of increased mitigation of the Proposed Use if the Weld County Commissioners approved the Application. These options included a reduction of the height of the buildings for the Proposed Use, improvements to landscaping and screening techniques, stricter odor regulations, and air emissions monitoring. The Weld County Commissioners refused to incorporate any of these proposals to mitigate the impact of the Proposed Use on the surrounding land users.

53. Throughout the Hearing, each of the Weld County Commissioners (individually, a “Commissioner”) made comments that strongly indicated that he or she was basing his or her determination with respect to the application on external, political considerations. These external political considerations included lengthy soliloquies about the growth of Weld County and the need for construction materials as well as the alleged jobs and economic benefits that Martin Marietta claimed would result from the Proposed Use. On several occasions, one or more of the Commissioners asked Martin Marietta about other sites that it had considered for its Proposed Use and why Martin Marietta believed that the Proposed Site is the best location for the Proposed Use.

54. A quasi-judicial administrative decision must be decided by applying the pertinent law to the facts of the particular case. As a judicial decision maker, an administrative body sitting in a quasi-judicial capacity should generally “not permit family, social, political, financial, or other interests or relationships to influence the [body’s] judicial conduct or decision.” Colo. Judicial Code of Conduct R. 2.4.

55. The Weld County Commissioners’ policy-based comments and questions were wholly irrelevant to the legal charge that they faced in conducting the Hearing and ruling on the Application as dictated by the legal framework set forth in Chapter 23 of the Weld County Code.

56. At the conclusion of the Hearing, the Weld County Commissioners voted 5 – 0 in favor of granting the Application.

57. Upon information and belief, in casting their votes, only one of the Commissioners referenced the legal framework that governed the decision under Chapter 23 of the Weld County Code while all of the Commissioners referenced irrelevant political considerations to justify their votes.

Commissioner Cozad's Conflict of Interest

58. Subsequent to the Hearing, the Plaintiffs learned that, while previously employed by Tetra Tech (an environmental consulting firm), Commissioner Cozad was a direct supervisor of the Tetra Tech consultant that represented Martin Marietta at the Hearing before the Weld County Commissioners.

59. Upon information and belief, Commissioner Cozad was employed by Tetra Tech as recently as December 2014 and, upon information and belief, at some point in recent time she held a financial and/or professional stake in the success of Martin Marietta's Application and Proposed Use at the Proposed Site.

60. A showing that a decision maker in a quasi-judicial, adjudicative hearing has a conflict of interest will overcome any presumption of integrity and honesty that might normally attach to such a proceeding. *Meyerstein v. City of Aspen*, 282 P.3d 456, 468 (Colo. App. 2011). The absence of impartiality is a violation of the fundamental right to due process of law. *See Applebaugh v. Bd. of Cnty. Comm'rs*, 837 P.2d 304, 309 (Colo. App. 1992).

61. Commissioner Cozad failed to disclose her obvious conflicts of interest prior to the Hearing and did not recuse herself from the Hearing or on the Weld County Commissioners' final decision on the Application. It is unknown what communications have occurred amongst the Weld County Commissioners behind closed doors, and, at the very least, Commissioner Cozad's participation in the Hearing creates the unlawful appearance of impropriety and bias.

Future Proposed Industrial Conversions and the Fragmentation of Weld County's Consideration of the Combined Impact of Such Uses

62. Upon information and belief, at the time that Martin Marietta filed its Application, it was aware that a third-party intended to formally request the rezoning of the 131-acre agricultural parcel that sits immediately to the north of the Proposed Site (and immediately to the west of the Indianhead Estates residential subdivision). *See* Weld 34, LLC Change of Zone (Z) Application (attached hereto as **Exhibit G**). The location of this property is depicted on the attached **Exhibit H** as the "Proposed Industrial Rezoning." Similar to the Proposed Site, this parcel is presently ostensibly used as productive farmland within the A (Agricultural) Zone District. The proposed rezoning would change the zoning of this parcel from the A (Agricultural) Zone District to the I (Industrial) Zone District.

63. Upon information and belief, at the time that Martin Marietta filed its Application, it was aware that a third-party intended to formally apply for a Use by Special Review permit for the 6.88-acre parcel that is adjacent to and directly west of the Proposed Site. The proposal seeks to repurpose this property within the A (Agricultural) Zone District, which ostensibly currently exists as productive farmland, as a pet cremation and recreational vehicle storage facility. *See* USR15-0044 (attached hereto as **Exhibit I**). The location of this property is depicted on the attached **Exhibit H** as the “Proposed Pet Cremation Facility.”

