DISTRICT COURT, WELD COUNTY, COLORADO 915 10th Street, Greeley, CO 80631 P.O. Box 2038 Greeley, CO 80632 Phone Number: (970) 475-2400	DATE FILED: November 10, 2016 2:58 PM FILING ID: 716E17D5F6182 CASE NUMBER: 2015CV30776
PLAINTIFFS: 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 v. **DEFENDANTS:** 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, Steve 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	**▲ COURT USE ONLY ▲** Case Number: 2015CV30776 Division 4
Attorney for the Board of County Commissioners of Weld County, Colorado (including all of the individual Commissioners in their official capacities: Chair Michael Freeman, Pro-Tem Sean Conway, Barbara Kirkmeyer, Steve Moreno, and Julie Cozad) Bruce T. Barker, No. 13690 Weld County Attorney 1150 'O' Street, P.O. Box 758, Greeley, CO 80632 Phone Number: (970) 336-7235, Fax Number: (970) 352-0242 E-mail: bbarker@co.weld.co.us	

WELD COUNTY'S RESPONSE TO

PLAINTIFFS' SUPPLEMENTAL BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the 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 2,912 words.

By: _____
Bruce T. Barker, No. 13690

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Weld County Ordinances

COMES NOW the Board of County Commissioners of Weld County, Colorado ("the Board"), including all of the individual Commissioners in their official capacities, by and through its undersigned counsel, and hereby submits the following Response to Plaintiffs' Supplemental Brief:

INTRODUCTION

Plaintiffs' Supplemental Brief argues that the Certified Record does not support the Board's determination in its Amended Resolution. They ask the Court to reverse the Board's decision approving the application for the use-by-special review ("USR 15-0027" or "USR") submitted by Martin Marietta Materials, Inc. ("Martin Marietta"). Plaintiffs are incorrect in their arguments, as demonstrated below.

STANDARD OF REVIEW

It bears repeating that in a C.R.C.P. 106(a)(4) review, the only issue for consideration is whether the governmental body, in the exercise of its quasi-judicial authority, exceeded its jurisdiction or abused its discretion. The Court is not to reweigh the evidence in the record, or to interfere with or substitute its opinion, judgment or philosophy for that of the governmental body if there is any competent evidence in the record to support the decision. *Coleman v. Gormley,* 748 P.2d 361 (Colo. App. 1987); *Ross v. Fire and Police Pension Ass 'n,* 713 P.2d 1304 (Colo. 1986). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Bd. Of County Com'rs of Routt County v. O'Dell,* 920 P.2d 48, 51 (Colo. 1996), citing *Ross.* The Court must look to the entire record and must uphold the decision unless there is no competent evidence in

the record to support it. *Fedder v. McCurdy,* 768 P.2d 711, 713 (Colo. App. 1988). A quasi-judicial decision will not be deemed arbitrary and capricious or an abuse of discretion unless the court finds there is no competent evidence in the record to support it. So long as the record provides competent evidence to support the governmental body's decision, it must be affirmed even if reasonable persons could differ as to its merits. *Ford Leasing Development Co. v. Board of County Commissioners,* 528 P.2d 237 (Colo. 1974).

ARGUMENT

Plaintiffs' Supplemental Brief attacks certain findings of fact and conclusions made by the Board in its Amended Resolution. The topics of attack include: Conservation of Prime Farmland, Relationship to Agriculture, Compatibility with Existing Surrounding Land Uses, Increasing Commercialization and Industrialization of the Highway 34 Corridor, Violation of Noise Standards, Effect on Public Health, Safety and Welfare, Weld County's "Right to Farm," and "Mineral Resource Development." Each of these topics is discussed below.

*1. **Conservation of Prime Farmland.***

Plaintiffs argue that Martin Marietta has not demonstrated it made a diligent effort to "conserve PRIME FARMLAND in the locational decision for the proposed use," as required by W.C.C. § 23-2-230 B.6. According to Plaintiffs, the Amended Resolution is without support in concluding this requirement is satisfied by the clustering of operations onto the western portion of the property and leaving at least thirty (30) acres open for the railroad loop and irrigated grasslands. Amended Resolution, at p. 7.

