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 REPLY BRIEF

CERTIFICATE OF COMPLIANCE[1]

I hereby certify that this brief complies with all requirements of C.A.R. 28. Specifically, the undersigned certifies that:

The reply brief complies with the applicable word limits set forth in C.A.R. 28(g).

☒ Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains 5,660 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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

[1] This Certificate of Compliance is included in conformance with C.A.R. 28(a)(1) and C.A.R. 32(h), as applied to this case pursuant to the Court's January 12, 2016 Order Granting Plaintiffs' Unopposed Motion for Leave to Submit Briefing in Excess of Presumptive Page Limit.

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Plaintiffs, through counsel, respectfully submit this Combined Reply Brief to the Answer Briefs filed by Defendants Martin Marietta and Gerrard and Defendant the Weld County Commissioners:

INTRODUCTION

"[U]nless a zoning line is drawn somewhere there can be no zoning at all." *Clark v. Boulder*, 362 P.2d 160, 162 (Colo. 1961). Plaintiffs have relied on the Proposed Site's agricultural zoning for decades to build their small businesses, homes, and lives, and Defendants cannot rebut the uncontroverted fact that the Weld County Commissioners' approval of Martin Marietta's USR Application will irreversibly change the neighborhood in a previously unforeseeable manner that violates the Weld County Code.

The Answer Briefs make sweeping claims regarding the evidence allegedly in the record. Like the Weld County Commissioner's perfunctory resolution approving the Application, however, these conclusory allegations do not withstand judicial scrutiny. The credible evidence confirms that Martin Marietta failed to meet its burden under section 23-2-230.[2] The Application involves an unlawful USR and Martin Marietta failed to provide competent evidence that the Proposed Use is compatible with existing and future uses surrounding the Proposed Site. Martin Marietta also made no effort to preserve Prime farmland at the Proposed Site in violation of section 23-2-230.

The Weld County Commissioners' overwhelming reliance on non-statutory political considerations ignored controlling law and rendered the approval spot rezoning. Similarly, nothing excuses Commissioner Cozad's failure to disclose her "insider" participation in the

[2] Unless otherwise stated, all references are to the Weld County Code.

Application, and this conflict of interest fatally undermined the fundamental fairness of the proceeding below.

RESPONSE TO DEFENDANTS' STATEMENTS OF FACTS

The Proposed Use

Defendants do not dispute that the Proposed Use will be a massive, heavy industrial use. The Proposed Use will convert 131 acres in the Agricultural Zone to a regional construction materials factory containing the following:

a. A 110-foot tall batch concrete plant;

b. A 100-foot tall continuous asphalt plant;

c. A 6,400-foot rail loop accommodating 121-car trains completely stopping onsite to dump—over the course of eight-hour unloading periods—trainloads of aggregate and/or asphalt cement three times weekly;

d. A materials processing facility for recycling and wholesale and retail sales of aggregate and similar materials;

e. At least seventeen other new buildings; and

f. Storage of 680,000 cubic yards of construction materials, 4.5 million of gallons asphalt cement, 40,000 pounds of chemical color additives, 285 tons of cement, 180 tons of coal fly ash, and 47,000 gallons of diesel fuel and propane.

Martin Marietta claims that despite the continuous (drum mix) design of its asphalt plant, the asphalt plant should not be considered a "continuous" plant because the approved USR only permits around-the-clock operations when Martin Marietta needs to produce asphalt at night. MM Br., at 9-10; *see* BATES000007. Martin Marietta's own air pollution consultant confirmed that the asphalt plant will be a continuous plant, and the *use* of the facility is irrelevant to the *type* of facility that will be constructed. BATES000350-63, BATES002393-405.

The Proposed Site

Defendants mischaracterize Gerrard's existing use of a portion of the Proposed Site as an "industrial" use. MM Br., at 2; WC Br., at 1. As confirmed by the Application, Gerrard's existing use is a "construction business, shop, and office." BATES000190. There is no evidence in the record that Gerrard's existing use is "industrial" or involves "manufacturing." *Cf.* MM Br., at 15. A construction "Contractor's Shop" is a use allowed by right in the Commercial Zone. W.C.C. § 23-3-230.B.11. Gerrard's existing USR only permits Gerrard's disturbance of 18 acres of the 131-acre Proposed Site. USR #1584, at 3 (attached hereto as **Exhibit A**).[3] Unlike Martin Marietta's proposed heavy industrial use, Gerrard's commercial use is much smaller in scope and intensity and more compatible with the neighborhood.