64. Upon information and belief, at the time that Martin Marietta filed its Application, it was aware that a third-party intended to formally apply for a Use by Special Review permit for the 23-acre parcel that is located less than 500 feet south of the Proposed Site (and in the immediate vicinity of the property owned by Plaintiff Cummings and the property that Plaintiff Rockin S Ranch had intended to develop as a new wedding and event venue). The proposal seeks to repurpose this property within the A (Agricultural) Zone District, which ostensibly currently exists as productive farmland, as a “trucking and commercial construction business” for the transloading of flyash from a newly constructed (under the proposal) rail spur into flyash silos and up to twenty semi trucks and trailers. *See* W3 Legacy, LLC Site Specific Development Plan and Use by Special Review (USR) Application (attached hereto as **Exhibit J**). The location of this property is depicted on the attached **Exhibit H** as the “Proposed Flyash Transloading Facility.”

65. Upon information and belief, at the time that Martin Marietta filed its Application, it was aware that the current occupant of the Proposed Site, Gerrard Construction, intended to formally apply for a Use by Special Review permit for the 38-acre parcel that is adjacent to the southwestern edge of the Proposed Site (and immediately to the north of the property owned by Plaintiff Cummings and immediately to the east of Motherlove’s organic farm). Upon information and belief, Gerrard Construction intends to repurpose this property within the A (Agricultural) Zone District, which ostensibly currently exists as productive farmland, as the new location for its construction office and materials and equipment storage yard. The location of this property is depicted on the attached **Exhibit H** as the “Proposed Gerrard Relocation.”

66. Neither Martin Marietta nor any of these third-parties has asked the Weld County Commissioners to consider the combined impact of these many proposed land use changes (including combined dust, noise, air pollution, odors, and traffic). In fact, if the approval of the Application is not reversed, when the Weld County Commissioners formally consider these other proposals, it can be expected that Martin Marietta and these third-parties will argue that the Proposed Use at the Proposed Site is evidence of the alleged industrial character of the surrounding land uses and therefore the appropriateness of these other industrial land use proposals. *See, e.g.*, Ex. G, at p. 7 (describing the proposed site for the rezoning as to the north of the Proposed Site, which “is being developed by Martin Marietta for industrial use”).

67. Accordingly, the fragmented consideration of these proposed land use changes will potentially have a “domino effect,” whereby the approval of Martin Marietta’s Application

will render these other proposals to significantly increase the intensity of surrounding land uses fate accompli. The net effect of these many proposals will irreversibly alter the character of the local community and existing land uses, and their combined impact presents a potentially existential threat to the Plaintiffs' continued use and quiet enjoyment of their respective properties.

68. Upon information and belief, the Application is part of a larger, concerted effort to convert the area surrounding the Proposed Site from agricultural to industrial uses. Several of the opponents that spoke at the Hearing argued that the Application must be considered within the greater context of these many proposed land use changes, which will convert the local area from primarily agricultural and residential uses (that is zoned almost entirely within the A (Agricultural) Zone District) to intensive and dirty industrial uses. Despite the protests of the opponents, however, the Weld County Commissioners refused to consider these other nearby land use proposals in reviewing and ultimately approving the Application in a vacuum.

69. The Weld County Commissioners abused their discretion when they approved the Application without considering the other proposed alterations to land uses in the immediate vicinity of the Proposed Site and the substantial, negative impact that these combined uses will have on existing land users, including all of the Plaintiffs.

FIRST CLAIM FOR RELIEF

(Review of the Weld County Commissioners' Approval of
Martin Marietta's Amendment to a Site Specific Plan and Use by
Special Review Permit, USR15-0027 pursuant to C.R.C.P. 106(a)(4))

70. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

71. In granting the Application, the Weld County Commissioners violated the Weld County Code, which does not permit the Proposed Use on the Proposed Site within the A (Agricultural) Zone because:

- a. The Proposed Use does not include mining activity and therefore the Proposed Use cannot be characterized as a "mineral resource development facility" as required for such a Use by Special Review Permit; and
- b. The Proposed Use will include a continuous (drum mix) asphalt plant, which (as opposed to a batch asphalt plant) is not a lawful Use by Special Review Permit.

72. The Weld County Commissioners' violation of the Weld County Code is a *per se* abuse of discretion. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004).

