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

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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.

▲ COURT USE ONLY ▲

Case No. 2015CV30776

Division: 4

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PLAINTIFFS' SUPPLEMENTAL BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with this Court's October 7, 2016 Order re: Plaintiffs' Motion to Set Briefing Schedule. Specifically, the undersigned certifies that:

☒ Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains 3,983 words.

Consistent with this Order, this Supplemental Brief is confined to the issues raised by the Amended Resolution. The Plaintiffs expressly incorporate all of their earlier briefing and argument before the Court.

By: */s/ James Silvestro*
James Silvestro, #43982

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INTRODUCTION

The Amended Resolution adopted by the Weld County Commissioners (the "BOCC") suffers from the same infirmities as the underlying record. The record is devoid of any competent evidence to support the approval of Martin Marietta Materials Inc.'s ("MMM") application (the "Application") to convert 131 acres zoned as agricultural land (the "Proposed Site") into a heavy industrial asphalt, concrete, and railroad-to-truck transloading facility (the "Proposed Use"). Consequently, the BOCC has abused its discretion.

Although the Amended Resolution purports to rely upon credible evidence, it does so by mischaracterizing evidence and incorporating "facts" that are not in the record. Among its many flaws—each of which is independently fatal to the Application—the Amended Resolution ignores the uncontroverted evidence that the Proposed Use is inconsistent with existing and future surrounding uses and will adversely affect the public health and welfare. Moreover, the Amended Resolution confirms that MMM made no effort to preserve Prime farmland, that the Proposed Use is unrelated to agriculture, and that the Application is for an unlawful land use.

ARGUMENT

I. The Amended Resolution Confirms that There Was No Competent Evidence in the Record to Support Approval.

The Weld County Code mandates an intensive review before an application for a Use by Special Review ("USR") may be approved because "[u]ses by Special Review are USES which have been determined to be more intense . . . than the Uses Allowed by Right in a particular zone district." W.C.C. § 23-2-200.A. To obtain approval for a USR, the applicant bears the burden of proof to demonstrate all nine required elements. W.C.C. § 23-2-230.B.

The Amended Resolution confirms that the BOCC engaged in the same after-the-fact rationalization that MMM utilized after it selected the Proposed Site. Rather than analyzing the Proposed Use with an eye towards harmony with existing and future surrounding uses, the Amended Resolution repeatedly refers to the fact that the Proposed Site is the best location for MMM's needs. Consequently, the Amended Resolution is unsupported by competent evidence and should be overturned.

A. *MMM's "Locational Decision" Made No Effort to Conserve Prime Farmland.*

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." W.C.C. § 23-2-230.B.6. The Amended Resolution claims that MMM satisfied this requirement "through the configuration of its site" by "clustering the industrial activities on the site as far west as possible." Amended Resolution, at p. 7.

This conclusion fails for two reasons. First, there is no evidence that MMM made any effort to "configure" the Proposed Use at the Proposed Site to preserve Prime farmland. None of the Applicant Defendants argued this before the BOCC, and in fact, MMM's attorney claimed that the "clustered" development was intended to reduce the negative impact of the heavy industrial use on neighboring residents—MMM did not make any mention of Prime farmland. Transcript, at 37:13-37:20. Moreover, the suggestion in the Amended Resolution that the Proposed Use will "retain 30 acres" of Prime farmland (representing only 22.9 percent of the Proposed Site) further ignores that the "undeveloped" area will be bisected by a railroad loop and earthen berms and cannot be used as productive farmland. Amended Resolution, at 10; *see* BATES000198.

Second, the plain meaning of W.C.C. § 23-2-230.B.6 has nothing to do with the configuration of a proposed development. The County Code requires that an applicant provide competent evidence to demonstrate "a diligent effort" was made to preserve Prime farmland in the "locational decision for the proposed use." (Emphasis added.) The plain meaning of this mandate is that an applicant must use diligent efforts to preserve Prime farmland when it selects a location for a proposed use. Moreover, a development is already required to be "clustered" within a given site to preserve Prime farmland is separately required by W.C.C. § 23-2-240.A.11. The BOCC's attempt to interpret W.C.C. § 23-2-230.B.6 to require the exact same showing would improperly relegate this Design Standard as meaningless surplusage. *Colo. Med. Bd. v. Office of Admin. Courts*, 2014 CO 51 ¶19.

