DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, Greeley, CO 80631 P.O. Box 2038, Greeley, CO 80632 Phone Number: (970) 475-2400	
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
Attorneys for Defendant Martin Marietta Materials, Inc. Wayne F. Forman, Colo. Atty. Reg. No. 14082 Mark J. Mathews, Colo. Atty. Reg. No. 23749 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	

DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S SUPPLEMENTAL ANSWER 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 3995 words.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Wayne F. Forman
Wayne F. Forman, Colo. Atty. Reg. No. 14082

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Defendant Martin Marietta Materials, Inc. ("Martin") respectfully submits its Supplemental Answer Brief:

INTRODUCTION

After reviewing voluminous evidence and holding a nearly 14 hour hearing, the Board of County Commissioners of Weld County ("Board") approved Martin's application for an amendment to a site-specific development plan and for a Use by Special Review ("USR") permit to operate an asphalt plant, a ready-mix concrete plant, and a transloading facility in Weld County ("Proposed Use") on a 131-acre site ("Proposed Site") adjacent to SH34, CR13 and a railroad line. The Board's Amended Resolution ("AmRes.") is supported by competent record evidence, and should be affirmed. *See Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 534 P.2d 1212, 1216 (Colo. 1975).

ARGUMENT

I. THE AMENDED RESOLUTION CONFIRMS THAT THERE IS COMPETENT RECORD EVIDENCE SUPPORTING APPROVAL.

A. Diligence in attempting to conserve prime farmland.

Plaintiffs assert "there is no evidence" that Martin demonstrated diligence to conserve prime farmland in the locational decision for the Proposed Use, Pls.'Supp.Br. at 2, and that the USR criteria pertaining to farmland preservation "has nothing to do with configuration of the Proposed Site." Pls.'Supp.Br. at 3. Both arguments are meritless.

First, Martin Marietta did exercise due diligence in the site location process. Martin spent three years evaluating more than 13 sites for the Proposed Use. BATES0397. Martin chose the selected site because it was uniquely suited to the Proposed Use in terms of size, location of railroad and road infrastructure, proximity to market, impact on County roads, and avoidance of

residential subdivision entrances. BATES0398. Many of the other sites considered would have encroached more significantly on nearby residential areas. Trans.189:18-191:20; 30:11-23;BATES2559-60, 2580-82. While the final site selection report did not explicitly include preservation of prime farmland as a factor, it did not do so because all of the sites encroached upon prime farmland. Trans.221:4-7 ("… if you look for a 100-acre site that's ready to develop anywhere in Weld County, it's going to either be prime farm land or adjacent to prime farm land. That was already a factor in any site that could have been surveyed and that's why it wasn't listed as a separate criterion of site selection analysis that was presented earlier.")

Moreover, the Board reasonably interpreted the diligence requirement to preserve farmland as pertaining to the location of operations on the selected site. AmRes. at 7, 10. There is ample record evidence that Martin satisfied the diligence required by W.C.C.§23-2-230B.6. by its selection of this site and site configuration, AmRes. at 7, on the parcel currently owned by Gerrard, which is already used for commercial and manufacturing uses. Trans.18:17-20;BATES2559. The remainder of the Proposed Use will occur on the western portion of the parcel owned by Weld LV. Trans.20:8-21:13;BATES2563-2564. The submitted USR provides for approximately 30 eastern acres to remain undeveloped, buffering industrial activities from the largest concentration of neighbors. Trans.20:13-15;BATES2383. By clustering the industrial activities to the western portion of the Weld LV parcel, and preserving a substantial portion of the site, Applicant has shown diligent efforts to preserve prime farmland, as the Board determined.

Further, as the Board determined, the Code does not mandate that prime farmland can never be developed, AmRes. at 10, as exemplified by the fact that prime farmland was removed to develop Indianhead Estates (AmRes. at 7;BATES1434-35) and Gerrard's commercial and

manufacturing facility. Trans.18:16-20;BATES0084;2559. Even the Johnstown Encore mixed use development project is all on prime farmland. Trans.73:15-18.

