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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), **MARTIN MARIETTA MATERIALS, INC.**, a North Carolina corporation, **GERRARD INVESTMENTS, LLC**, a Colorado limited liability company, **WELD LV, LLC**, a Nevada limited liability company, and **WELD LV II, LLC**, a Nevada limited liability company.

Defendants.

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Case No. 2015CV30776

Division: 4

PLAINTIFFS' OPENING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION..... 1

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW 12

ARGUMENT..... 13

 I. The Proposed Use Includes an Illegal Continuous (Drum Mix) Asphalt Plant..... 13

 II. The Proposed Use is Incompatible with Existing and Future Neighboring Uses
 and the Record Does Not Include Any Competent Evidence that the Application
 Meets the Requisite Criteria for Approval..... 17

 A. The Proposed Use is Inconsistent with the Weld County Comprehensive Plan..... 18

 1. Adequate Fire Services Do Not Exist to Serve the Proposed Use..... 18

 2. The Proposed Use Will Force Neighboring Farms to Shutter in Violation of the
 Right to Farm 19

 B. The Proposed Use is Inconsistent with the A (Agricultural) Zone District 20

 C. The Proposed Use is Incompatible with Existing Land Uses 22

 D. The Proposed Use is Incompatible with Planned Future Uses 24

 E. Martin Marietta Made No Effort to Conserve Prime Farmland 26

 F. The Proposed Use Does Not Adequately Protect the Health, Safety and Welfare
 of the Inhabitants of the Neighborhood and the County 27

 G. The Proposed Use Violates the Design Standard Requiring that Any
 Development Occur on the Least Prime Soils..... 31

 H. The Proposed Use Violates the Operations Standard for Noise 31

 III. The Weld County Commissioners Relied Upon Legally Impermissible Criteria and
 Failed to Apply the Correct Legal Standard 32

IV. Plaintiffs' Due Process Rights Were Violated by Commissioner Cozad's Failure to Disclose Her Conflict of Interest 334

REQUEST FOR ORAL ARGUMENT 35

CONCLUSION..... 35

TABLE OF AUTHORITIES

Cases

Canyon Area Residents v. Bd. of Cnty. Comm'rs, 172 P.3d 905 (Colo. App. 2006)13

Churchill v. Univ. of Colo. at Boulder, 2012 CO 5413

Clark v. City of Boulder, 362 P.2d 160 (Colo. 1961)16

Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't, 196 P.3d 892 (Colo. 2008).....12

Gallegos v. Garcia, 155 P.3d 405 (Colo. App. 2006)12

Lawley v. Dep't of Higher Educ., 36 P.3d 1239 (Colo. 2001)12

Margolis v. Dist. Court, 638 P.2d 297 (Colo. 1981)1

Meyerstein v. City of Aspen, 282 P.3d 456 (Colo. App. 2011).....13

Mountain States Tel. & Tel. Co. v. Pub. Util. Comm'n, 763 P.2d 1020 (Colo. 1988).....34

Nixon v. City & Cnty. of Denver, 2014 COA 172.....13

People v. Wadle, 97 P.3d 932 (Colo. 2004).....12

Sundance Hills Homeowners Assoc. v. Bd. of County Comm'rs, 534 P.3d 1212 (Colo. 1975).....12

Venard v. Dept. of Corr., 72 P.3d 446 (Colo. App. 2003).....12

Western Paving Constr. Co. v. Beer, 917 P.2d 344 (Colo. 1996).....13, 15

Statutes

C.R.C.P. 106(a)(4) 1, 3

C.R.S. § 24-4-106(7)..... 12

C.R.S. § 25-12-101 30

C.R.S. § 25-12-103(1)..... 32

Weld County Ordinances

W.C.C. § 22-2-20.G..... 11

W.C.C. § 22-2-20.H.....	18
W.C.C. § 22-2-20.J.....	19
W.C.C. § 23-2-200.A.....	11, 17
W.C.C. § 23-2-230.....	32, 33
W.C.C. § 23-2-230.B	15, 17, 18, 20, 21, 22, 24, 26, 27, 28, 31, 32
W.C.C. § 23-2-240.....	31
W.C.C. § 23-2-240.A.....	18, 31
W.C.C. § 23-2-250.....	32
W.C.C. § 23-2-250.A.....	32
W.C.C. § 23-3-10.....	9, 16, 20
W.C.C. § 23-3-20.....	9
W.C.C. § 23-3-40.....	10, 14, 15, 16, 17
W.C.C. § 23-3-40.A.....	9
W.C.C. § 23-3-230.B	17
W.C.C. § 23-3-240.B	33
W.C.C. § 23-3-310.B	9
W.C.C. § 23-3-320.B	9
W.C.C. § 23-3-330.B	9
W.C.C. § 23-3-320.D.....	10
W.C.C. § 23-3-330.D.....	10

Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino ("Plaintiffs"), through undersigned counsel, respectfully submit this Opening Brief:

STATEMENT OF JURISDICTION

This Court's jurisdiction arises under C.R.C.P. 106(a)(4). This case seeks review of an action taken by Defendant the Weld County Board of County Commissioners (the "Weld County Commissioners") affecting real property located in Weld County. The Weld County Commissioners made the challenged land use decision while sitting in their capacity as a quasi-judicial body. *See Margolis v. Dist. Court*, 638 P.2d 297, 305 (Colo. 1981). Plaintiffs challenge the Weld County Commissioners' abuse of discretion and arbitrary, capricious, and unlawful approval of an application for Use by Special Review ("USR") submitted by Defendant Martin Marietta Materials, Inc. ("Martin Marietta") and Defendant Gerrard Investments, LLC ("Gerrard") to convert existing Prime agricultural farmland to an intensive industrial use.

STATEMENT OF THE ISSUES

- I. Whether the Weld County Commissioners Abused Their Discretion by Approving Martin Marietta's Use by Special Review Application Because the Proposed Use, Which Includes a Continuous (Drum Mix) Asphalt Plant, Constitutes an Unlawful Use by Special Review in the A (Agricultural) Zone District.
- II. Whether the Weld County Commissioners Abused Their Discretion by Approving Martin Marietta's Use by Special Review Application Given that the Proposed Use is Incompatible with Existing and Planned Uses and the Record is Devoid of Any Competent Evidence that the Proposed Use Satisfies the Requisite Criteria.
- III. Whether the Weld County Commissioners Abused their Discretion by Applying the Wrong Legal Standard and Basing their Decision on Impermissible Political Considerations.

- IV. Whether the Weld County Commissioners' Approval Violated Defendants' Rights to Due Process of Law Because a County Commissioner Failed to Disclose Her Conflict of Interest and Recuse Herself.

STATEMENT OF THE CASE

Plaintiffs are land owners and leaseholders that live and/or operate businesses on properties in unincorporated Weld and Larimer Counties that surround an agricultural property owned by Defendants Weld LV, LLC and Weld LV II, LLC in unincorporated Weld County (the "Proposed Site").