73. The Weld County Commissioners further abused their discretion in granting the Application despite the absence of competent evidence with regards to the following essential elements that Martin Marietta was required to demonstrate:

- a. There is no competent evidence that the Proposed Use is consistent with the Weld County Comprehensive Plan set forth in Chapter 22 of the Weld County Code (as required by Weld County Code § 23-2-220.A.1) because there was un rebutted, competent evidence of the following:
 - i. The Application requests permission to engage in a special use that is unrelated to and does not compliment agricultural uses.
 - ii. The increased trucking and train traffic, dust, odors, noise, and pollution that will result from the Proposed Use are detrimental to the health, safety, and welfare of the surrounding land users in violation of Chapter 22 of the Weld County Code and none of these substantial externalities are mitigated by the Proposed Use as approved. Specifically, Martin Marietta’s air quality study, traffic impact study, and property value impact study were all deeply flawed and wholly unreliable.
 - iii. There is no adequate fire protection for the Proposed Use, which will require fire services that the local fire district is incapable of providing, as required by Chapter 22. Weld County Code § 22-2-20.H.5.
 - iv. The Proposed Use acutely threatens the “Right to Farm” of both Plaintiff Motherlove and Plaintiff Cummings, as the Proposed Use may increase pollution loads to a level that makes it impossible for neighboring land users to safely and economically continue to farm their land in violation of Chapter 22 of the Weld County Code. *See id.* 22-2-20, “Weld County Right to Farm Statement” (“Agricultural users of the land should not be expected to change their long-established agricultural practices to accommodate the intrusions of urban users into a rural area.”).
- b. There is no competent evidence that the Proposed Use is consistent with the intent of the A (Agricultural) Zone District (Weld County Code § 23-2-230.B.2), which is intended to preserve the cultivation of Prime farmland, only permits such a Use by Special Review as part of a mineral resource development facility, and does not permit the construction and operation of a continuous (drum mix) asphalt plant;
- c. There is no competent evidence that the Proposed Use is compatible with the existing surrounding land uses (Weld County Code § 23-2-220.B.3), which includes operational and productive farmland (including Plaintiff

Motherlove's specialty Certified Organic herb farm and Plaintiff Cummings' productive farm land), single-family homes on large lots, and other businesses that complement the existing agricultural uses and character of the surrounding land uses;

- d. There is no competent evidence that the Proposed Use is compatible with the future development of the surrounding area (Weld County Code § 23-2-230.B.4) as evidenced by the opposition of all surrounding governments;
- e. There is no competent evidence that Martin Marietta undertook diligent effort to conserve Prime agricultural land on the Proposed Site (Weld County Code § 23-2-230.B.6); and
- f. There is no competent evidence that the Proposed Use complies with the Design Standards and Operations Standards set forth in Chapter 23 (Weld County Code § 23-2-230.B.7), which require that a proposed use be designed and operated in a manner that will mitigate the negative impacts on the health, safety, and welfare of surrounding land users.

74. A quasi-judicial administrative decision must be based upon findings of fact within the administrative record and failure to make express factual findings on a core issue may be grounds for remand to the administrative body to make such findings. *Canyon Area Residents*, 172 P.3d at 909-10.

75. The Weld County Commissioners also abused their discretion by failing to provide the Plaintiffs with due process of law with regards to their opposition to the Application.

76. The Weld County Commissioners ignored the fundamental safeguards of due process when they refused to apply the legal standards that governed their decision on the Application and instead focused the hearing around extraneous and improper political and economic considerations.

77. Similarly, Commissioner Cozad's refusal to acknowledge her conflict of interest with respect to the Application and failure to recuse herself from the Hearing severely undermines the impartiality of this quasi-judicial process. At the very least, Commissioner Cozad's extensive history with Martin Marietta's "hired gun" creates the appearance of impropriety such that the only just result is the reversal and remand of the Weld County Commissioners' decision to grant the Application.

78. Finally, the Weld County Commissioner's approval of the Application constitutes an abuse of discretion because it failed to consider the negative and combined impacts of the pending land use changes proposed by neighboring third-parties and, upon information and

belief, with the support of Martin Marietta, which will result in substantial combined impacts and irreversibly alter the character of the local environment and community. Piecemeal attempts to incrementally change the character of existing and future land uses within an area of Weld County violate the fundamental purpose of the Weld County Code, which seeks to ensure that land use determinations are made in a holistic fashion that is sensitive to the rightful use and quiet enjoyment of neighboring land users. *See, e.g.*, Weld County Code § 22-1-100 (explaining that Weld County zoning regulations are intended to accomplish “coordinated, adjusted and harmonious development of the County”); Weld County Code § 23-1-40.B.7 (providing that one of the purposes of zoning within Weld County is to regulate “the USE of land on the basis of the impact of land USE changes to the community or surrounding areas”). Accordingly, the Weld County Commissioners’ abject refusal to consider the Application within this larger context, as requested by the opponents, violated the Weld County Code and was an abuse of discretion.

