DISTRICT COURT, WELD COUNTY, COLORADO 915 19th Street Greeley, Colorado 80631 **MOTHERLOVE HERBAL COMPANY**, a Colorado Certified B Corporation, **INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC.**, a Colorado Nonprofit Corporation, **ROCKIN S RANCH LLC**, a Colorado Limited Liability Company, **JOHN CUMMINGS**, an Individual, **DAVID KISKER**, an Individual, **GARY OPLINGER**, an Individual, **WOLFGANG DIRKS**, an Individual, and **JAMES PIRAINO**, an Individual, **Plaintiffs**, v. **THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO** (including all of the individual Commissioners in their official capacities: Chair Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steven Moreno, and Julie Cozad), **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
Attorneys for Plaintiffs: Mark E. Lacis, Reg. # 37421 James R. Silvestro, Reg. # 43982 IRELAND STAPLETON PRYOR & PASCOE, P.C. 717 Seventeenth Street, Suite 2800 Denver, Colorado 80202 Phone: 303-628-2700; Fax: 303-623-2062 e-mail: mlacis@irelandstapleton.com jsilvestro@irelandstapleton.com	

PLAINTIFFS' COMBINED SUPPLEMENTAL REPLY 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 2,498 words.

Consistent with this Order, this Combined Supplemental Reply Brief is confined to the issues raised by the Amended Resolution and Defendants' Supplemental Answer Briefs. 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 Supplemental Briefs filed by Defendants Weld County (the "BOCC") and Martin Marietta ("MMM") confirm that the BOCC approved an incompatible and unlawful heavy industrial use. The Amended Resolution is unsupported by the record, approves an unlawful USR, and constitutes a *de facto* rezoning of from agricultural to industrial. The Amended Resolution is "designed merely to relieve a particular property from the restrictions of the zoning regulations," *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961). Colorado law requires reversal.

ARGUMENT

I. The Amended Resolution Is Unsupported By Competent Evidence.

A. MMM Made No Effort To Conserve Prime Farmland in Selecting Its Site.

When MMM submitted its Application, it misidentified the Proposed Site as non-Prime farmland. BATES000181. MMM now acknowledges that the Proposed Site is Prime farmland but argues that it satisfied the conservation requirement by proposing to locate its heaviest industrial development on the western 77 percent of the Proposed Site. MMM Br. at 2. MMM will "conserve" 30 acres on the easternmost portion of the 131-acre site by limiting the development of that portion to a new rail line, fencing, and an earthen berm. BATES00070-71. Even if this can be considered a "clustered" development, there is no evidence that this layout was part of an effort to conserve Prime farmland. The maps that Defendants cite to support this claim merely demonstrate that MMM's production facilities will be "clustered" near the public roadway. This is not evidence of "diligent efforts" to conserve Prime farmland.

Regardless, MMM failed to comply with W.C.C. § 23-2-230.B.6, which requires the BOCC to find that a "diligent effort has been made to conserve PRIME FARMLAND in the **locational decision** for the proposed use." (Emphasis added.) The plain meaning of this provision requires that diligent efforts be used when selecting a site and is distinct from the site design "clustering" that is required under W.C.C. § 23-2-240.A.11 to conserve Prime farmland once a location is properly selected.

According to MMM, the conservation of Prime farmland did not factor into MMM's site selection process because, according to its attorney's testimony at the hearing, all of the sites it considered "encroached upon prime farmland." MMM Br. at 2. This speculation is not a defense and is in fact contradicted by competent evidence in the record. Specifically, opponents of the MMM Application proposed other sites that are not Prime farmland and are zoned industrial. BATES001754, BATES002035, BATES002226. MMM's Site Selection Report (which is dated after MMM made its "locational decision") did not evaluate any of these industrial areas and, with respect to the sites it did evaluate, did not consider the existence and/or removal of Prime farmland. BATES000395-400.