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 neighboring governments, and the protest of hundreds of neighboring land users—the Weld County Commissioners approved an Application for an Amendment to a Site Specific Development Plan and for a USR Permit (the "Application") submitted by Martin Marietta, which permits Martin Marietta to drastically and permanently alter the nature and character of an established agricultural and residential area. As set forth in the Application, Martin Marietta intends to construct and operate, among other things: (1) a 100-foot tall continuous (drum mix) asphalt plant; (2) a 110-foot tall batch concrete plant; (3) a transloading facility that will include a 6,400 foot heavy railroad spur loop to accommodate 121 car-length trains (with four locomotives); and (4) a materials processing and recycling facility that will include concrete and asphalt crushing as well as washing, screening, sorting, stockpiling, unloading, and loading of sand, rock, gravel, crushed stone, overburden, clay, and topsoil.

The record demonstrates that Martin Marietta selected the Proposed Site out of nothing more than economic expediency. The Proposed Use is not a legal land use at the Proposed Site

and, even if it were, Martin Marietta failed to meet its burden to provide the required competent evidence to establish the appropriateness of the Proposed Use at the Proposed Site. The record further demonstrates that the Weld County Commissioners improperly considered irrelevant economic and political factors and the reliability of the entire process was fatally undermined by the failure of a Commissioner to properly disclose a conflict of interest and recuse herself from the approval process.

Accordingly, Plaintiffs timely challenge this unlawful and incompatible land use pursuant to C.R.C.P. 106(a)(4) in order to protect their homes, their livelihoods, and the health, safety, and welfare of their families, employees, customers, and community.

The Proposed Use

As set forth in its Application, Martin Marietta intends to operate a large-scale, heavy industrial facility. Transcript of Aug. 12, 2015 Public Meeting of the Weld County Board of County Commissioners (hereinafter, "Transcript"), at 16; BATES000173-195. This planned industrial facility will involve construction of the following components:

- a. A 110-foot tall batch concrete plant;
- b. A 100-foot tall continuous (drum mix) asphalt plant² powered by on-site natural gas electric generation;
- c. A rail spur and 6,400-foot train loop to accommodate the entire length of 121-car trains (including 4 locomotives) completely stopping onsite to dump—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 crushing, washing, screening, sorting, stockpiling, unloading, and loading of sand, rock, gravel, crushed stone, overburden, clay, and topsoil;

² Martin Marietta's air pollution consultant defines the Proposed Use to include a "parallel-flow drum mix plant." BATES00352-53 ("Since the drum process is continuous, these [asphalt] plants have surge bins or storage silos.").

- e. A 14,400 square foot office building, an electrical substation, and at least fifteen other new buildings and modular trailers;
- f. Storage of up to 680,000 cubic yards of construction materials, including sand, rock, gravel, aggregate, cement, and various additives; and
- g. Storage of up to 4.5 million gallons of asphalt cement, 24,000 gallons of emulsified asphalt cement, 40,000 pounds of chemical color additives, 285 tons of cement, 180 tons of coal fly ash, 37,000 gallons of diesel fuel, and 10,000 gallons of propane.

Transcript, at 4:21-5:20, 19:13-20:20; BATES000097-99, BATES000209, BATES000352.

In order to demonstrate the impact of a similar facility, neighbors submitted a video of a Martin Marietta aggregate and asphalt facility in Fort Collins, Colorado. BATES002659.³ The video shows an intense heavy-industrial use characterized by loud machinery, fugitive dust, and other, unspecified emissions. *Id.*

From a traffic standpoint, Martin Marietta estimates that the Proposed Use will initially generate 1,120 "site trips" per day and that this number will increase to an estimated 2,260 "site trips" per day by 2035. BATES00179. As approved by the Weld County Commissioners, Martin Marietta may engage in operations at the Proposed Site twenty-four hours a day/seven days per week.⁴ BATES000007-8. Martin Marietta has no control over when trains will arrive onsite, and it is expected that trains will arrive and generate substantial noise at the Proposed Site in the middle of the night. Transcript, at 20:2-20:3, 225:5-225:7.

³ Counsel for the Weld County Commissioners has agreed to supplement the Certified Record to include this video, which was entered into the administrative record on August 12, 2015.

⁴ Although the Proposed Use will only "typically" include industrial activities from Monday to Saturday beginning an hour before sunrise and concluding an hour after sunset, as approved, Martin Marietta has unfettered discretion to engage in Sunday and overnight operations depending on production needs. BATES000007-8 ("Depending on the request of the jurisdiction purchasing the asphalt, night operations could occur seven days per week."); Transcript, at 5:5-5:6 ("The hours of operation for Martin Marietta are 24 hours a day – seven days a week.").

The Proposed Site

The Proposed Site is a 131-acre agricultural parcel located on the east side of Weld County Road 13 approximately one half mile south of U.S. Highway 34 in unincorporated Weld County. Transcript, at 4. For at least the past twenty-five years it has primarily been used to grow corn, wheat, and alfalfa. BATES000887, BATES001165-66. The Proposed Site sits within Weld County's "A (Agricultural) Zone District" (hereinafter, "Agricultural Zone") and has been designated by Weld County as "Prime (Irrigated) Farmlands of National Importance." BATES000001, BATES001434-35.

All of the land uses in the immediate vicinity of the Proposed Site are either single-family residences on large lots or productive "Prime" farmland. BATES001434-35; BATES002233. Plaintiffs, which include nearby homeowners, a specialty organic farm, and a proposed dairy farm-themed event center, are representative of all the existing land uses within close proximity to the Proposed Site. *See generally* Transcript, at 42:6-47:4, 54:15-57:23, 58:6-60:12, 89:5-89:24, 174:7-180:10, 181:14-184:8. The following is a picture of the Proposed Site and surrounding area as it presently exists (taken from the property to the southeast of the Proposed Site):



BATES001888.

After what it claims was more than three years of consideration, Martin Marietta publicly announced its selection of the Proposed Site for its Proposed Use in or around January 2015 and engaged with neighboring landowners at a "formal neighborhood meeting" on January 27, 2015. Transcript, at 31:24-32:6; BATES002577. Thirty-seven of the thirty-eight public comments that Martin Marietta received at this initial "open house" were in opposition to the Proposed Use at the Proposed Site. BATES000627-33.

Following this initial public outcry, Martin Marietta produced a "Site Selection Report" in March 2015 that purports to justify its selection of the Proposed Site. BATES000395-99. This report claims that the Proposed Use is needed because all of Martin Marietta's existing

facilities are co-located with sand and gravel extraction operations and, without explanation, claims that once such resources are depleted, the existing asphalt and concrete production facilities must be relocated. BATES000396. Martin Marietta explains that it owns a quarry outside of Granite Canyon, Wyoming, which has access to the Union Pacific Rail line. *Id.* Therefore, Martin Marietta explains, the most efficient way for it to transport these raw materials to Colorado "is to find a location along a rail line in Northern Colorado to construct a rail unloading facility, concrete plant, asphalt plant, and aggregate sales yard" *Id.* The report further claims that Martin Marietta desired a site that is located near its end users, so that it can minimize its transportation costs. BATES000396-97.