The Board reasonably interpreted its Code in determining that Martin exercised diligence in its "locational decision" by selecting the least impactful location for its facility and placing its operations on the site's far west side to ensure a sizable buffer of prime farmland between its operations and homeowners. *See Quaker Court Ltd. Liability Co. v. Bd. of Cnty. Comm'rs*, 109 P.3d 1027, 1030 (Colo. App. 2004) (if governmental body's interpretation of code is reasonable, it will be affirmed under C.R.C.P. 106 review). It is the Board's role to determine when this diligence requirement is satisfied and to balance conservation of farmland with the need for industrial and commercial development in the County. AmRes. at 7,10.

B. A Zoning District intent.

Plaintiffs allege that the Board erred in determining that the Proposed Use is consistent with the intent of the A Zoning District, because that use is unrelated to agriculture. Pls.'Supp.Br. at 4. But, as the Board noted, W.C.C.§23-3-10 further provides that the A Zoning District "is also intended to provide areas for the conduct of USES by Special Review which have been determined to be more intense or to have a potentially greater impact than USES Allowed by Right." In turn, Code §23-3-40.A.4 includes as uses eligible to receive a USR permit: "[m]ineral resource development facilities including: . . . 4. asphalt and concrete batch plants…[and] 7. TRANSLOADING." The Proposed Use will comprise asphalt and concrete plants and a transloading facility. The Board, therefore, appropriately determined that the Proposed Use would be consistent with its District's intent.

There is competent record evidence supporting the Board's finding that the Proposed Use is related to agriculture. Martin currently supplies about 80% of the asphalt demand in Weld County,

and the new facility will almost certainly be the primary source of aggregate in Weld County in the future. Trans.18:2-4,303:23-304:2;BATES0016. Accordingly, the Proposed Use will supply product to farms, feed areas, processing plants and other facilities in Weld County, and will also be required for infrastructure growth and maintenance to allow agricultural products to be supplied to their different markets. Trans.27:22-28:18;155:24-156:6;BATES0685;2570. To pretend that Martin's business does not benefit Weld County's agricultural industry ignores the economic realities of that industry.

Finally, Plaintiffs cite to the County Comprehensive Plan to suggest that proposed uses must be "directly related to, or dependent upon, agriculture to locate within agricultural areas." W.C.C.§22-2-20G. But this language is in the Comprehensive Plan, not the Code USR criteria, under a Goal which states: "County land use regulations should protect the individual property owner's rights to request a land use change." W.C.C.§22-2-20.G.A.Goal 7. As a "Policy" of this Goal, the Comprehensive Plan provides that "county land use regulations should support commercial and industrial uses that are directly related to, or dependent upon, agriculture to locate within agricultural areas . . . ." W.C.C.§22-2-20.G.A.Goal 7.A.Policy 7.1. This provision states only that it should be a policy to encourage "directly related" uses. It doesn't suggest that other uses are prohibited or discouraged. Indeed, the very next Policy provision under the same Goal states that "conversion of agricultural land to nonurban residential, commercial and industrial uses should be accommodated when the subject site is in an area that can support such development . . . ." W.C.C.§22-2-20.G.A.Goal 7.A.Policy 7.2.

Plaintiffs' argument proves too much. If, as Plaintiffs assert, "the directly related to agriculture" was a USR criterion and asphalt/concrete plants cannot be "directly related" to

agriculture, then asphalt/concrete facilities could never be approved under the Code's USR provisions in the A Zoning District. Yet, as discussed above, such uses are specifically listed as USRs in the A Zoning District under W.C.C.§23-3-40.A.4.

C. Compatibility with existing land uses.

Plaintiffs' claim that the record is devoid of evidence that the Proposed Use will be compatible with surrounding land uses. In fact, there is considerable evidence about the design features and operational requirements which address the potential impacts of the Proposed Use on nearby residents. *E.g*., Trans.27:6-40:24; Martin/Gerrard Answer at 18-21. These potential impacts were addressed by changes to Applicant's site layout to minimize offsite impacts (BATES0240-241), and through a dust abatement plan (BATES0242), landscape plan (BATES0197), emergency action plan (BATES0199), waste handling plan (BATES0207-208), spill prevention, control and countermeasure plan (BATES0210-230), as well as by Applicant's expert reports, including a traffic study (BATES0256-287), noise analysis (BATES0305-310, 2731-2734), wildlife review (BATES0364-376), impact assessment on bees and farms (BATES0343), air emissions assessments (BATES0346-348;0349-361), water resource assessment (BATES0344-345), and value diminution report (BATES0492-535). There was also evidence about areas where industrial and residential uses exist in close proximity and testimony by those living near industrial facilities, including Martin's 35th Avenue Greeley plant, who have not been adversely impacted by the operations. Trans.30:18-31:6;98:14-20;106:9-12;129:13-16;131:10-15;145:16-24;242:1-4;299:12-300:10.