Finally, MMM argues that the BOCC endeavored "to balance conservation of farmland with the need for industrial and commercial development in the County." MMM Br. at 3. This is not the standard set forth in W.C.C. § 23-2-230.B.6. A USR is not a political balancing act; it is a quasi-judicial determination that requires the application of facts to law. *Nixon v. City & Cnty. of Denver*, 2014 COA 172, ¶12. There is no competent evidence that MMM made any effort to conserve Prime farmland in its site selection.

B. <u>The Proposed Industrial Use Has No Relationship to Agriculture.</u>

An agricultural USR must be related to the "intent" of the Agricultural Zone and "related to" agriculture. W.C.C. §§ 23-2-230.B.2, 23-3-10. This makes sense—if a non-agricultural use can lawfully operate in the Agricultural Zone, this zoning designation and the broader zoning scheme are meaningless.

Defendants argue that this material element can be satisfied by any remote, tangential connection to agriculture and cite to a number of generic claims in the record regarding the nebulous connection between agriculture and the Proposed Use. In reality, the only particularized evidence in the record demonstrates that agriculture accounts for less than 1 percent of all aggregate uses. Neighborhoods Opposition Report, at 58 (part of the Jan. 27, 2016 record supplement).

If a USR is "related to" agriculture just because it has some theoretical connection, any industrial use can be located in the Agricultural Zone and Weld County's USR process unlawfully provides for institutionalized spot zoning. A lawful zoning scheme requires a "comprehensive zoning plan" to ensure stability and compatibility in land uses. *Clark*, 362 P.2d at 162. There is no relationship between the Proposed Use and agriculture, and the Amended Resolution should be reversed.

C. <u>The Proposed Industrial Use Is Incompatible with Surrounding Residential and Agricultural Uses.</u>

Defendants argue that the Proposed Use cannot be deemed incompatible "on its face" and must instead be viewed within the context of MMM's "mitigation efforts" and the conditions of approval. MMM Br. at 5. However, the majority of these conditions merely require compliance with generally applicable laws and do nothing to lessen the negative impacts on surrounding

homes and farms. Amended Resolution, at 17-22. Although the opponents proposed a number of stringent conditions to provide for meaningful mitigation, Trans. at 58:21-60:12, all of these proposals were rejected by the BOCC. As approved, this non-conforming use will operate as any other heavy industrial facility in an Industrial Zone. The Amended Resolution does nothing to ensure compatibility.

MMM admits that all surrounding existing uses are residential and agricultural but argues that the BOCC properly considered Gerrard's existing use on a portion of the Proposed Site. MMM Br. at 6. MMM does not, however, explain how an on-site use that will be abandoned as part of the Proposed Use factors into the "existing surrounding land uses" that must be considered under W.C.C. § 23-2-230.B.3. Moreover, MMM again misrepresents the nature of Gerrard's current use as "industrial/commercial." The record confirms that Gerrard operates a low-intensity USR that would otherwise be a use by right in a Commercial Zone. BATES000190; W.C.C. § 23-3-230.B.11. There are no existing industrial uses near the Proposed Site. Trans., at 78:20-78:23.

The BOCC claims that the incompatibility of the Proposed Use should be ignored because the "main activities" will be between 1,000 and 2,000 feet of the surrounding residences. BOCC Br. at 6. However, it is undisputed that more than a dozen homes will be located approximately 700 feet from the new rail spur. BATES002580-86; Trans., at 20:2-3, 225:5-7. The Proposed Use is fundamentally incompatible with these neighboring residences. *See* Trans. at 78:23 ("[T]here's nothing to this industrial scale out there.").