Due to these private economic considerations, the report states that Martin Marietta only studied thirteen properties for the Proposed Use. BATES000397; *see also* Transcript 29:7-29:14 (explaining that Martin Marietta will save \$18 million by locating the Proposed Use adjacent to an existing rail line). Martin Marietta claims that these thirteen potential sites were analyzed and ranked based upon the following criteria:

1. Properties that could fit at 6000 feet of rail track in a closed circle;
2. Properties without physical features that would obstruct rail;
3. Properties with an elevation drop of 25 feet or less across the property;
4. Properties in close proximity to the interstate and State highways;
5. Properties with nearby access to a signalized intersection;
6. Properties requiring little travel along County roads to get to the highway;
7. Properties with "few neighbors"; and
8. Properties that avoid haul routes that run in front of subdivision entrances.

BATES000398. The majority of these factors relate solely to a site's topography and/or profitability and do not account for existing zoning or neighboring land uses. Only the final two factors arguably seek to determine whether the Proposed Use will negatively impact neighbors. Notably, the report does not include any consideration of a site's existing zoning, compatibility with a site's existing and planned neighboring uses, whether the site contains Prime farmland, or an analysis of the site-specific impacts of the Proposed Use on public health, safety, and welfare.

The report concludes with a statement that Martin Marietta is still investigating another site east of Windsor, but notes that it would require a transfer to the Great Western rail line, which would increase Martin Marietta's costs. BATES000399. This Windsor site is not analyzed in the report, and the record is devoid of any serious consideration of this or other industrial sites by Martin Marietta. In contrast, opponents provided significant evidence that the Windsor site—which is an existing industrial park zoned for industrial use—is a more appropriate location. *See, e.g.,* BATES001754, BATES002035, BATES002226, BATES002486.

Without including any specifics about the other potential sites or how the factors were actually applied, the Site Selection Report shows that the Proposed Site received the highest "score" and therefore declares that it is the "most favorable site." *Id.* On its face, the report confirms the incompatibility of the Proposed Use at the Proposed Site in that it awards the Proposed Site with the lowest possible score with regards to "Few neighbors." BATES000398. Other potential sites received better scores with respect to this compatibility factor but were rejected by Martin Marietta due to physical and/or financial considerations. *Id.*

Martin Marietta commissioned various reports on the impact that the Proposed Use will have on the Proposed Site and neighboring land users, but all of these reports were completed months *after* Martin Marietta had already selected the Proposed Site (in January 2015). *See* BATES000256-311, BATES000349-63, BATES000401-422, BATES00492-608.

Use by Special Review

The Weld County Code establishes that land within an Agricultural Zone is "considered 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 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." Weld County Code § 23-3-10 (hereinafter, "W.C.C."). In addition to some limited public uses, only agricultural and related, complimentary uses are permitted by right in an Agricultural Zone. *Id.* § 23-3-20. In contrast, the Weld County Code explains that one purpose of the "I (Industrial) Zone District" (hereinafter, "Industrial Zone") is "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 NEIGHBORHOOD."

Under the Weld County Code, transloading is only permitted by right in an Industrial Zone. *See id.* §§ 23-3-310.B, 23-3-320.B, 23-3-330.B. Transloading may be located in an Agricultural Zone only if the Weld County Commissioners grant a request for such a USR. *Id.* § 23-3-40.A. In contrast, there is no land use designation under the Weld County Code that permits the siting of a permanent concrete or asphalt production facility as a matter of right. To

construct and operate a concrete or asphalt production facility (even in an Industrial Zone), the use must be approved by the Weld County Commissioners. *See id.* §§ 23-3-40, 23-3-320.D, 23-3-330.D. Accordingly, because the Proposed Site is in an Agricultural Zone, Martin Marietta was required to apply for a USR for the Proposed Use.

Martin Marietta's Application

Martin Marietta submitted the Application to the Weld County Planning Department on April 28, 2015. BATES000173. The Planning Department solicited comments regarding the Application from all neighboring governments within a three-mile radius of the Proposed Site. Following its review of all of the referral comments, the Planning Department concluded that "most of the comments indicated that the proposed Martin Marietta project is incompatible with the area, the region and the vision for this gateway to Weld County." Transcript, at 7:1-7:3.

Following its own independent review, the Planning Department determined that "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 for this region." BATES000101. Further, the Planning Department found that the Application and supporting materials failed to demonstrate that existing transportation infrastructure is adequate to support the Proposed Use and presented potential conflicts with existing land users over noise, odors, light, dust, visual impact, health concerns, air and water pollution, and safety concerns resulting from increased truck and train traffic. BATES100-02. The Planning Department also reported that the public comments received from land owners living within the immediate vicinity of the Proposed Site opposed the Application by a margin of 175 to 5. BATES000103. Ultimately, the Planning Department concluded that "[t]he noise, odors, and traffic from the

proposed uses will cause disruption to the nearby residential properties" and "that the negative impacts are such that there are **no conditions** that could be placed on this USR **that would ensure the compatibility** with the surrounding existing land uses." BATES000104-05 (emphasis added).

The Planning Commission held a meeting on July 21, 2015, to consider the Application. BATES000081. After nearly twelve hours of testimony, the Planning Commission voted to recommend denial of the Application. BATES000075. In the Resolution recommending denial, the Planning Commission states that the Proposed Use does not support agricultural uses as required by W.C.C. § 22-2-20.G.1 (as incorporated within W.C.C. § 23-2-220.A.1), that the Proposed Use is "**incompatible with the area**, region, and the vision for the future of this gateway to Weld County," and that the resulting noise, odors, light, dust, visual impact, health concerns, air and water pollution, and safety concerns resulting from increased truck and train traffic cannot be mitigated. BATES000068-73 (emphasis added).

The Weld County Commissioners held a hearing to consider the Application on August 12, 2015 (the "Hearing"). BATES000013. The Hearing was well attended by the public and the majority of those who attended opposed the Application. BATES000045-67. Of the members of the public who spoke at the Hearing, the majority that opposed the Application lived near the Proposed Site and the majority of those that spoke in support did not live near the Proposed Site and were either employed by or contracted with Martin Marietta. *Id.* At the conclusion of the Hearing, the Weld County Commissioners voted to approve the Application. BATES000043. This approval was finalized by the execution of a resolution dated September 15, 2015. BATES000001-12. The resolution sets forth the USR approval criteria and, without any

particularized findings, includes a perfunctory statement that Martin Marietta "has shown compliance" with the legally required factors. *Id.*

STANDARD OF REVIEW

Government actions are reviewed pursuant to C.R.C.P. 106 for an abuse of discretion. *Gallegos v. Garcia*, 155 P.3d 405 (Colo. App. 2006); *Venard v. Dept. of Corr.*, 72 P.3d 446 (Colo. App. 2003). A reviewing court may reverse the decision of an administrative agency if the court finds that the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, interpreted the law erroneously, or exceeded its authority. C.R.S. § 24-4-106(7); *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001). 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).

Further, 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. While a land use decision is not a "popularity contest," there should be "competent and substantial documentary and testimonial evidence" to support a quasi-judicial body's land use decision—especially when the body fails to make particularized findings. *See Sundance Hills Homeowners Assoc. v. Bd. of County Comm'rs*, 534 P.3d 1212, 1216 (Colo. 1975). 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 v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 909-10 (Colo. App. 2006).