On this evidence, the Board imposed seven Conditions of Approval and 42 Development Standards requiring mitigation measures on nearly every aspect of the application. The Board explicitly cited mitigation measures related to road improvements and traffic, noise, landscaping,

dust, aesthetics and hours of operation, in support of its finding of compatibility. AmRes.,¶2.C,pp.4-5. There is no basis to conclude that these findings and the Board's compatibility determination reflect an arbitrary exercise of discretion.

In their brief, Plaintiffs argue that the Board erred by including Gerrard's construction business as a surrounding land use. Pls.'Supp.Br. at 5-6. But the existence of Gerrard is relevant evidence of the existing commercial/industrial activity in the immediate vicinity of the Proposed Use. The Board also found the Proposed Use will be compatible with other surrounding land uses, including "a wedding business and event venue, agricultural uses, residences and open areas." *Id*. at 4.

Plaintiffs also claim the Board erred in relying upon a "discredited" map showing a substantial number of nearby areas zoned for industrial and commercial uses. BATES2582. But John Franklin, Johnstown planner, said only that the map included zoning designations, not actual development. Trans.78:20-23. And County Planner Diane Aungst raised several benign issues: the map accurately identified a parcel to the north of the site as proposed industrial that hadn't yet been rezoned, although an application was pending; a parcel to the north of SH34 shown as industrial was in fact limited industrial; and an area to the southeast shown as commercial was a dairy farm. Trans.244:19-245:5. These comments hardly discredit the map and the Board, in assessing credibility and weighing evidence, was entitled to rely upon it.

Finally, Plaintiffs complain that the Board incorrectly found that the nearest home to the facility is 1,000 feet away, claiming instead that 14 homes are within "500 feet of the Proposed Site" and "less than 1000 feet … from the railroad track" within the site. Pls.'Supp.Br. at 6-7. But the Board's finding has ample record support (Trans.39:7-11) (ready mix plant 1,450 feet from

nearest residence, asphalt plant 1,900 feet), BATES2402 (emission stack 1,350 feet from nearest residence).

D. Compatibility with future development.

Plaintiffs argue that there is no evidence that heavy industrial use will surround the Proposed Use in the future. Pls.'Supp.Br. at 8. But the USR criterion requires only that nearby future uses are compatible with, rather than identical to, the Proposed Use.

The Board's findings on this USR criterion are amply supported by competent record evidence. AmRes. at 5-6. Supporting evidence includes the existing and proposed land uses and zoning in the vicinity of the Proposed Use along the SH34 and CR13 corridors that reflect substantial industrial and commercial uses. BATES2582;Trans.244:13-17;296:18-297:8;298:14-19; Martin/Gerrard Answer at 21-23.

Plaintiffs also complain that the findings that Windsor has approved commercial and industrial developments and that Johnstown has approved commercial uses and a truck parking and transload facility, Am.Res. at 6, have no record support. But the existence of Johnstown's industrial rail unloading facility is in the record (BATES000183) and, regardless, the Commissioners are entitled to rely upon their own knowledge and experience when they, as here, include them in their findings to allow for judicial review. *See Geer v. Stathopulos*, 309 P.2d 606, 611 (Colo. 1957) (agency may take administrative notice of facts if included in judicially reviewable findings); *Londer v. Friednash*, 560 P.2d 102, 104 (Colo. App. 1976) (hearing officer statements based on personal knowledge were proper as they were included within findings).