Evidence of clustering and the conservation of prime farmland on the Martin Marietta site is found by viewing the diagrams and depictions at BATES 002552, 002559 to 002564. The site consists of two (2) parcels. One of the parcels was previously approved for industrial use for the operation of a construction business under USR-1584. That parcel was taken out of agricultural production prior to August 12, 2015. TR, 18:15-19. The diagram at BATES 002559 clearly shows that approximately a third of the USR site was part of USR-1584 owned by Gerrard Investments, LLC ("Gerrard"). The second parcel is owned by Weld LV II, LLC ("Weld LV"). TR, 18:16. USR 15-0027 is designed so most of the use is on the Gerrard side. At least thirty (30) acres (over half) of the Weld LV side will remain open space and be planted in native grasses. BATES 002383. It may be reclaimed for agricultural production once USR 15-0027 is discontinued. TR, 188:17-21.

The choice of this site by Martin Marietta complies with W.C.C. § 23-2-239 B.6. This Code section does not require that portions of the property continue to be farmed during operation of the USR. Rather, it merely requires the USR to be sited so as to *conserve* prime farmland. For the reasons stated above, the siting at this location complies with that requirement because the prime farmland on the Weld LV side will be conserved and available for future use after reclamation, and a third of the site on the Gerrard side is already out of production.

2. ***Relationship to Agriculture.***

Plaintiffs contend that the proposed Martin Marietta facility will not be consistent with the intent of the A (Agricultural) Zone District. They argue there is no support in the Certified Record for this statement on page 3 of the Amended Resolution: "Aggregate, 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 on farms, and to build and maintain roads to get agricultural products to market."

Contrary to Plaintiffs' assertions, Carolynne White testified at the hearing on August 12, 2015, that materials produced at the plant will be used to *build farms*. She gave some examples: "barns, feed areas, processing plants, roads, whether paved or not. All of those facilities require one or more of the materials, raw materials or processed materials that are produced at this facility . . .in water ditch repairs, ditch roads, concrete pipelines, water storage spillways, pump stations, all of those things require materials to be constructed." TR, 27:22-28:3, and BATES002570. She also testified that Martin Marietta supplies approximately eighty percent (80%) of the asphalt used by Weld County for County roads. TR, 18:2-3. Although Ms. White did not specifically mention "dikes," "loafing sheds," "dairy parlors," or "runoff control," common sense says those are normally found on farms and are built using concrete and aggregate.

Without legal support, Plaintiffs argue the Amended Resolution constitutes "*de facto* spot zoning." But "spot zoning" in Colorado is where there is a change-of-zone for an area that is contrary to a comprehensive zoning plan. *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961). ("In determining whether spot zoning is involved, the test is whether the change in question was made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations.") Here, what is being considered is not a change-of-zone, but a USR that is allowed in the zone district as long as the

USR criteria are met. Just because the Plaintiffs do not think the criteria for the USR have been met does not make it "*de facto* spot zoning."

3. ***Compatibility with Existing Surrounding Land Uses.***

Plaintiffs contend the Amended Resolution is "devoid of any competent evidence that [Martin Marietta's] proposed heavy industrial use will be compatible with the existing agricultural and residential uses that surround the Proposed Site." Plaintiffs' Supplemental Brief, at p. 5. The gist of Plaintiffs' argument seems to be that a use must be considered on its face to determine its compatibility with existing surrounding land uses without considering what conditions or development standards could be employed to enable the uses to be compatible.

But Plaintiffs' argument is contrary to the intent stated in W.C.C. § 23-2-200 A.:

Sec. 23-2-200. - Intent and applicability.

A. Uses by Special Review are USES which have been determined to be more intense or to 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. The additional consideration or regulation of Uses by Special Review, and the application to a Use by Special Review of Performance, Design and Operations Standards listed both herein and for applicable USES from any zone district, are designed to protect and promote the health, safety, convenience and general welfare of the present and future residents of the COUNTY.* (Emphasis added.)

It is clear from reading this section that integral to the determination of compatibility for USR's is a review and application of "Performance, Design and Operational Standards." As stated on pages 4 and 5 of the Amended Resolution, the Board found compatibility through the imposition of seven (7) conditions of approval and forty-two (42) development standards.

Without citation to the Certified Record, Plaintiffs state on page 6 of their Supplemental Brief that fourteen (14) single family homes are within 500 feet of the Martin Marietta facility. That information is incorrect. After redesign of the railroad loop, the nearest houses in the Indianhead subdivision are more than 700 feet away from the tracks. BATES 002371 and 002383. Additionally, as shown on BATES 000311, nearly all of the residences shown are more than 1,000 feet away from the main activities of the facility, which include the asphalt plant, ready mix plant, asphalt truck load, truck wash, hopper unload and conveyor transfer.