A quasi-judicial decision must provide for due process and adhere to fundamental principles of fairness. *See Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54; *Canyon Area*, 172 P.3d at 908. As such, a quasi-judicial body's failure to correctly interpret governing law or otherwise remain within its lawful authority constitutes reversible error. *Nixon v. City & Cnty. of Denver*, 2014 COA 172, ¶ 12.

Finally, a quasi-judicial hearing must be conducted in an atmosphere evidencing fairness in the adjudication. *Id.* at 908. While quasi-judicial proceedings are presumed to be conducted with honesty and integrity, this presumption may be "overcome by a showing that the decision-maker has a conflict of interest." *Meyerstein v. City of Aspen*, 282 P.3d 456, 467-68 (Colo. App. 2011).

ARGUMENT

I. The Proposed Use Includes an Illegal Continuous (Drum Mix).

The Weld County Commissioners committed a *per se* abuse of discretion by approving the Application because, on the face of the Weld County Code, the Proposed Use is unlawful. *See Western Paving Constr. Co. v. Beer*, 917 P.2d 344, 347 (Colo. 1996) (explaining that misinterpretation or misapplication of governing law constitutes an abuse of discretion). Although the USB ordinance provides that an applicant may, upon meeting the requisite burden of proof, receive special approval to operate an asphalt "batch plant," there is nothing in the Weld County Code that permits a land owner to construct or operate a continuous (drum mix) asphalt plant in an Agricultural Zone. *See* W.C.C. § 23-3-40. This is a critical distinction: a

continuous (drum mix) asphalt plant is a more intensive industrial land use that can operate for longer hours and produce substantially more asphalt than a batch asphalt plant. BATES002209-10 (citing U.S. EPA report on asphalt emissions).

Possibly betraying its awareness of this legal failing, Martin Marietta's Application and supporting materials do not identify the type of asphalt plant that it intends to operate at the Proposed Site. Rather, Martin Marietta repeatedly refers to the "asphalt plant" in unqualified terms. *See, e.g.*, BATES000175-201 (the Application questionnaire), Transcript, at 16:22-16:23, 34:1-34:2, 220:4-220:11. This vagueness stands in obvious contrast to Martin Marietta's identification of the "concrete batch plant" it intends to build. *See* BATES000173 (describing the Proposed Use in the Application as "[a]n aggregate transloading facility with concrete batch plant and an [*sic*] asphalt plant operations as well." (Emphasis added)).

Despite Martin Marietta's cageyness,⁵ however, the record is replete with numerous allusions to its intention to construct a continuous (drum mix) asphalt plant in an Agricultural Zone in violation of W.C.C. § 23-3-40. For example, in describing the anticipated air pollution from the Proposed, Martin Marietta's air pollution "expert" explicitly refers to the asphalt plant as a "drum mix" plant that utilizes a "continuous"—as opposed to a batch—process. BATES000350-63, BATES002393-405. At the Hearing, Martin Marietta also discussed the circumstances when the asphalt plant would need to operate "continuously" at night or on Sundays. Transcript, at 222:8-222:20.

⁵ The record includes an unchallenged assertion that this is not the first time that Martin Marietta has obtained approval for the unlawful construction of a continuous (drum mix) asphalt plant. BATES002637 ("When the [Martin Marietta] plant was originally approved by the Larimer County Board of County Commissioners in March of 2009, the approval was for a batch asphalt plant In reality, a larger-scale, continuous flow drum asphalt plant was installed [A] continuous flow drum plant with its larger silos merely allows for more production, greater storage of asphalt cement and more truck traffic than ever intended under the special review.").

The record demonstrates that this issue and the dramatic differences between batch and continuous asphalt operations were repeatedly raised by opponents. *See, e.g.*, Transcript, at 42:23-43:8; BATES000072 ("[T]his asphalt manufacturing facility should be a *continuous plant* because batch plants 'make asphalt as needed' and continuous plants operate 24/7."). Neighbors submitted uncontroverted evidence that continuous asphalt plants have a greater production and storage capacity, and operate longer, during off-peak hours, and without downtime. BATES002209-10. Opponents also presented evidence of the unique public safety challenges presented by "drum mix" asphalt plants. BATES001613-17 (describing a public safety disaster resulting from the incorrect use of batch plant safety procedures on a drum mix plant). Martin Marietta offered no rebuttal to these arguments in the voluminous record below.

In light of the qualitative differences between batch and continuous (drum mix) operations, the omission of any reference to continuous (drum mix) asphalt operations in W.C.C. § 23-3-40 can and should be read as a prohibition on such uses consistent with the plain meaning of the ordinance and the broader intent of the Weld County Code. *Western Paving*, 917 P.2d at 347 ("Statutes or ordinances cannot be construed in such a way as to defeat obvious legislative intent, and the best guide to intent is the declaration of policy which forms the initial part of an enactment."). The Weld County Code provides that USR's represent more intensive land uses and function as exceptions to the generally applicable zoning laws. *See* W.C.C. § 23-2-230.B (applicants bear the burden of proof to demonstrate compatibility and protection of public health). With specific respect to land in an Agricultural Zone, the Weld County Code is intended to preserve agricultural uses and prevent "the interference of other, incompatible land USES." *Id.* § 23-3-10. While some non-agricultural uses may, after careful review under the USR

process, be consistent with this intent, there are many land uses that are so incompatible with agricultural uses that they are not included as potential USR's. Under the Weld County Code, a continuous (drum mix) plant is one use that is never permitted in an Agricultural Zone under any circumstances.

If the list of potential USR land uses is not narrowly construed, then the Weld County Commissioners would have *carte blanche* to approve any nonconforming land use pursuant to the USR process. Such an unreasonable interpretation would frustrate the core tenet of land use planning by permitting the Weld County Commissioners to upend neighboring land users' reasonable expectations and engage in unlawful spot zoning at will. *Cf. Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961) ("Property owners have the right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require rezoning in the public interest.").

The Weld County Commissioners violated W.C.C. § 23-3-40 in approving the Application. The Weld County Commissioners, the Planning Department, and even the Weld County Attorney incorrectly treated that Application as if it includes an asphalt batch plant. *See, e.g.,* BATES000001-12 (approving "asphalt and concrete batch plants"); Transcript, at 1:8-1:20, 4:10-4:18, 230:1-230:2, 265:11-265:12, 305:3-305:12. There is a material difference between continuous (drum mix) and batch asphalt plants and the Weld County Code only permits the construction and operation of an asphalt batch plant pursuant to a USR in an Agricultural Zone. Because Martin Marietta intends to construct a continuous (drum mix) asphalt plant in an Agricultural Zone, the Weld County Commissioner's approval of the Application was in violation of W.C.C. § 23-3-40 and is therefore an abuse of discretion.

II. The Proposed Use is Incompatible with Existing and Future Neighboring Uses and the Record Does Not Include Any Competent Evidence that the Application Meets the Requisite Criteria for Approval.

The Weld County Code requires an intensive substantive review before an application for a USR within an Agricultural Zone may be approved because "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." W.C.C. § 23-2-200.A. To obtain approval for a USR in an Agricultural Zone, the applicant bears the burden of proof to demonstrate all nine required elements. W.C.C. § 23-2-230.B (listing seven discrete elements and requiring compliance with design and operations standards).