Defendants also misrepresent the existing non-Gerrard uses. Martin Marietta's Application and Planning Staff's unbiased report confirms this portion of the Proposed Site is "primarily agricultural farmland." BATES000174; BATES000100 (describing the farmland as "productive"). Substantial, competent evidence confirms that the 113 acres of Prime farmland that presently exist on the 131-acre Proposed Site has been used to produce corn, wheat, and alfalfa for the past twenty-five years. BATES000738, BATES000887, BATES001165-66 (describing an alfalfa harvest in May 2015).

Martin Marietta confirms that its Site Selection Report was completed in March 2015—at least three months after it selected the Proposed Site. MM Br., at 2-4. Martin Marietta concedes that the Proposed Site was partly selected for financial reasons and does not dispute that it worked backwards to squeeze its site selection into Weld County's USR process. *Id.* at 2.

[3] Although Gerrard's existing USR was not included in the record, it is incorporated within the Application, and is referenced by Defendants.

Defendants do not deny that Marin Marietta failed to consider more suitable locations for the Proposed Use and selected the Proposed Site without any concern for existing zoning and/or Prime farmland. *Id.* at 2-3; BATES000395-99; *cf.* Trans., at 54:15-55:11 (identifying five other sites zoned industrial with no Prime farmland).

Both Answer Briefs erroneously suggest "the Proposed Use will be located in an area already zoned and used for commercial and industrial areas." MM Br., at 3; WC Br., at 8. This contradicts the competent evidence—at the hearing, Defendants' maps of existing uses were discredited by Planning Staff and the Johnstown Town Planner. Trans., at 78:20-79:8, 244:19-245:5. Planning Staff presented an unbiased report, including accurate maps, showing that the existing neighborhood is <u>entirely</u> residential and agricultural:

	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

Id. at 244:19-245:5; BATES000116.

<u>County Review</u>

Defendants ignore the negative referrals received from surrounding jurisdictions and the conclusions reached by Planning Staff and the Planning Commission, which found the Proposed Use incompatible with existing and planned uses. BATES000068. Planning Staff concluded the Application would: (1) destroy Prime farmland; (2) negatively impact surrounding users; (3) be inconsistent with the broader region; (4) overwhelm existing infrastructure; and (5) be

incompatible with existing uses as evidenced by overwhelming local opposition. BATES000100-05. The Planning Commission affirmed this conclusion and found the Application is "incompatible with the area, region, and the vision for the future of this gateway to Weld County" and the resulting impacts to health, safety, and welfare cannot be mitigated. BATES000068-73.

Martin Marietta emphasizes the favorable public comments submitted, but fails to acknowledge that most of these were from outside Weld County. MM Br., at 5. More than 97 percent of comments received from individuals near the Proposed Site opposed the Application. BATES000103.