Here, it is undisputed that MMM did not consider the existence of Prime farmland when it selected the Proposed Site. Opening Brief, at pp. 26-27. There is no evidence that MMM made a diligent effort to preserve Prime farmland, and the BOCC's unreasonable interpretation of W.C.C. § 23-2-230.B.6 cannot save MMM's defective Application.

B. *The Proposed Use Is Inconsistent With and Not "Related to" Agriculture.*

W.C.C. § 23-2-230.B.2 provides that a USR applicant bears the burden to demonstrate that a 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 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." *Id.* (emphasis added); *see also* W.C.C. § 22-2-20.G (land use regulations should support uses that are "directly related to, or dependent upon, agriculture to locate within agricultural areas").

The BOCC claims that the Proposed Use is "related to" agriculture because "[a]ggregate, asphalt and concrete from the proposed use will also be used for the construction of dikes, spillways, ditch liners, feed areas, processing plants, irrigation structures, loafing sheds, dairy parlors and runoff control on farms, and to build and maintain roads used to get agricultural products to markets." Amended Resolution, at p. 3.

The record does not support this conclusion and is without any reference to "dikes," "spillways," "loafing sheds," "dairy parlors," or "runoff control." The Applicant Defendants did not provide any evidence that the Proposed Use would be related to agriculture—MMM actually argued that the Proposed Use is needed for non-agricultural growth in northern Colorado. Trans., at 27:13-21. The only discussions of this factor at the hearing were: (1) Planning Staff's conclusion that the Proposed Use has no relationship with agriculture, Transcript, at 6:11-6:19; and (2) Commissioner Cozad's unsupported proclamation that the Proposed Use is related to agriculture because it will support infrastructure generally. Transcript, at 303:20-301:5.

The Amended Resolution merely states the obvious: aggregate, asphalt, and concrete are used in construction. The Amended Resolution does not identify any special relationship between these commodities and agriculture. Instead, it simply concludes that any infrastructure that might help get produce to market—such as an airport or a power plant—could be "related to" agriculture and may therefore be built on land zoned agricultural. This reductionist interpretation ignores the need for any meaningful relationship between a generic commodity

and agriculture. By the BOCC's logic, Weld County could permit a textile factory or auto plant to be built in an Agricultural Zone because farmers wear clothes and drive trucks. The Proposed Use is not seeking to produce fertilizer or irrigation equipment—it does not relate to agriculture.

There is no evidence to support a finding that the Proposed Use "will maintain and promote agriculture," Amended Resolution, at p. 3, and the Amended Resolution therefore constitutes *de facto* spot zoning for an industrial use. The BOCC abused its discretion when it unreasonably interpreted W.C.C. § 23-2-230.B.2 to allow for any non-agricultural use that could have some distant, theoretical connection to agriculture.

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

The Amended Resolution is similarly devoid of any competent evidence that MMM's proposed heavy industrial use will be compatible with the existing agricultural and residential uses that surround the Proposed Site. W.C.C. § 23-2-230.B.3 provides that a USR applicant bears the burden of proof to demonstrate that a proposed use is "compatible with the existing surrounding land USES." (Emphasis added.)