Martin Marietta selected the Proposed Site for its intended heavy industrial use first and then worked backwards to try and fit its selection within the requirements of W.C.C. § 23-3-230.B. Although Martin Marietta submitted hundreds of pages and hours of testimony in support of its Application, it ultimately failed to provide any competent evidence to overcome what was plainly evident to neighboring landowners, surrounding governments, Planning Department staff, and the Planning Commission: there is no competent evidence to support the approval of the Application. The record is devoid of any competent evidence that the Proposed Use is: (a) consistent with the Weld County Comprehensive Plan; (b) consistent with the Agricultural Zone of the Proposed Site; (c) compatible with existing uses near the Proposed Site; (d) compatible with planned future neighboring uses; (e) the product of a "a diligent effort" to preserve Prime farmland; (f) sufficiently protective of the health, safety, and welfare of

neighboring residents; (g) in compliance with the design standard requiring that new construction occur on the "least prime soils"; and (h) in compliance with the operations standard for noise. The Weld County Commissioners abused their discretion by approving the Application despite the absence of any competent evidence to satisfy these required elements.

A. The Proposed Use is Inconsistent with the Weld County Comprehensive Plan.

To obtain approval for a USR, an applicant bears the burden of proof to establish that the proposed use complies with the Weld County Comprehensive Plan. W.C.C. § 23-2-230.B.1. Chapter 22 of the Weld County Code sets forth the Comprehensive Plan for land uses in unincorporated Weld County. Although many requirements in the Comprehensive Plan overlap with specific USR requirements addressed below (*e.g.* the preservation of public health and safety), there are many land use standards that exist solely in the Comprehensive Plan. Of these standards, Martin Marietta failed to provide any competent evidence that the Proposed Use: (1) will be served by adequate fire protection services; and (2) will not violate neighbors' Right to Farm.

1. Adequate Fire Services Do Not Exist to Serve the Proposed Use.

W.C.C. § 22-2-20.H provides that within an Agricultural Zone, land use applicants must "[e]nsure that adequate services and facilities are currently available or reasonably attainable to accommodate the requested new land use for more intensive development." *See also id.* § 23-2-240.A.4 (requiring that a USR application "demonstrate" that "[a]dequate fire protection measures are available on the site for the STRUCTURES and facilities permitted."

Several neighbors raised concerns that the Proposed Use will involve processes that heat materials to such a substantial degree that the materials become flammable and that a fire at the

Proposed Site could not be extinguished using the equipment presently possessed by the fire district. Transcript, at 103:23-104:3, 170:17-170:3; BATES002616-18. A fire at the proposed asphalt plant would require firefighting foam that the fire district serving the Proposed Site does not possess. Transcript, at 125:9-126:4; BATES002616-18.

Martin Marietta did not submit any discussion of the inadequacy of fire protection services for the Proposed Use with its Application, and when pressed on the issue at the Hearing, responded that "if there's certain equipment that we need to have on site to deal with things we make sure we have those things on site with the fire districts." *Id.* at 227:15-227:17. When pressed further, Martin Marietta stated that it would "potentially" have fire suppression foam on site. *Id.* 227:18-227:20. Such non-committal statements cannot constitute "competent" evidence of a showing that adequate fire protection services exist to serve the Proposed Use—the Application does not demonstrate compliance with this essential element.

2. The Proposed Use Will Force Neighboring Farms to Shutter in Violation of the Right to Farm.

W.C.C. § 22-2-20.J provides that Weld County expressly recognizes the "Right to Farm" and protects against new land uses that would encroach upon existing farms in an Agricultural Zone. Specifically, "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." *Id.*

Several neighbors raised concerns that the Proposed Use would encroach on and force out existing farms. BATES002130-31; BATES002220. Specifically, one farmer testified that the increased dust, air pollution, and contaminated surface runoff generated by the Proposed Use will result in lower yields and threaten the viability of his farm. Transcript, at 44:8-47:4.

Representatives of another farm, which grows organic herbs for pregnant and nursing mothers, testified and provided evidence that the Proposed Use is expected to jeopardize their organic status and their ability to sell products in large markets, like California, which require specialized labeling or otherwise prohibit the sale of products that contain heavy metals and other carcinogens. *Id.* at 174:7-180:10; BATES001901. The owners stated that if the Application was approved, "we probably won't be there in a couple of years and it would threaten the viability of our business." Transcript, at 177:9-177:12.

Martin Marietta's only response to these comments is a nebulous promise to adhere to Weld County's Right to Farm policy. BATES002352. At the Hearing, proponents of the Application mischaracterized the opponents' argument and claimed that the Right to Farm did not require its client to continue farming the Proposed Site. Transcript, at 188:14-188:24; BATES001759; BATES002677. In justifying approval of the Application, one of the Weld County Commissioners echoed this mischaracterization of the opponents' argument and thus failed to make a finding as to whether the Proposed Use will violate neighbors' Right to Farm. Transcript, at 295:19-296:8.

B. The Proposed Use is Inconsistent with the A (Agricultural) Zone District.

W.C.C. § 23-2-230.B.2 requires a USR applicant to demonstrate that the proposed use is consistent with the "intent" of the zoning designation for the proposed site. Here, the Proposed Site is in an Agricultural Zone. W.C.C. § 23-3-10 provides that the "intent" of the Agricultural Zone district is to ensure that agriculture is "protected from adverse impacts resulting from uncontrolled and undirected business, industrial and residential 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." (Emphasis added).

Many neighbors objected to the Application on the grounds that the Proposed Use is wholly unrelated to agricultural uses and would irreversibly alter the public perception of the "gateway" to Weld County as agrarian and rural. BATES002130-31, BATES002215, BATES002477. Martin Marietta's heavy industrial use stands in stark contrast to other non-agriculture uses in the area that are nevertheless related and complimentary to agriculture. Transcript, at 55:16-57:23 (a neighbor's plan for an event venue is dependent upon "a peaceful rural setting" and that industry experts confirm that the Proposed Use will destroy the viability of her business); BATES001759 (a neighboring organic farm hosts educational seminars). The Weld County Planning Commission concurred with these assessments and concluded: "The proposed USB does not directly relate to nor is it dependent upon agriculture." BATES000068.

Martin Marietta's only attempt at compliance with W.C.C. § 23-2-230.B.2 amounts to tautological statements that the Proposed Use is "related to" agricultural uses because "many agricultural business depend upon" aggregate product, concrete, and asphalt. BATES000181. Martin Marietta's warped interpretation of the material requirement set forth in W.C.C. § 23-2-230.B.2 would render it meaningless as, under this reading, almost any conceivable land use is "related to" a facility that produces construction materials. *Cf.* Transcript, at 43:2-43:3 ("[I]t is estimated that roughly one percent of [Martin Marietta's] production actually goes to support agriculture."). This is not competent evidence that the Proposed Use is consistent with the intent of the Agricultural Zone district.