D. <u>The Proposed Industrial Use is Inconsistent with Planned Future Development.</u>

The record is devoid of any competent evidence that the neighborhood is becoming increasingly industrialized. Defendants sidestep this issue by citing to unsupported predictions of MMM's counsel and individual County Commissioners[1] as to future *commercial* uses in the broader region. MMM Br. at 7; BOCC Br. at 6-7. While the BOCC is correct that Windsor has designated an area half a mile from the Proposed Site as an "employment corridor," BOCC Br. 7, the BOCC's argument twists this statement out of context. The record demonstrates that future development within Windsor and Greeley will include business parks and "select industrial uses." BATES000716. But explicitly provides that "heavy industrial uses" are only permitted if they are incidental to other uses and completely screened from view. *Id.*

The incompatibility of the Proposed Use with future development was confirmed by MMM's own consultant, BATES000145, and served as one of the many reasons that the Weld County Planning Staff recommended denial of the Application. BATES000317-18. The planned "mixed-use" development of the surrounding "employment corridor" renders the proposed heavy industrial use even less compatible. Trans. at 70:12-79:18.

Lastly, Defendants speculate that the Amended Resolution's reference to the unfavorable letter from Greeley Planning on May 27, 2015, was a mistake and that the BOCC intended to reference a June 26, 2015 letter submitted by the Greeley City Council. BOCC Br. at 8-9; MMM Br. 7-8. Regardless, neither letter can fairly be characterized as "generally support[ive]" of the Proposed Use. Amended Resolution, at 6. The June 26 letter takes no position on the

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[1] MMM overstates the extent to which individual commissioners may manufacture evidence through "administrative notice." MMM Br. at 7. Colorado law provides that administrative notice may be used to confirm facts already in the record, *Londer v. Friednash*, 560 P.2d 102, 104 (Colo. 1976), and when the body confirms that it is doing so. *Geer v. Stathopulos*, 309 P.2d 606, 611 (Colo. 1957). Here, the BOCC misconstrued evidence within the record and baselessly speculated as to future development.

Application or its compatibility with Johnstown and Windsor's future development plans. BATES000685-686. The referral governments that did take a position universally opposed MMM's Application. BATES000740-41; BATES000759-60; BATES000717; BATES000742.

E. MMM's Own Study Confirms that the Proposed Use Will Violate the Noise Standard.

Defendants dismissively argue that it is "speculation" that the Proposed Use will violate the applicable noise standard. BOCC Br. at 9. But this argument demonstrates a fundamental misunderstanding of the underlying burden of proof. Under the County Code, MMM has the burden of demonstrating that its Application will comply with all operation standards (including noise). W.C.C. § 23-2-230.B. The Code does not provide that an unlawful use can be approved because neighbors may then police a nuisance (at great personal expense).

The only evidence in the record demonstrates that even after employing all "robust" sound mitigation techniques, MMM Br. at 9, the Proposed Use will violate the applicable noise standard. BATES000305-11. MMM's more recent attempt to discredit its own study, MMM Br. at 8 n.1, does not change the fact that there is no evidence to support approval.

F. The Conditions of Approval Will Not Adequately Protect Public Health, Safety, and Welfare.

As this Court previously 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 3. The Amended Resolution does not ameliorate these flaws.

For example, the Amended Resolution does not address the questions raised by MMM's study regarding surrounding property values. *Compare* BATES000492-535 *with* Neighborhoods

Opposition Report, at 21-22, 69-75. MMM argues without support that the BOCC was not required to consider diminution in property values as part of its public welfare determination. MMM Br. at 11. This issue was explicitly raised by opponents throughout the administrative process, and the BOCC's failure to make any findings further demonstrates that the BOCC ignored the public welfare.

MMM suggests that the conditions of approval will "mitigate" the harmful impacts of the Proposed Use but also concedes that most of these conditions only require compliance with "state and County laws." MMM Br. at 10. Again, conditions that require compliance with existing laws are superfluous and provide no additional protection for more vulnerable neighbors.

Finally, MMM's claim that Plaintiffs have "exaggerate[d]" the deleterious impacts of nighttime operations is incorrect. MMM Br. at 10 n.2. MMM notes the limits on aggregate and concrete operations but omits that under the approved USR trains will arrive at the Proposed Site at night and the asphalt plant can operate overnight whenever "requested" by customers. Amended Resolution, at 17. Consequently, the Amended Resolution is wrong: the Proposed Use not "consistent with traditional farming practices and the majority of the general public's work hours." *Id.* at 6, 9. These nighttime operations will magnify the negative impacts of the Proposed Use on the surrounding community.