4. ***Increasing Commercialization and Industrialization of the Highway 34 Corridor.***

Plaintiffs claim the statements in the Amended Resolution saying the USR is "suitable for commercial and industrial uses," and that there is "a high likelihood that existing transportation and infrastructure will attract more commercial and industrial development in the area," are without support in the Certified Record. Their claim is incorrect.

In her testimony, Carolynne White detailed how the mixture of rail and roadway infrastructure in the vicinity of the USR have created a "pattern of commercial and industrial development." TR, 31:6-23. She referred to the maps at BATES 002580-002582. The maps show current and future land uses surrounding the USR. They include both commercial and industrial uses.

Plaintiffs attempt to portray the maps at BATES 002580-002582 as "discredited." For support of this assertion they point to testimony by Weld County Planner Diana Aungst at TR, 244:29-245:5. However, in her testimony, Ms. Aungst only noted how the maps show residential properties located in various directions from the USR, a property to the north where there is an

application for change-of-zone to industrial, an area to the north in the Town of Windsor which is "limited industrial" instead of industrial, and a parcel to the southeast which is now a dairy farm but may be converted to a commercial USR in the future. It is a stretch to say Ms. Aungst' testimony "discredited" the maps.

Ms. Aungst' testimony about the maps was in response to a question posed by Commissioner Kirkmeyer. TR, 244:8-18. She asked Ms. Aungst about her apparent failure to consider the future development of the surrounding area. Ms. Aungst' made the following statement at TR, 245:4-5: "So, staff was looking at the area within about a quarter mile *and at the existing land uses; not at the proposed land uses . . .*" (Emphasis added.) But she was required to review the compatibility of the USR with *future development of the surrounding area*, as required by W.C.C. § 23-2-230 B.4., which says the following:

> Sec. 23-2-230 B.4. That the USES which would be permitted will be compatible with the *future DEVELOPMENT of the surrounding area* as permitted by the existing zone and with future DEVELOPMENT as projected by Chapter 22 of this Code and any other applicable code provisions or ordinances in effect, or the adopted MASTER PLANS of the affected municipalities. (Emphasis added.)

Commissioner Kirkmeyer understood this directive, as shown in her concluding remarks: "[It] basically boils down to . . . compatibility with the existing and future surrounding land uses, consistency with the area whether it's existing and future land use areas. And then our ability to mitigate should [we] feel that there are negative impacts so that we can ensure adequate protection of the health, welfare and safety of the surrounding area, which means a lot of area." TR, 295:1-4.

Plaintiffs also allege misstatements made by the Board in the Amended Resolution regarding planned and approved developments along the Highway 34 corridor by the Towns of Windsor and Johnstown. These allegations are incorrect.

Information supplied with Martin Marietta's USR application clarifies that Johnstown has approved the FedEx distribution area and Feldspar Manufacturing in the Ironhorse Industrial Park to the west of Weld County Road 13. TR 78:18-79:8. This includes an "existing rail unloading facility that is used to unload frac sand." The application information also states: ". . . .Windsor has annexed land northeast of the intersection of WCR 13 and Highway 34. According to Windsor's Land Use Map, the land north of Highway 34 from WCR 13 all the way to WCR 17 is proposed as an employment corridor." BATES 000183.

Although the City of Greeley's May 27, 2015, letter did not specifically express support for the USR, it also did not request denial. The letter urged ". . . careful consideration for the proposed use and its regional impact, particularly concerning future land use patterns for the area and along Highway 34." BATES 000717. It asked for two (2) mitigations to be required of the development, both of which have been incorporated into the development. BATES 002590, and Development Standard 32 in the Amended Resolution.

Perhaps the Board's reference in its Amended Resolution to the expression from Greeley for support for the facility was in its June 26, 2015, letter, wherein the Greeley City Council stated: "Furthermore, it is important to acknowledge the importance of aggregate providers and their ability to provide asphalt and concrete for the future. The City Council recognizes that locating facilities somewhere in Northern Colorado will be important in supporting future economic growth in the area as local gravel resources become less available, even as new

development needs additional concrete and asphalt supplies. Rail and major road corridors will be important in supporting such efforts." BATES 000685-000686.

5. ***Violation of Noise Standards.***

Plaintiffs claim that even with all of the proposed noise mitigation the facility will violate residential noise standards. Plaintiffs' Supplemental Brief, at p. 9. Their argument seems to be that the USR must not be approved "because we know they will break the law." But that is not the standard in W.C.C. § 23-2-200 A., which states: "The additional consideration or regulation of Uses by Special Review, and the application to a Use by Special Review of Performance, Design and Operations Standards listed both herein and for applicable USES from any zone district, are designed to protect and promote the health, safety, convenience and general welfare of the present and future residents of the COUNTY." Development Standard 24 of the Amended Resolution imposes a strict noise standard on the facility that, if broken, could lead to revocation of the USR pursuant to Development Standard 40 and the procedures set forth in W.C.C. § 23-2-270. Plaintiffs now saying that Development Standard 24 "will be broken" is speculation.