C. The Proposed Use is Incompatible with Existing Land Uses.

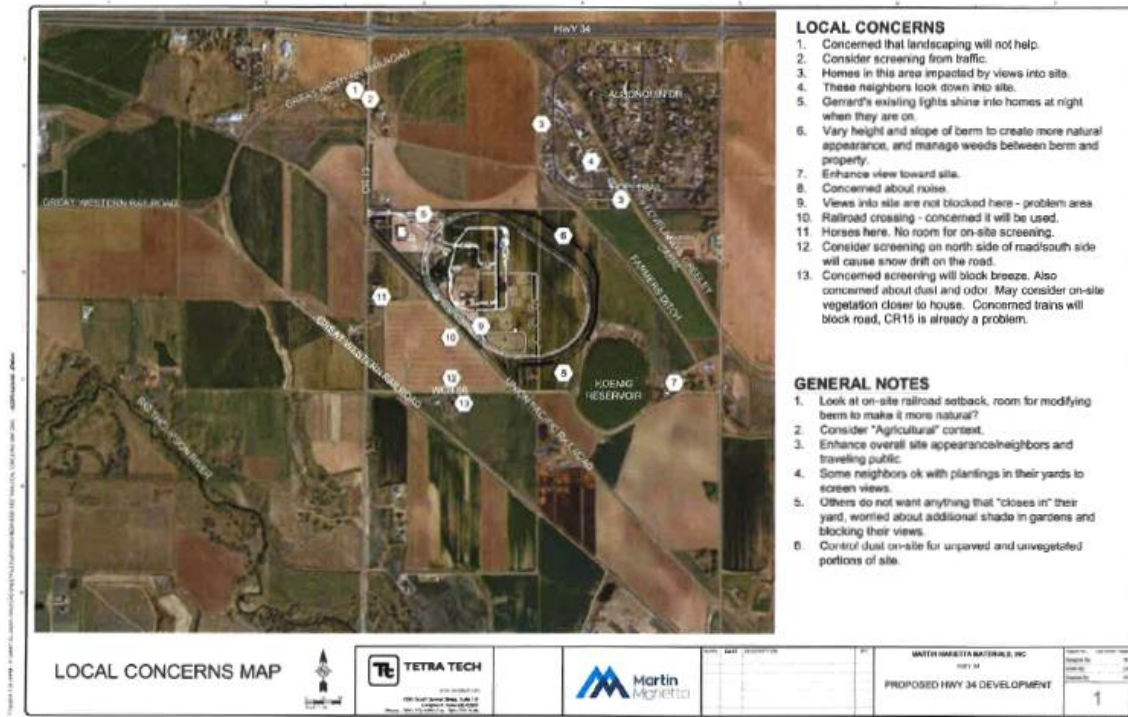
W.C.C. § 23-2-230.B.3 provides that a USR applicant bears the burden of proof to demonstrate that the proposed use is "compatible with the existing surrounding land USES."

The record contains substantial evidence that the existing surrounding uses are incongruous with the 131-acre heavy industrial facility that Martin Marietta seeks to construct. As reported by Weld County Planning Department Staff, the Proposed Site is immediately surrounded by agricultural and residential uses on all sides:

Zoning		Land Use	
N	A (Agricultural)	N	Agricultural/Residential
E	A (Agricultural)	E	Agricultural/Residential
S	A (Agricultural)	S	Agricultural/Residential
W	Larimer County/Agriculture	W	Agricultural/Residential

BATES000116. There are fourteen single-family homes within 500 feet of the Proposed Site and approximately 100 single-family home sites are located in a residential subdivision that is immediately adjacent to the northeast corner of the Proposed Site. BATES000070; *see also* BATES000198. Approximately 8 percent of the land area in the twenty sections surrounding the Proposed Site is actually used for industrial uses. BATES002233.

The nonconformity of the Proposed Use is demonstrated by the map submitted on Martin Marietta's behalf, which depicts the intensive, industrial Proposed Use (depicted in the center of the map with the 6,400-foot rail loop and at least nineteen new buildings where there is currently an irrigated alfalfa field) surrounded by productive farmland, irrigation infrastructure, and single-family homes on all sides:



BATES000198; *see also* BATES000097-99, BATES001887. A counselor for the Town of Johnstown (located one half mile west of the Proposed Site) characterized the Proposed Use as a "radical departure" from existing uses in the area. Transcript, at 71:21-71:22.

In response to this overwhelming evidence, Martin Marietta argued that there are other industrial uses in the broader vicinity of the Proposed Site. Transcript, at 31:11-31:22 (referring to BATES002580-82). In support of this contention, Martin Marietta presented maps of the zoning *designations*—as opposed to actual, existing land *uses*—for the broader region around the Proposed Site. BATES002580-82. However, the map that Martin Marietta used to illustrate this point was quickly disputed by officials from a neighboring government, which explained that there is actually only one existing industrial use in the areas shown in their jurisdiction as "Industrial" on Martin Marietta's map—a light industrial park containing distribution facilities for FedEx and a pipeline company approximately one mile from the Proposed Site. Transcript,

at 78:20-78:23.⁶ Planning Department staff also confirmed the unreliability of the map, which incorrectly designates large swaths of land to the north and adjacent to the Proposed Site as industrial. Transcript, at 244:19-245:5. This misleading map suggests a greater concentration of industrial uses near the Proposed Site than actually exists.

In the face of uncontroverted evidence that the Proposed Use is surrounded exclusively by agricultural and residential uses, there is no competent evidence that the intensive, heavy industrial use proposed in the Application is compatible with "existing surrounding uses."

D. The Proposed Use is Incompatible with Planned Future Uses.

W.C.C. § 23-2-230.B.4 requires that an applicant demonstrate its proposed use is consistent with the future development of the surrounding area as permitted by existing zoning or the master plans of affected municipalities.

Here, all of the property adjacent to the Proposed Site is zoned for agricultural or residential uses. BATES000116. With respect to the surrounding area, the Planning Department solicited comments from all surrounding jurisdictions within three miles of the Proposed Site to inquire as to whether the Proposed Use is inconsistent with their visions for the future. BATES000095-96. The Planning Department received the following substantive 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." The Resolution states that the Proposed Site is located in an area that Johnstown has formally designated for annexation and use for "low-density, single-family residential homes." BATES000740-41.

⁶ The fleeting reference to two light industrial uses appears to be the only identification of other existing industrial land uses near the Proposed Site in the entire record.

- b. The Planning Department for the Town of Windsor submitted a letter 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." BATES000759-60.
- c. The City of Greeley's Community Development-Planning Division commented that the Proposed Use "is incompatible" with the existing and future uses in the surrounding area, which will include "residences, retail, restaurants, neighborhood commercial, and institutions." BATES00716. Greeley further stated its belief that the Proposed Use "is an intensive industrial use unanticipated considering the nature of this corridor." BATES000717.
- d. Larimer County stated its belief that the Proposed Use "represents a significant change to the area with regards to traffic, noise, dust and odors, to mention a few." BATES000742.

The Proposed Site is adjacent to Larimer County, within a half mile of Johnstown and Windsor, and within three miles of Greeley. The Planning Commission concluded that "most of the comments [from surrounding jurisdictions] indicate that the proposed Martin Marietta project is incompatible with the area, the region, and the vision for the future for this gateway to Weld County." BATES000068.