As reported by Weld County Planning Staff and uncontested in the record, the Proposed Site is surrounded by agricultural and residential uses on all sides:

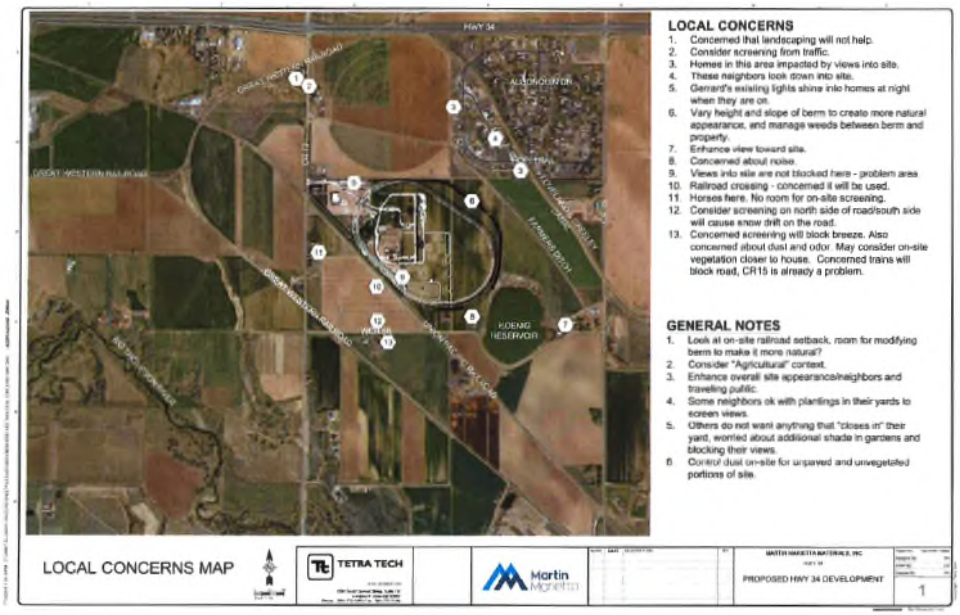
	Zoning		Land Use
N	A (Agricultural)	N	Agricultural/Residential
E	A (Agricultural)	E	Agricultural/Residential
S	A (Agricultural)	S	Agricultural/Residential
W	Larimer County/Agriculture	W	Agricultural/Residential

BATES000116. Despite this reality, the Amended Resolution treats the existing use at the Proposed Site as if it were one of the existing surrounding uses and mischaracterizes this

commercial operation as an "industrial construction business." Amended Resolution, at 2. If the Application is upheld, however, this existing onsite use will cease and the majority of the Proposed Site will be converted from an alfalfa field to the proposed heavy industrial use.

The Amended Resolution further claims that the Proposed Use is consistent with existing surrounding uses by relying upon a discredited zoning map (submitted by MMM)[1] that shows future potential (as opposed to existing) land uses within the broader region. Amended Resolution, at p. 4. Consistent with this forward-looking map, the Amended Resolution paradoxically claims that the Proposed Uses is consistent with existing surrounding uses because of "likely" future commercial and industrial uses in the region.

The Amended Resolution also incorrectly states that the nearest residence is 1000 feet from the "facility." Amended Resolution, at p. 5. In reality, there are fourteen single-family homes within 500 feet of the Proposed Site:



[1] Even if this map had anything to do with existing surrounding uses, its accuracy was fatally undermined by officials by public officials who testified at the hearing that the map is incorrect and misleading. Transcript, at 78:20-78:23; 244:19-245:5.

BATES000198. Each of these homes will be less than 1000 feet (some far less) from the railroad track that will encircle the Proposed Site to accommodate the three full trainloads of aggregate that will arrive each week at unpredictable hours. BATES000070; BATES000495; Transcript, at 20:2-20:3, 225:5-225:7.

The only competent evidence in the record confirms that all of the existing surrounding land uses are either agricultural or residential. The only reference in the record to existing industrial uses in the vicinity of the Proposed Site is a passing mention of a light industrial park approximately one mile away. Transcript, at 78:20-78:23. The heavy industrial Proposed Use is fundamentally incompatible with the existing character of the surrounding neighborhood. There is no evidence to support the BOCC's finding that the Proposed Use is compatible with existing land uses, and the BOCC abused its discretion in adopting the Amended Resolution.

D. *There is No Evidence that the Corridor Surrounding the Proposed Site Will Become Industrialized.*

W.C.C. § 23-2-230.B.4 requires an applicant demonstrate that 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.