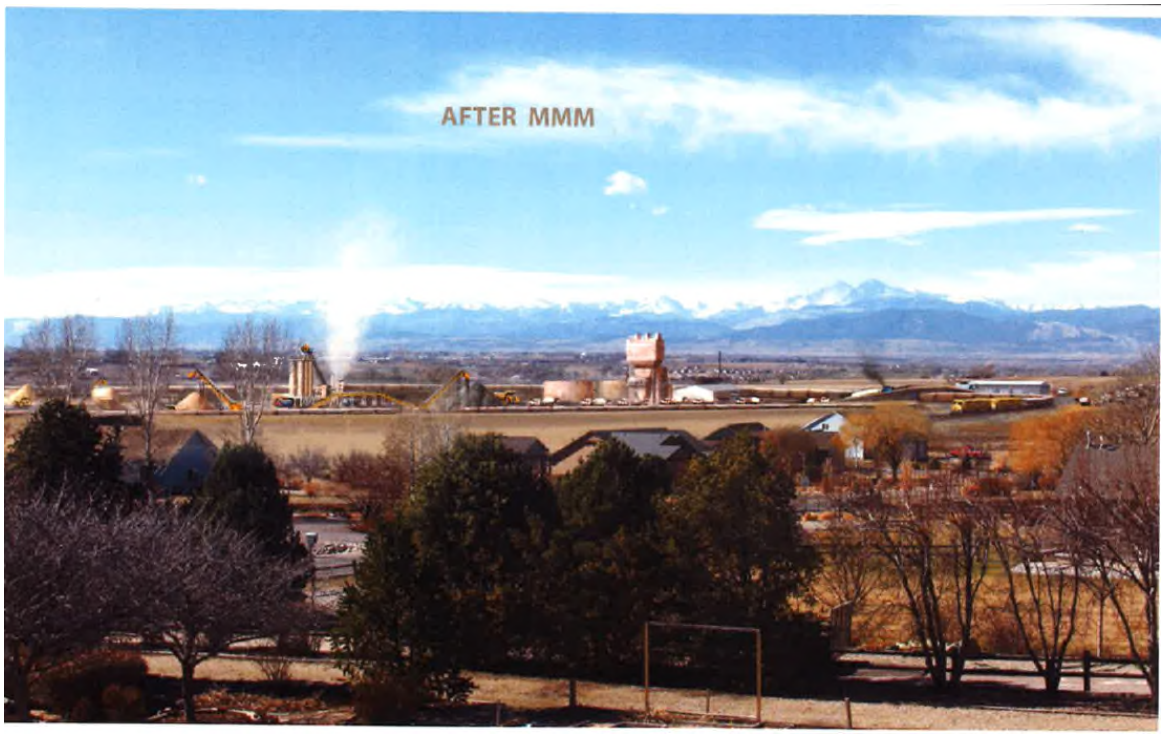
The Weld County Commissioners did not make particularized findings of fact. What Martin Marietta dubs "specific findings" in the Resolution is nothing more than a recitation of the legal requirements. *Compare* MM Br., at 6 *with* BATES000002-3. The Resolution includes conditions of approval, but contrary to Defendants' spin, most of these conditions are vague and unenforceable. These conditions include:

(1) Providing for "typical" hours of operation—which Martin Marietta can ignore whenever it needs to produce materials at non-"typical" hours, BATES000007-8;

(2) Requiring an "Improvements and Road Maintenance Agreement"—without setting forth any guiding principles or required benchmarks for such agreement, BATES000003; and

(3) Establishing a $100,000 landscaping fund—representing 0.5 percent of this $20,000,000 project to somehow shield its heavy industrial use (including several 100-foot smoke stacks) from hundreds of residences and farms, BATES000385.

Martin Marietta's claim that a twelve acre "buffer" will insulate neighbors is similarly misleading:



BATES002300. Most of the residences are less than 700 feet from the new railroad and the decelerating trains that will arrive at the Proposed Site three times per week at all hours. BATES002590-86; Trans., at 20:2-3, 225:5-7.

ARGUMENT

I. The County Code Does Not Permit the Operation of a Continuous (Drum Mix) Asphalt Plant in the Agricultural Zone.

Section 23-3-40 only permits a batch asphalt plant as a USR. Uncontroverted, competent evidence confirms that a continuous (drum mix) asphalt, which is not permitted in the Agricultural Zone, is a materially different use. BATES000072; BATES001613-17; BATES002209-10.

Defendants concede that the County Code does not expressly permit the operation of a continuous (drum mix) asphalt plant within the Agricultural Zone. MM Br., at 8-9; WC Br., at

20-21. The Weld County Brief endeavors to simultaneously claim Martin Marietta will operate a batch asphalt plant, WC Br., at 20, and, confusingly, that the County Code grants the Weld County Commissioners discretion to treat a continuous (drum mix) plant as a batch plant without ever saying so. Perhaps this confusion was to be expected. Throughout this process, Martin Marietta has—intentionally or unintentionally—refused to describe the asphalt plant it intends to construct. *See, e.g.*, Trans., at 16:22-23, 34:1-2, 220:4-11; BATES000173.