Tellingly, Martin Marietta made no attempt to introduce evidence that the Application is compatible with surrounding future land uses. Rather than argue that the Proposed Use is consistent with the settled vision for future development, Martin Marietta argues with the substance of this vision: "Designating property for low density residential land use is not the best future use of land that has direct access to two railroads." BATES000142. This is not competent evidence that the Proposed Use is compatible with planned future surrounding uses. Other than Martin Marietta's conclusory claims to the contrary, the record is devoid of any suggestion that

the Proposed Use is consistent with the low-intensity residential and retail uses formally planned by neighboring governments.

E. Martin Marietta Made No Effort to Conserve Prime Farmland.

W.C.C. § 23-2-230.B.6 provides that a USR applicant bears the burden of proof to "demonstrate that a diligent effort has been made to conserve PRIME FARMLAND in the locational decision for the proposed use." Prime farmland is defined as "land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber and oilseed crops, and is also available for these USES (the land could be cropland, pastureland, rangeland, forest land or other land It has the soil quality, growing season and moisture supply needed to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable FARMING methods."

The Proposed Site is Prime farmland. BATES001434-35. Accordingly, the Application could not be approved without a finding that Martin Marietta made "a diligent effort" to preserve the Proposed Site.

A complete review of the record, however, reveals that Martin Marietta provided no evidence of any such efforts. Other than a conclusory claim that this essential element was satisfied, Martin Marietta's presentation to the Weld County Commissioners does not even make reference to the Proposed Site's status as Prime farmland. *See* Transcript, at 223:3-223:4 ("Um, we've talked quite a bit about diligent effort to conserve prime farm land."). Martin Marietta failed to submit any documentary evidence to support this claim. Instead, Martin Marietta responded to criticism that the Proposed Use would destroy Prime farmland during the application process by attempting to argue against the property's indisputable status as Prime

farmland: "[T]he portion that will be removed from agriculture has been kept in pasture grass and is not a significant generator of food product for people or animals. Therefore, the agricultural land being removed from production has not been used as prime agricultural production land." BATES000159. Indeed, it seems likely that Martin Marietta was not even aware that it needed to expend any effort—much, less "diligent efforts"—to preserve Prime farmland given that its "Site Selection Report" did not take the existence of Prime farmland into consideration in evaluating potential locations for the Proposed Use. BATES000395-99; *see also* Transcript, at 54:15-55:11 ("There are at least five industrially zoned sites available that would have not removed prime farmland from production.").

F. The Proposed Use Does Not Adequately Protect the Health, Safety and Welfare of the Inhabitants of the Neighborhood and the County.

W.C.C. § 23-2-230.B.7 provides that a USR applicant bears the burden of proof to demonstrate that the proposed use includes "adequate provision for the protection of the health, safety and welfare of the inhabitants of the NEIGHBORHOOD and the COUNTY."

Although Martin Marietta commissioned numerous reports in a belated attempt to argue that the Proposed Use does not threaten the public health, safety, and welfare near the Proposed Site, all of these reports were completed well after Martin Marietta had already selected the Proposed Site and around the same time that it first provided neighbors with its "Site Selection Report." Martin Marietta's Site Selection Report concedes that convenience was its paramount concern in selecting the Proposed Site and that the Proposed Use is inconsistent with neighboring residential uses: "If there was another site in Weld County that provided [the] same level of access to the rail and road systems that was away from any residential development, Martin Marietta would be proposing their facility on this property. The problem is, Martin Marietta has

not been able to find a better site." BATES000143. Martin Marietta confirmed at the Hearing that the Proposed Site is not the only viable location and is instead the best location for Martin Marietta's needs. Transcript, at 189:11-189:13. Martin Marietta did not select the Proposed Site in accordance with the governing legal standard and instead created unreliable evidence that attempts to minimize the negative externalities of the Proposed Use.

In response to these flawed reports, neighbors presented substantial evidence which undermines the credibility and reliability of each of these Martin Marietta-commissioned reports. Consequently, the record is without competent evidence to demonstrate that Martin Marietta met its burden to demonstrate that the Proposed Use adequately protects the public health, safety, and welfare as required by W.C.C. § 23-2-230.B.7.

Human Health

In support of its contention that the Proposed Use will not negatively affect human health, Martin Marietta submitted an undated and unsigned written statement and presented testimony from Scott Phillips, a medical toxicologist. *See* BATES00346-48; Transcript, p. 199:15-200:14. The statement focuses exclusively on human health impacts from asphalt plants and does not address the severity of the impacts that will result from increased dust and emissions from other processes contemplated as part of the Proposed Use. BATES002285. Further, Dr. Phillips's testimony merely provides that the Proposed Use will comply with CDPHE standards for air pollution and does not address the potential localized effects on human health that could result from siting the Proposed Use adjacent to family homes and working farms.

Traffic

Martin Marietta estimates that the Proposed Use will initially generate 1,120 "site trips" per day and that this number will increase to an estimated 2,260 "site trips" per day by 2035. BATES00179. Without recommending any infrastructure improvements (aside from unsupported allusions to "planned" government improvements), Martin Marietta's initial traffic study demonstrated that traffic on County Road 13 will increase exponentially in the short and long term, but nevertheless claimed that the Application is "viable" given existing infrastructure. BATES000256-304. Following significant pushback from neighbors and opponents' technical review of the traffic study which concluded that the Proposed Use would result in a "failing" level of service, Martin Marietta agreed that it would construct a new traffic signal at the intersection of County Road 13 and U.S. 34. "Neighborhoods Opposition Report," at 27-53.⁷

This concession, however, remains insufficient to rectify the many other flaws identified in the technical review of the study. For example, the technical review highlights that the traffic study minimizes the true impact of truck traffic that will result from the Proposed Use, as opponents' traffic expert explained that one truck should be treated as three passenger cars when analyzing traffic congestion. Transcript, at 49:7-49:11. In the short term, the Proposed Use is expected to nearly double the amount of trucks that use U.S. 34 on a daily basis. *See* Transcript, at 11:24-12:8. The technical review also highlights the fact that Martin Marietta's traffic study makes no account for increased train traffic and the impact that numerous local rail crossings will have on increased traffic congestion. "Neighborhoods Opposition Report," at 50. Further, all of Martin Marietta's traffic analysis in the record is based off of these traffic projections,

⁷ This report was entered into the administrative record on August 7, 2015, and counsel for the Weld County Commissioners has agreed to supplement the Certified Record with this report.

which were not developed by an independent traffic expert but are instead the product of "[Martin Marietta's] estimates." BATES000267. The record does not include competent evidence to support these "estimates."

In the absence of any support for its assumptions and critical omissions, Martin Marietta's traffic study does not constitute competent evidence.

Noise

As explained *infra*, by its terms, Martin Marietta's noise report confirms that the Proposed Use will result in violations of the state noise statute at all adjacent residential properties. The noise that will result from the Proposed Use will be a "public nuisance," which is a "major source of environmental pollution" and "represents a threat to the serenity and quality of life in the state of Colorado." C.R.S. § 25-12-101. There is no competent evidence to the contrary.

Air Pollution

Martin Marietta introduced evidence regarding the air pollution that will result from the Proposed Use in the form of a report prepared by Stewart Environmental Consultants, a rebuttal to opponents' critique of the report, and testimony from David Stewart. BATES000349-63, BATES002393-405, Transcript, p. 198:18-204:5. These materials confirm that the Proposed Use will result in the emission of seven criteria pollutants and six hazardous air pollutants, including formaldehyde. BATES002404.