G. The Proposed Use Will Impair Neighbors' Right to Farm.

Despite Defendants' claims, Plaintiffs have never argued that the Right to Farm imposes a "rigid requirement that all farmland remain farmland." The Right to Farm does, however, serve to warn new, encroaching users that they may not interfere with the ability of existing

farmers to continue to farm their land. The only evidence in the record regarding surrounding farms provides that neighboring farmers believe the Proposed Use could force them to close. BATES002130-31; BATES002220; Trans. at 44:8-47:4, 174:7-175:16.

The Right to Farm is not limited to "new residential users" and is unrelated to Prime farmland as confusingly suggested by the Amended Resolution. The Right to Farm applies broadly to "[p]ersons moving into" Weld County and serves to ensure that farmers—like the Plaintiff farmers here—will not be forced "to change their long-established agricultural practices to accommodate the intrusions of urban users." W.C.C. § 22-2-20.J. The Amended Resolution misconstrues and misapplies the Right to Farm and wholly ignores the fact that the Proposed Use will violate neighbors' Right to Farm.

II. The Amended Resolution Approves an Unlawful USR.

The BOCC's Supplemental Brief willfully ignores that MMM seeks to operate an unlawful continuous (drum mix) asphalt plant. For its part, MMM now finally admits that it will operate a continuous (drum mix) asphalt plant before contradicting itself and claiming that because the plant will not operate continuously it is not a continuous plant. MMM Br. at 12-13. As Plaintiffs have previously argued, the BOCC is not entitled to discretion to impliedly expand the scope of permissible USRs when it has never done so and has never even acknowledged that MMM intends to construct a continuous (drum mix) asphalt plant.

The Supplemental Briefs acknowledge that the Proposed Use will not be part of a "mineral resource facility." Defendants argue that the BOCC should again be afforded discretion to approve standalone asphalt and concrete plants within the Agricultural Zone. But there is no showing in the record or the Amended Resolution that the BOCC ever endeavored to interpret its

governing legislation such that it should be afforded any degree of discretion to expand the scope of permitted USRs. All of the minerals to be processed as part of the Proposed Use will be mined and transported in from Wyoming. BATES000190. Accordingly, the Proposed Use is not a "mineral resource facility," and the County Code does not permit this USR within the Agricultural Zone.

III. Defendants Have No Response to the BOCC's Continued Reliance on Impermissible Criteria.

Just as it did when it initially approved the Application, the BOCC's adoption of the Amended Resolution is driven by broader economic and political considerations, including the perceived need for construction materials. These extraneous considerations have no place in the quasi-judicial process set forth in W.C.C. § 23-2-230, and the BOCC abused its discretion and exceeded its authority by looking outside of the statutory factors. *See* Plaintiffs' Op. Br., at 32-33.

IV. Commissioner Cozad's Continued Involvement Furthers the Appearance of Impropriety.

MMM claims that it was proper for Commissioner Cozad to take part in approving the Amended Resolution without disclosing the nature of her potential conflicts of interest. Without the aid of any discovery, Plaintiffs have overcome the presumption of impartiality and presented evidence that raises a substantial appearance of impropriety. The burden of demonstrating impartiality shifted to the BOCC, and the BOCC has not provided complete transparency regarding Commissioner Cozad's past dealings with MMM through her former employer.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' previous briefing, Plaintiffs respectfully request that this Court reverse the Amended Resolution.

DATED: November 17, 2016

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

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CERTIFICATE OF SERVICE

I certify that on November 17, 2016, **PLAINTIFFS' COMBINED SUPPLEMENTAL REPLY BRIEF** was filed and served via ICCES on the following:

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