Without any evidentiary support from the record, the Amended Resolution summarily concludes that the Proposed Site is "suitable for commercial and industrial uses" and finds that there is "a high likelihood that existing transportation and infrastructure will attract more commercial and industrial development in the area." Amended Resolution, at p. 5. The BOCC appears to be alone in this assessment, as the comments from all surrounding jurisdictions reveal that "the proposed Martin Marietta project is incompatible with the area, the region, and the vision for the future of this gateway to Weld County." BATES000068; Transcript, at 7:10-7:14

("The batch plan[t] is an intensive industrial use and unsuitable for the nature of this corridor and its impacts likely cannot be fully mitigated. Approval of this USR would likely establish a sprawling and overly intense land use pattern for future development of the corridor.").

Undeterred by the lack of evidentiary support in the record, the Amended Resolution impermissibly relies on "facts" from outside the record. Such "facts" include alleged commercial and industrial developments that have been "planned" by Windsor in the "Highway 34 Corridor" and Johnstown's alleged approval of "a truck parking and transload facility at the Highway 34 and CR 13 intersection." Amended Resolution, at p. 6. The Amended Resolution also mischaracterizes comments that were submitted by Greeley on May 27, 2015. *Id.* at 7. Greeley's May 27, 2015 letter cannot be fairly characterized as evidence that Greeley "generally supports" the Proposed Use—to the contrary, the letter states that the Proposed Use is "incompatible" with the vision of Greeley and Windsor and represents "an intensive industrial use unanticipated considering the nature of this corridor." BATES000716-717.

Because the record does not contain any competent evidence of similar heavy industrial uses that will surround the Proposed Site in the future, MMM failed to meet its burden under W.C.C. § 23-2-230.B.4 and the BOCC abused its discretion in adopting the Amended Resolution.

E. *Uncontroverted Evidence Confirms that the Proposed Use Will Violate Noise Standards.*

W.C.C. § 23-2-230.B provides that a USR applicant must demonstrate compliance with all operations standards set forth in W.C.C. § 23-2-250, which includes compliance with applicable noise standards. *Id.* § 23-2-250.A.

In the Amended Resolution, the BOCC correctly identifies the operative noise standard: 55 dB(A) during the day and 50 dB(A) at night at all boundaries of the Proposed Site that are adjacent to residential uses. Amended Resolution, at p. 6. The Amended Resolution then concludes that noise from the Proposed Use "has been mitigated" such that this standard will be met at all such boundary lines. *Id.*

This conclusion, however, is contrary to the uncontroverted evidence in the record. The noise report submitted by MMM confirms that even if all proposed noise mitigation is employed, the Proposed Use will violate the residential noise standard. *See* Reply Brief, at 19-20. The only evidence regarding noise demonstrates that the Proposed Use will violate the applicable noise standard. Accordingly, the BOCC abused its discretion when it determined that the Proposed Use will comply with W.C.C. § 23-2-230.B.

F. *The Only Competent Evidence Demonstrates that the Proposed Use Will Adversely Affect Public Health, Safety, and Welfare.*

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." In a belated effort to satisfy this requirement, MMM commissioned reports after it selected the Proposed Site which purport to show that the Proposed Use does not threaten public health, safety, and welfare. MMM's own 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.

Because MMM worked backwards to justify its selection of the Proposed Sites, many of the reports it submitted are fatally flawed. As this Court recently noted: "at the public hearing, the BOCC heard extensive testimony that the proposed use is incompatible with existing residential uses; that it would negatively impact surrounding property values; and that several of the studies submitted by Martin Marietta were deeply flawed." Order of Remand, at p. 3.