Among other concerns raised by neighbors, opponents demonstrated that Stewart's analysis was objectively flawed in at least two main respects: (1) Stewart claims, without evidentiary support, that dust from truck traffic, which was not include in its initial report, will

be reduced by 90 percent due solely to street sweeping; and (2) Stewart claims that hazardous formaldehyde emissions will not exceed permissible levels at the property line because the Proposed Use will use carbon filters on the asphalt cement tanks, which is invalid because it has no impact on formaldehyde emissions from the drum mix aggregate dryer, silo filling, and truck load. "Neighborhoods Opposition Report," at 76-84.

Again, the record reveals that Martin Marietta's flawed analysis fails to provide competent evidence regarding this critical component for the protection of human health.

G. The Proposed Use Violates the Design Standard Requiring that Any Development Occur on the Least Prime Soils.

W.C.C. § 23-2-230.B provides that a USR applicant bears the burden of proof to establish compliance with all of the design standards set forth in W.C.C. § 23-2-240. One such design standard requires that USR's in the Agricultural Zone "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.

As demonstrated above, Martin Marietta selected the Proposed Site without any consideration for preserving Prime farmland. Similarly, the record does not include any evidence that Martin Marietta analyzed the relative quality of the soils at the Proposed Site such that it made any effort to design the Proposed Use's facilities to be located on the least prime soils on the Proposed Site. There is no competent evidence that Martin Marietta met this design standard.

H. The Proposed Use Violates the Operations Standard for Noise.

W.C.C. § 23-2-230.B provides that a USR applicant bears the burden of proof to establish compliance with all of the operations standards set forth in W.C.C. § 23-2-250. One such

operations standard requires that a proposed use comply with the noise standards established by state statute. *Id.* § 23-2-250.A. Section 25-12-103(1), C.R.S., provides that the noise in a residential zone may not lawfully exceed 55 db(A) during the day and 50 db(A) at night (when measured at a distance of twenty-five feet from the property line).

Martin Marietta's own noise expert conceded that, even if Martin Marietta performs all of its promised sound mitigation strategies, the Proposed Use will still violate the residential noise standard at three different residences. BATES000309. When measured from the adjacent property lines, Martin Marietta's own expert predicts that the Proposed Use will violate the state noise statute at all seven neighboring properties during the day and at six of the seven neighboring properties at night. *Id.* There is no competent evidence in the record that the Proposed Use will not violate section 25-12-103(1), C.R.S.

III. The Weld County Commissioners Relied Upon Legally Impermissible Criteria and Failed to Apply the Correct Legal Standard.

The Weld County Code provides for a quasi-judicial procedure and a rigid standard for determining the resolution of a USR application in an Agricultural Zone. W.C.C. § 23-2-230. The Weld County Commissioners are charged with determining whether the applicant has met its burden of proof to demonstrate nine discrete factors regarding the proposed USR within the context of its proposed location. *Id.* § 23-2-230.B. These factors do not include any consideration of the economic benefit that might result from the USR, the perceived "need" for the proposed use in Weld County, or other political or philosophical considerations.

Here, the Weld County Commissioners abused their discretion by ignoring the applicable legal standard set forth in W.C.C. § 23-2-230 and approving the Application on the basis of inappropriate political and economic reasons. The record is filled with statements from each of

the county commissioners that demonstrate that their paramount concern in approving the Application is to generate jobs and revenue for Weld County and ensure that Martin Marietta will be able supply materials for new construction. *See, e.g.*, Transcript, at 87:23-88:2, 106:15-106:17, 141:22-143:2. Conversely, there are no questions or statements from the commissioners regarding the preservation of Prime farmland or the type of asphalt plant that Martin Marietta intends to construct. *See generally* Transcript. In justifying their votes to approve the Application, several commissioners stressed that their approval was based on the county's need for the Proposed Use and the expected economic benefit. Transcript at 301:10-301:22, 302:11-302:14, 303:2-303:7.

As a political matter, all of the foregoing considerations may be fair game. With respect to a USR application, however, these considerations are wholly inappropriate. If the Weld County Commissioners believe that, as a political matter, Martin Marietta's Proposed Use is needed within the county, it should use its legislative powers to ensure that adequate zoning exists to accommodate such use in locations that are both physically and financially appealing to Martin Marietta. The USR process, however, is not the correct venue for such political change and the conversion of a single agricultural parcel to an intensive heavy industrial use, which is wholly inconsistent with surrounding uses, is tantamount to unlawful spot zoning. Accordingly, the Weld County Commissioners exceeded their jurisdiction and abused their discretion by misapplying and misconstruing the legally required standards set forth in W.C.C. § 23-3-240.B.

IV. Plaintiffs' Due Process Rights Were Violated by Commissioner Cozad's Failure to Disclose Her Conflict of Interest.

An adjudicatory hearing may be unlawfully compromised by "a personal, financial or official stake in the decision evidencing a conflict of interest on the part of a decision maker."

Mountain States Tel. & Tel. Co. v. Pub. Util. Comm'n, 763 P.2d 1020, 1028 (Colo. 1988). Here, as recently as 2014, Commissioner Cozad worked for Tetra Tech (Martin Marietta's primary consultant during the USR application process) and served as the direct supervisor to the consultant that represented Martin Marietta at the Hearing, Pam Hora. First Amended Complaint, ¶¶ 63-64.⁸ Despite her past personal and financial relationship, Commissioner Cozad did not disclose this conflict of interest and did not recuse herself from the Hearing. Commissioner Cozad's failure to disclose this conflict undermines the impartiality of the entire proceeding and constitutes grounds for reversal.

In stark contrast, when the Application was before the Planning Commission two separate commissioners recused themselves to avoid any appearance of impropriety. *See* BATES000081. Specifically, one commissioner recused himself after he disclosed that he had approached Martin Marietta about relocating the project to a different site that would benefit him financially. *Id.* Another commissioner recused himself because his employer has a business relationship with Martin Marietta. *Id.*

Because Commissioner Cozad did not disclose her past personal and financial relationship with Martin Marietta's consultant, Plaintiffs have no way of knowing whether she worked on the Application or otherwise stands to benefit from its approval. Further, because Commissioner Cozad did not recuse herself, Plaintiffs have no way of knowing what communications occurred amongst the Weld County Commissioners behind closed doors, and, at the very least, Commissioner Cozad's participation in the Hearing substantially undermines any

⁸ These facts are not in the record because they were not known to Plaintiffs until after the Hearing. Complaint, ¶ 63.

presumption of impartiality. The resulting decision therefore violated Plaintiffs' rights to procedural due process and should be reversed.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request that they be permitted to appear before the Court for oral argument regarding the issues raised in this Opening Brief.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court reverse the approval of the Application and provide such other and further relief as it deems just and proper.

DATED: January 19, 2016

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

/s/ Mark Lacin

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CERTIFICATE OF SERVICE

I certify that on January 19, 2016, **PLAINTIFFS' OPENING BRIEF** was filed and served via ICCES on the following:

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