Finally, though the Board's findings on compatibility incorrectly cited the Greeley staff's May 27, 2015 letter, the Board clearly intended to refer to the June 26, 2015 letter (BATES0685-686) signed by all Greeley Councilmembers. That letter, issued after the Greeley staff letter,

recognized the importance of the Proposed Use and acknowledged that, as local gravel sources become less available, "[r]ail and major road corridors will be important" to support growth. The Greeley Council letter confirms the City's support for the Proposed Use.

E. Noise.

Plaintiffs argue that the Proposed Use violates the County's residential noise limits of 55 dB(A) during the day and 50 dB(A) at night and therefore should not have been approved. Pls.'Supp.Br. at 9. This claim incorrectly interprets the record evidence and ignores the extensive noise mitigation measures that will be undertaken by Martin and enforced by the County and the Colorado health department.

In approving the Proposed Use, the Board imposed Development Standard 24, which requires that the facility meet standard residential noise levels at adjacent residential property boundaries. BATES0010. As a preliminary matter, this residential noise standard is more stringent than County and state law, which both require that industrial uses meet industrial noise standards set at 80 dB(A) during the day and 75 dB(A) at night. W.C.C.§14-9-40;C.R.S.§25-12-103. By requiring Martin to meet residential as opposed to industrial standards, the Board ensured that noise levels are protective of neighbors.

Moreover, this Development Standard is a requirement that Martin must meet once the Proposed Use is constructed, not a standard that must be satisfied before approval of a USR.[1]

[1] Indeed, Martin's modeling relied upon the very conservative assumption that all potential sources of noise on the entire 131-acre site would be operating simultaneously and continuously, which the evidence recognizes is unrealistic and unexpected to occur. BATES0308;BATES0091;Trans.37:1-11. Because all sources of noise pollution will not in fact be operating either simultaneously or continuously, the modeled sound levels are inflated estimates of those that will truly result from the USR. BATES0308; Trans.37:1-11. Despite being overstated, the modeled levels still predicted daytime noise levels that meet County and state residential levels and only minimal potential for exceeding residential limits at three select receiver locations during nighttime operations, which are rare. BATES0309; Trans.37:1-11.

Under this development standard, Martin must, once the facility is constructed, conduct daytime and night time monitoring according to a County-approved monitoring protocol. The results of the monitoring must be reported to the County no less frequently than once per year for the full term of the USR. Should the monitoring find that the facility exceeds the action levels, Martin Marietta will identify the source of the noise and take corrective actions to reduce the noise or face enforcement action. BATES0312.

Finally, Plaintiffs ignore the robust sound mitigation and monitoring measures Martin will undertake, including redesigning the rail loop with a 700 foot setback from the northeastern property line, grouping industrial activity on the west half of the property, and installing several vegetated berms. Trans.36:18-38:11;BATES2590. In addition, Martin will enclose the concrete plant and use white noise back-up alarms, a below grade hopper for unloading trains, and a circular track route. Trans.38:7-11;BATES2591-2592. The efficacy of these measures will be directly reflected in the monitored noise levels of the fully-operational Proposed Use which must meet the stringent noise standards established in Development Standard 24.

F. Public health, safety and welfare.

Plaintiffs claim there is no competent evidence demonstrating that the Proposed Use will not adversely affect public health, safety and welfare. Pls'Supp.Op.Br. at 9. The Board's findings show otherwise. AmRes. at 7-9. *See*, *e.g.*, BATES0346-348 (human health); BATES0360-361 (air quality); BATES0003-04 (traffic). While Plaintiffs argue that Plaintiffs' evidence should be "discounted" because Martin somehow "worked backwards" to justify its site selection, the fact remains that Martin presented extensive and compelling evidence of the lack of impact the Proposed Use would have on nearby uses, and the Board carefully considered this evidence, as

reflected in the conditions imposed upon Martin's operations in the Amended Resolution. Martin/Gerrard Answer at 23-29.