A. Martin Marietta Will Construct a Continuous (Drum Mix) Asphalt Plant.

Martin Marietta takes issue with Plaintiffs' description of the asphalt plant it intends to construct. MM Br., at p. 11. Martin Marietta argues that its proposed asphalt plant should not be considered a continuous plant because during "standard" operations it will only be operated fourteen hours per day. *Id.* at 10-11; BATES000007-8. This ignores Plaintiffs' uncontroverted argument that a continuous-design plant is qualitatively different than a batch plant and constitutes a more intensive land use. Opening Br., at 15. Martin Marietta's own air pollution consultant confirmed that Martin Marietta will construct a continuous (drum mix) asphalt plant because this classification was necessary to analyze the increased emissions from a continuous plant. BATES000350-63, BATES002393-405. Just because Martin Marietta may elect to not operate the plant at a given time, does not change the character of the plant it constructs. In contrast to a continuous (drum mix) plant, a batch plant can never be operated continuously. BATES002209-10. Martin Marietta's proposed asphalt plant is an illegal continuous plant.

B. The Weld County Commissioners Cannot Impliedly Expand the Plain Meaning of Section 23-3-40.

Martin Marietta alternatively argues that the Weld County Commissioners had discretion to expand the list of possible USRs within the Agricultural Zone to permit its proposed

continuous plant. MM Br., at 8-9. Martin Marietta claims that because the County Code defines "mineral resource development facilities" as "including" "asphalt and concrete batch plants," this provision can be liberally interpreted to permit materially different designs. *Id.*

By its own terms, however, the County Code must be narrowly construed to uphold its intent. Within the Agricultural Zone, the Code is foremost intended to preserve agricultural uses and prevent "the interference of other, incompatible land USES." W.C.C. § 23-3-10. While some USRs may, after careful review, be consistent with this narrow intent, there are many land uses that are so incompatible with agriculture that they are not listed as permissible USRs. Continuous asphalt plants are not listed within section 23-3-40 precisely because they constitute a more intensive use than batch plants.

If "including" as used within section 23-3-40 can be interpreted to mean that the detailed list of permissible uses is "non-exhaustive" then there is no limit to the type and intensity of land use activity that might be shoehorned into this provision. Such an expansive interpretation would likewise frustrate a core tenet of land use planning by permitting the Weld County Commissioners to upend neighboring land users' reasonable expectations and engage in unlawful spot zoning at will. *Cf. Clark*, 362 P.2d at 162.

Moreover, the use of the word "including" in section 23-3-40 must have a different meaning than the phrase "including but not limited to" which is used at least 104 times throughout the County Code. *See, e.g.*, W.C.C. § 17-3-40 (non-exhaustive "including but not limited to" list); *id.* § 22-2-60.D (same); *id.* §22-5-60 (same). If "including" means the same thing as "including but not limited to," the words "but not limited to" are meaningless in all 104 of these provisions. Every word in an ordinance must be interpreted to have meaning. *Rose v.*

Allstate Ins. Co., 782 P.2d 19, 23 (Colo. 1989). In order to give effect to the phrase "but not limited to" as used throughout the Code, the word "including" must mean something less than "including but not limited to." Accordingly, section 23-3-40, which does not use this "including but not limited to" phrasing, is exhaustive.

This Court should similarly disregard Defendants' argument that deference be given to the Weld County Commissioners' alleged interpretation of section 23-3-40 to permit a continuous asphalt plant. MM Br., at 9; WC Br., at 21. The authority cited by Defendants generally supports the proposition that a local government's reasoned interpretation of a code provision may be entitled to deference. *See Quaker Court Ltd. Liab. Co. v. Bd. of Cnty. Comm'rs*, 109 P.3d 1027 (Colo. App. 2004); *Abbott v. Bd. of Cnty. Comm'rs*, 895 P.2d 1165 (Colo. App. 1995). Here, however, the Weld County Commissioners did not engage in any reasoned interpretation of section 23-3-40. In fact, the Weld County Commissioners failed to even appreciate that the Application is for the construction and operation of a continuous asphalt plant. Opening Br., at 16. The approved Application provides for "asphalt and concrete batch plants" and makes no mention of the continuous asphalt plant that Martin Marietta desires. BATES000002.