79. Pursuant to C.R.C.P. 106(a)(4), the Plaintiffs are entitled to a review of the Weld County Commissioners’ approval of the Application and an order reversing that decision.

80. The Plaintiffs have suffered and will continue to suffer harm as a result of the actions of the Weld County Commissioners.

81. The Plaintiffs have no other plain, speedy, or adequate remedy provided by law.

SECOND CLAIM FOR RELIEF
(Request for Declaratory Relief)

82. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

83. A C.R.C.P. 106 claim for appellate relief may properly be accompanied by a request for declaratory relief pursuant to C.R.C.P. 57 when a matter raises issues regarding the constitutionality or legality of a statute and/or government action. *See Native Amer. Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004), *cert. denied* (Colo. Aug. 16, 2004).

84. In addition to the relief that the Plaintiffs request pursuant to C.R.C.P. 106, the Plaintiffs further request relief under C.R.C.P. 57 construing the Weld County Code and applicable principles of due process governing the Weld County Commissioners’ authority with respect to the Application. Specifically, the Plaintiffs seek a declaratory judgment that:

- a. The construction and operation of a batch concrete plant and a transloading facility on land that is zoned within the A (Agricultural) Zone District is only a permissible Use by Special Review when such uses are a component of an onsite mineral resource development facility;

- b. The construction and operation of a continuous (drum mix) asphalt plant is not a permissible Use by Special on land that is zoned within the A (Agricultural) Zone District;
- c. In making a determination with respect to an application for a Use by Special Review permit, the Weld County Commissioners must base their decision on the legal requirements set forth in the Weld County Code and may not consider outside factors, including but not limited to politics, broader policy considerations, employment, or economic growth;
- d. As a former senior employee with Tetra Tech, Commissioner Cozad must recuse herself from any land use decisions that the Weld County Commissioners make on applications that were in any part developed by Tetra Tech during the period of Commissioner Cozad's employment with Tetra Tech; and
- e. All of the Weld County Commissioners must disclose any potential conflict of interest with regards to an application for a Use by Special Review permit before they may participate in a hearing and vote on such an application.

WHEREFORE, the Plaintiffs respectfully request that this Court:

- (a) Conduct judicial review of the Weld County Commissioners' approval of the Application under C.R.C.P. 106(a)(4) and grant all of the relief that the Plaintiffs seek under their first cause of action, including without limitation, holding that the Weld County Commissioners abused their discretion by (1) approving an unlawful land use application; (2) approving a land use application that is not supported by competent evidence with regards to the factors set for in the Weld County Code; (3) approving a land use application following a hearing that failed to comply with basic notice of due process, including the right to a fair and impartial quasi-judicial process in which unbiased arbiters apply the facts to the relevant governing law; and (4) approving a fragmented land use application that does not fully consider the impacts that will result from all pending proposals to convert agricultural land to intensive industrial uses near the Proposed Site.
- (b) Grant declaratory judgment as requested in the Plaintiffs second cause of action;
- (c) Award the Plaintiffs their reasonable costs and attorneys' fees; and
- (d) Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 9th day of September, 2015.

IRELAND STAPLETON PRYOR & PASCOE, PC
This document is e-filed per C.R.C.P. 121, section 1-26.

/s/ James Silvestro

Mark E. Lacin, Reg. # 37421

James R. Silvestro, Reg. # 43982

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Attached Exhibits:

- A. Map of Proposed Site and Plaintiff Businesses
- B. Map of Proposed Site and Plaintiff Homeowners
- C. Excerpts from the Weld County Code
- D. Excerpt from the Texas Dept. of Transportation's Pavement Design Guide
- E. Report of the staff of the Weld County Planning Services re: USR15-0027
- F. Map of Proposed Site and Surrounding Jurisdictions
- G. Weld 34 LLC Change of Zone Application
- H. Map of Proposed Site and Other Proposed Industrial Land Uses
- I. USR Application for Pet Cremation Facility
- J. USR for Flyash Transloading Facility