The Amended Resolution claims that the public health and welfare will be protected by the Conditions of Approval and Development Standards. Amended Resolution, at 7. The Amended Resolution ignores, however, that the vast majority of these standards merely require existence with state and County law, and do nothing to actively mitigate the negative impacts that the non-conforming Proposed Use will have on all surrounding land owners. *See id.* at 17-22. Moreover, the Amended Resolution falsely claims that the Proposed Use may only engage in night operations three times per month—as adopted, the Amended Resolution allows that night operations at the asphalt plant "could occur seven days per week." *Compare id.* at 8 *with id.* at 17. The claim that the hours of operation for the Proposed Use will be "consistent and compatible" "with the majority of the general public's work hours" is contracted by the Amended Resolution itself. *Id.* at 7-8, 17.

Considerable evidence was presented that the Proposed Use will negatively impact neighboring property values, substantially increase traffic, and generate more and different air pollution than predicted by MMM. The Amended Resolution wholly ignores property value concerns and issues with MMM's traffic and air pollution studies. *See* Opening Brief, at 29-31.

Accordingly, the BOCC abused its discretion in approving the Application without any competent evidence that the Proposed Use will not adversely affect public health, safety, and welfare.

G. *The Amended Resolution Ignores that the Proposed Use Will Force Neighboring Farms to Close.*

To obtain approval for a USR, an applicant bears the burden of proof of compliance with the Weld County Comprehensive Plan. W.C.C. § 23-2-230.B.1. Although many requirements in the Comprehensive Plan overlap with requirements for approving a USR, there are several land use standards that exist solely in the Comprehensive Plan. Specifically relevant here, W.C.C. § 22-2-20.J provides that Weld County recognizes a "Right to Farm," whereby "[a]gricultural 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."

The record below includes competent evidence that the approval of the Proposed Use will likely result in the closure of one or more neighboring farms. BATES002130-31; BATES002220. Specifically, at the hearing before the BOCC, 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.

Despite such concerns, the Amended Resolution ignores the impact that the Proposed Use will have on surrounding farms and instead, interprets the "Right to Farm" only from the perspective of the Proposed Site. Specifically, the Amended Resolution provides that MMM's plan to remove Prime farmland is permissible because the "Right to Farm" "does not prevent the conversion of farmland to other uses. Instead it puts new residential users on notice that there are agricultural uses in the vicinity that may impact their urban and suburban lifestyles."

Amended Resolution, at p. 4 (emphasis added). This claim, however, misconstrues the Right to Farm, which applies to all new land users in Weld County, not just residential users.

The undisputed evidence in the record demonstrates that MMM's new use will impede surrounding farmers' Right to Farm. The Amended Resolution fails to address that the Proposed Use will violate neighbors' Right to Farm. The BOCC abused its discretion in approving the Application and elevating the concerns of MMM above those of surrounding farmers.

II. The Amended Resolution Ignores the Unlawful Nature of the Proposed Use.

The Proposed Use is not a permitted USR within the Agricultural Zone because: (1) it will include a continuous (drum mix) asphalt plant; and (2) there will not be any mineral resource activities at the Proposed Site. Because the Proposed Use is not legally permitted, the BOCC's approval of the Application was a *per se* abuse of discretion. *See Western Paving Constr. Co. v. Beer*, 917 P.2d 344, 347 (Colo. 1996).

A. *The BOCC Has Not Interpreted the County Code to Permit the Operation of a Continuous (Drum Mix) Asphalt Plant.*

Although W.C.C. § 23-3-40 permits the operation of an "asphalt or concrete batch plant" as a USR, there is nothing in the Weld County Code that permits a land owner to operate a continuous (drum mix) asphalt plant in an Agricultural Zone.

Plaintiffs initiated this lawsuit in part because they believe that the inclusion of a continuous (drum mix) asphalt plant as part of the Proposed Use violates the permissible uses within the Agricultural Zone. Amended Compl. ¶ 76. In its earlier briefing, the BOCC argued through counsel that it impliedly interpreted the County Code to permit a continuous (drum mix) asphalt plant as a USR and that its interpretation is entitled to deference. But Colorado law does not provide for deference in the face of an implied interpretation. Reply Brief, at 9.