6. ***Effect on Public Health, Safety and Welfare.***

Plaintiffs appear to be asking the Court to reweigh the evidence by ruling that the USR will be incompatible with the neighborhood. However, as mentioned in the STANDARD OF REVIEW section above, it is not the Court's duty to substitute its own opinion, judgement or philosophy for that of the Board. Rather, the Court is to determine if there is competent evidence in the Certified Record to support the Board's decision. As shown herein and in the Board's

Answer Brief, there is plenty of evidence in the Certified Record proving that the USR, with the conditions of approval and development standards in the Amended Resolution, will be compatible with the existing and future surrounding land uses, and that the public health, safety and welfare will be adequately protected.

7. ***Weld County's "Right to Farm."***

Weld County's "Right to Farm" provision is found at W.C.C. § 22-2-20 J. A.Goal 10. Plaintiffs again mischaracterize what it means. The "Right to Farm" does not preclude adjacent uses the farmer believes will adversely affect his or her farming operations. Instead, it is a warning to "urban users" locating in the A (Agricultural) Zone District in Weld County that they should expect a rural lifestyle with farming operations and all that goes with it. They must not consider those things to be nuisances that may be stopped through litigation. The "Right to Farm" provision specifically cites C.R.S. § 35-3.5-102, which precludes nuisance actions brought against farmers by adjacent landowners who claim that certain "methods or practices that are commonly or reasonably associated with agricultural production" are causing a private or public nuisance. So, reference to the "Right to Farm" in Development Standard 41 of the Amended Resolution is a restriction on Martin Marietta from being able to claim that the surrounding agricultural operations are a nuisance to its operations at the USR. It is not the other way around as argued by Plaintiffs.

8. ***"Mineral Resource Development."***

Plaintiffs argue that because the materials transloaded and processed at the USR are not mined at that site makes it an unlawful use. They believe W.C.C. § 23-3-40 A. says this. It does not. Nowhere in the Weld County Code is there a requirement that the seven (7) uses listed in W.C.C. § 23-3-40 A., must only take place at the spot where the materials are mined.

CONCLUSION

The Board respectfully requests the Court to deny the Plaintiffs' C.R.C.P. 106(a)(4) appeal, and to dismiss the case accordingly.

Dated November 10, 2016.

BRUCE T. BARKER, ESQ.
WELD COUNTY ATTORNEY

Bruce T. Barker, No. 13690
Attorney for Defendant Weld County
1150 'O' Street, P.O. Box 758, Greeley, CO 80632
Phone Number: (970) 336-7235,
Fax Number: (970) 352-0242
E-mail: bbarker@co.weld.co.us

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I filed a true and correct copy of the foregoing document, titled WELD COUNTY'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF, via the Integrated Colorado Courts E-filing System (ICCES) which will provide notice of the filing and availability of such document by electronic mail to the following recipients:

Mark E. Lacis James R. Silvestro IRELAND STAPLETON PRYOR & PASCOE, P.C. 717 Seventeenth Street, Suite 2800 Denver, Colorado 80202 Telephone: 303-628-2700 E-mail: mlacis@irelandstapleton.com; jsilvestro@irelandstapleton.com *Counsel for Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, David Kisker, Gary Oplinger, John Cummings and James Piraino*	Patrick M. Groom WITWER, OLDENBURG, BARRY & GROOM, LLP 822 7th Street, Suite 760 Greeley, CO 80631 Telephone: 970-352-3161 E-mail: pgroom@wobjlaw.com *Counsel for Defendant Gerrard Investments, LLC*
Wayne F. Forman Mark J. Mathews BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.223.1100 E-mail: wforman@bhfs.com; mmathews@bhfs.com *Counsel for Martin Marietta Materials, Inc.*	Christopher M. Kamper. CARVER SCHWARZ MCNAB KAMPER & FORBES LLC 1600 Stout Street, Suite 1700 Denver, CO 80202 Telephone: 303-893-1815 E-mail: ckamper@csmkfcom *Counsel for Defendants WELD LV, LLC and WELD LV II, LLC*

Diane Beckman
Paralegal
Weld County Attorney's Office