Plaintiffs argue that these extensive conditions upon Martin's operations "do nothing" to mitigate impacts because they "only" require compliance with state and County. Pls.'Supp.Br. at 10. On the contrary, these conditions will mitigate the Proposed Use's impacts by requiring compliance with comprehensive state and County laws addressing health, safety and welfare protocol for issues ranging from noxious weed control to solid waste disposal. Moreover, several of the conditions exceed the requirements of state and County law including conditions related to noise levels, hours of operation,[2] landscaping fund requirements (requiring $100,000 in escrowed funds), and odor and emission restrictions on AC storage tanks, use of carbon filters, and implementation of a sophisticated emissions capture system. AmRes. Development Standards at pp.1,2,5.

Finally, Plaintiffs claim that the Amended Resolution "wholly ignores property value concerns and issues with MMM's traffic and air pollution studies." Pls.'Supp.Br. at 10. This contention is incorrect; the Amended Resolution addresses traffic on pages three through five and air quality on page eight. Any alleged "issues with Martin's traffic and air pollution studies" are addressed in Gerrard/Martin's Answer on pages 25-29. While Plaintiffs may disagree with the conclusions in Martin's studies, the credibility of witnesses and the weight to be given their

[2] Plaintiffs exaggerate when nighttime operations are allowed. Pls.'Supp.Br. at 10. Standard operating hours do not include nights, but night work at part of the facility may occur if cities, counties or CDOT request asphalt for night paving projects. Development Standard 6.A.4. When these circumstances arise, after giving notice to the County, hours of operation for the concrete plant may, up to three times per month between March and October, extend between 3:00 a.m. and daybreak. Trans.223:4-12; Development Standard 6.B.3. Hours of operation for aggregate sales and recycling operations will only occur during daylight hours. *Id*. at 6.C. With this schedule, the facility would never operate at full strength more than three nights per month and then only nights between March and October.

testimony is solely within the province of the Board. *Goldy v. Henry*, 443 P.2d 994, 997 (Colo. 1968). As for property values, nowhere does the Weld County Code require that the Board examine property values as an isolated criterion. Nonetheless, the record includes a report by a property appraisal expert that concludes that a diminution in property values near the Proposed Use was unlikely, BATES2599;0492-535, and testimony regarding how property values were not expected to decline. Trans.33:14-34:6;40:3-6;187:9-188:14.

G. Neighboring farms.

Plaintiffs contend that the Amended Resolution ignores the impact that the Proposed Use will have on surrounding farms and misinterprets Weld County's "Right to Farm" Policy. Plaintiffs claim the Proposed Use will "likely result in the closure of one or more neighboring farms" by citing to a letter and a PowerPoint slide, which present only conclusory statements by an owner and employee at the Motherlove farm without any supporting evidence. AmRes. at 11; BATES2130-2133;BATES2220.

By contrast, as noted by the Board, Martin offered testimony by air expert Dr. Stewart who testified that the likelihood of negative impacts to organic farming was extremely low because of the distance from the facility, the amount of facility emissions, and the requirement that the facility meet National Ambient Air Quality Standards. Trans.201:14-19; 201:23-202:4;BATES0704. Dr. Stewart concluded it would take 100 years to match the background metals concentrations already in the area's crops. Trans.199:4-9. On this evidence, the Weld County Environmental Health Services Department and the Board separately reached the reasonable conclusion that the amount of permitted emissions from the Proposed Use would not pose a health risk to employees or residents. BATES0002;0707.

Plaintiffs also argue that the Right to Farm disallows industrial development. But the Board reasonably determined that the Right to Farm Policy does not impose a rigid requirement that all land remain as farmland. Trans.295:14-296:8. As noted above, Comprehensive Plan Policy 7.2 states that conversion of agricultural land to other uses should be accommodated when the subject site is in an area that can support such development, and should attempt to be compatible with the region. AmRes. at 2. The Comprehensive Plan also makes clear that any concern for preserving farmland must be balanced with the protection of private property. AmRes. at 2, citing W.C.C.§22-2-20.G.A.Goal 7. As the Board noted, the "Right to Farm" exists not to prevent conversion of farmland but to put "new residential users on notice that there are agricultural uses in the vicinity that may impact their urban and suburban lifestyles." AmRes. at 4; W.C.C.§22-2-20 ("Persons moving into a rural area must recognize and accept there are drawbacks, including conflicts with long-standing agricultural practices and a lower level of services in town."). The Board reasonably relied upon the Comprehensive Plan and Code provisions in determining that "Right to Farm" doesn't impose a rigid requirement that all farmland remain farmland.