Once this action was remanded, the BOCC had a fresh opportunity to address this deficiency. Instead of resolving this issue, however, the BOCC has now doubled down on its refusal to address the issue. The Amended Resolution repeatedly refers to the asphalt plant that will be constructed as part of the Proposed Use as an "asphalt plant" without any description of the *type* of asphalt plant to be constructed. *See, e.g.*, Amended Resolution, at 5, 9.

By its own admission, MMM intends to construct a continuous (drum mix) asphalt plant. BATES000350-63, BATES002393-405. A continuous (drum mix) asphalt plant is not a permitted USR, and the BOCC's continued refusal to address the issue only serves as further evidence that the Proposed Use is unlawful.

B. *The Proposed Use Will Not Be Related to "Mineral Resource Development."*

Under the County Code, asphalt batch plants, concrete batch plants, and transloading facilities may only be part of a lawful USR within the Agricultural Zone if such facilities are part of a "mineral resource development." W.C.C. § 23-3-40.A. This makes sense: because the County's zoning scheme cannot necessarily account for where mineral deposits are located, an exception exists to allow certain uses within land in the Agricultural Zone that contains minerals.

Here, the Proposed Use is intended to be a standalone heavy industrial facility and all aggregate will be delivered from offsite. BATES00146. In other words, the Proposed Use will not be collocated with a mineral resource development, as required by the Weld County Code. Despite the fact that this issue was raised by the Court and discussed at length by counsel at oral argument, the Amended Resolution does not address the issue. There is no evidence that the Proposed Use will be collocated with mining operations or otherwise related to "mineral

resource development." Accordingly, the Proposed Use is not a lawful USR and the BOCC has exceeded its authority.

III. The Amended Resolution Confirms that the BOCC Relied Upon Legally Impermissible Criteria.

The County Code provides an explicit rubric for the consideration of USR applications. W.C.C. § 23-2-230. The BOCC must determine whether an applicant has met its burden of proof to demonstrate nine land use discrete factors. *Id.* § 23-2-230.B.

As in the hearing below, the BOCC continues to impermissibly rely upon a number of extraneous considerations in the Amended Resolution by focusing on the benefits to MMM and the County and claiming that the Proposed Site is "uniquely suited," "the ideal location," and "well suited" because of its proximity to transportation corridors. Amended Resolution, at 5, 7, 10.[2] The Amended Resolution confirms that the BOCC was blinded by the interests of MMM and the perceived boon that the County will realize from this $20 million industrial complex. These considerations are not permissible criteria under the County Code, and the BOCC exceed its authority by applying the incorrect legal standard. *Nixon v. City & Cnty. of Denver*, 2014 COA 172, ¶ 12.

IV. Commissioner Cozad Participated in Adopting the Amended Resolution and Still Has Not Disclosed the Nature of Her Relationship with MMM's Lead Consultant.

Commissioner Cozad's failure to disclose that she previously worked as a management-level supervisor for MMM's lead consultant on the Application, prior to the formal submission of the Application, creates an appearance of impropriety. When this matter was remanded to the BOCC, Commissioner Cozad should have disclosed the nature of her prior dealings with MMM

[2] The Amended Resolution's reference to Prime farmland underlying the Indianhead Estates Subdivision is similarly confounding. Amended Resolution, at 7. The status of neighboring land has no bearing on the Application.

and its consultant. Instead, Commissioner Cozad did not disclose her potential conflict of interest and participated in the approval of the Amended Resolution. Commissioner Cozad's continued participation in this matter further undermines any presumption of impartiality. As with the BOCC's initial approval, the adoption of the Amended Resolution violated Plaintiffs' rights to procedural due process and should be reversed.

CONCLUSION

For the reasons set forth above and in Plaintiffs' prior briefing, Plaintiffs respectfully request that this Court reverse the BOCC's approval of the Application.

DATED: October 28, 2016

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

/s/ Mark Lacis

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CERTIFICATE OF SERVICE

I certify that on October 28, 2016, **PLAINTIFFS' SUPPLEMENTAL BRIEF** was filed and served via ICCES on the following:

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