II. THE AMENDED RESOLUTION RECOGNIZES THE LAWFUL NATURE OF THE PROPOSED USE.

A. Operation of the asphalt plant.

Plaintiffs again argue that the Board erred in deciding that its Code allows the Proposed Use as a USR, because W.C.C.§23-3-40 does not explicitly permit a continuous (drum mix) asphalt plant in the A Zoning District. Pls.'Supp.Br. at 12. Plaintiffs raised this objection before the Weld County Staff, the Planning Commission and the Board. At every level, the County rejected Plaintiffs' hypertechnical interpretation of W.C.C.§23-3-40.

As discussed above, and in the Martin/Gerrard Answer at 8-11, W.C.C.§23-3-40 specifically allows a USR permit in the A Zoning District for "asphalt and concrete batch plants." W.C.C.§23-3-40.A.4. The Board reasonably interpreted this provision as allowing asphalt plants in general, including the Proposed Use, rather than only "batch" asphalt plants that do not operate continuously. The Board's interpretation is also reasonable because §23-3-40 uses the word "including" in listing eligible USR uses, and W.C.C.§23-1-50.J provides that all uses listed in this section are "representative and are not all inclusive." The Code language itself therefore rejects Plaintiffs' argument that the phrase "asphalt and concrete batch plants" include only those asphalt plants that operate as batch facilities. This is a reasonable interpretation of the Code to which the Court should defer.

Plaintiff' argument also fails because the Proposed Use cannot continuously operate. Night and Sunday operations are generally prohibited. AmRes. at 8; Martin/Gerrard Answer at 9-10. And Martin's air permit restricts production at the Proposed Use to an annual production level of 450,000 tons per year. BATES2393-2395; Martin/Gerrard Answer at 9-10. Because the asphalt plant has the capacity to produce 500 tons of asphalt per hour, BATES2393, it can only operate about 900 hours at maximum production, or about 10 percent of the time in a given year.

B. "Mineral resource development facility."

Plaintiffs argue that the Proposed Use is ineligible as a USR under W.C.C.§23-3-40.A. because the asphalt and concrete operations are not co-located with mineral extraction. Pls.'Supp.Br. at 13-14.

Plaintiffs misread the requirements of §23-3-40.A. That provision includes as eligible uses "[m]ineral resource development facilities <u>including</u> . . . asphalt and concrete batch plants."

This language clearly supports the Board's interpretation that standalone asphalt and concrete batch plants are included within the definition of eligible "mineral resource development facilities." There is no reference to any requirement that these facilities be co-located.. Indeed, "mining or recovery of other mineral deposits" is a *separately* listed example of a "mineral resource development facility" that is eligible for USR under W.C.C.§23-3-40.A. By listing mining as a separate eligible use from "asphalt and concrete batch plants," the Code obviously does not require mineral extraction to be co-located with asphalt and concrete batch plants for USR eligibility. The Board's interpretation was reasonable and warrants deference.

III. APPLICABLE LEGAL CRITERIA.

This issue was fully addressed in the Martin/Gerrard Answer at 31-33 and the Board's Answer at 26. The Board considered the appropriate criteria in determining that Martin met its burden of proof regarding the USR criteria in W.C.C.§23-2-230.

IV. COMMISSIONER COZAD.

This issue too was fully addressed in the Answer Briefs. To overcome the presumption of integrity, honesty and impartiality in favor of those serving in quasi-judicial capacities, Plaintiffs must show that the decision-maker had a conflict of interest at the time of her decisionmaking participation. *Scott v. Englewood*, 672 P.2d 22, 227-228 (Colo.App.1983). Because Plaintiffs have not pointed to any facts showing that Commissioner Cozad had a conflict of interest relating to the Proposed Use's approval, this argument fails.

CONCLUSION

For the reasons set forth above, Martin respectfully requests that this Court uphold the Board's approval of the application.

Respectfully submitted November 11, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Wayne F. Forman
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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2016, I filed a true and correct copy of the foregoing document, titled DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S SUPPLEMENTAL ANSWER 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:

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