Defendants do not cite any authority that allows a government's accidental and unreasoned expansion of its code to be afforded discretion by a reviewing court. Because the Weld County Commissioners did not recognize that the Proposed Use is outside the literal terms of section 23-3-40,[4] it is not entitled to any deference and its approval was unlawful.

[4] Again, Martin Marietta precipitated this confusion by repeatedly failing to identify the type of asphalt plant that it intends to construct.

II. The Uncontroverted, Competent Evidence Demonstrates that Martin Marietta Failed to Prove All Elements Required for Approval.

Defendants downplay both the intensive review required under the County Code, W.C.C. § 23-2-200.A, and the fact that an applicant bears the burden of proof to demonstrate all nine of the required elements set forth in 23-2-230.B. When the record is devoid of competent evidence sufficient to establish all legal requirements, the government's decision must be reversed.

A. Martin Marietta Has Not Demonstrated Adequate Fire Protection.

Defendants do not rebut Plaintiffs' uncontroverted evidence that adequate fire protection for the Proposed Use requires onsite fire suppression foam. Opening Br., at 18-19. Martin Marietta claims that it had preliminary meetings with the fire district and that the fire district submitted a comment confirming that it was awaiting a response from a "third party reviewer." MM Br., at 12. Nothing in the record suggests that this follow-up was completed. In contrast, opponents submitted competent evidence that adequate fire protection necessitates fire suppression foam be stored onsite. Trans., at 103:23-104:3, 170:17-171:3; BATES002616-18.

Now, Martin Marietta liberally paraphrases the hearing transcript and suggests that its representative promised to maintain foam onsite. MM Br., at 13. A review of the record, however, reveals that the representative merely stated Martin Marietta would "potentially" do so. *Id.* 227:18-20. This non-commitment cannot constitute "competent" evidence that adequate fire protection is currently "available on the site" as required by section 23-2-240.A.4. The absence of adequate fire protection poses an imminent threat to all neighbors, including Plaintiffs. Because there is no credible evidence that Martin Marietta met its burden with respect to section 23-2-240.A.4, the approval should be reversed.

B. The Proposed Use Violates Neighbors' Right to Farm.

Uncontroverted evidence demonstrated that the Proposed Use will likely result in the closure of neighboring farms, including the farm operated by Plaintiff Motherlove Herbal Company, which grows organic herbs for expecting and nursing mothers. Trans., at 44:8-47:4, 174:7-180:10; BATES001901. Motherlove presented competent evidence that because its products must meet heightened medicinal quality standards, the Proposed Use will likely cause the closure of its farm and "threaten the viability of [its] business." Trans., at 177:9-12; BATES001758-59.

In response, Martin Marietta echoes the misapprehension of the Weld County Commissioners and mischaracterizes Plaintiffs' Right to Farm argument as seeking to preserve farming at the Proposed Site. MM Br., at 13-14; Trans., at 295:19-296:8. Here, the Proposed Use will interfere with the Right to Farm guaranteed to surrounding land users. The Right to Farm provides: "Agricultural users of the land should not be expected to change their long-established agricultural practices to accommodate the intrusions of urban users into a rural area." W.C.C. § 22-2-20.

Defendants deny that the negative impacts of the Proposed Use will close neighboring farms solely on the ground that the approved Application requires compliance with state environmental laws. MM Br., at 12-15. The record does not include any particularized analysis or findings with regards to whether these environmental laws are sufficient to protect neighboring farmers' sensitive, preexisting uses as guaranteed by the Right to Farm. Uncontroverted evidence demonstrates that the Proposed Use endangers neighboring farms, and the record is devoid of any competent evidence that the Proposed Use will not violate

section 22-2-20.J. At the very least, this matter should be remanded for factual findings on this issue.

C. The Proposed Use Will Produce Construction Materials and Is Not "Directly Related To" Agriculture.

The Weld County Brief argues that a USR is consistent with the Agricultural Zone so long as it is a permitted USR under section 23-3-40. WC Br., at 20-21. This argument is circular and would render the analysis required by section 23-2-230.B superfluous. Within the Agricultural Zone, even if a use fits within a prescribed USR, an applicant must still prove that the USR is "directly related to, or dependent upon, agriculture." W.C.C. § 22-2-20.G.1 (as applicable through section 23-2-230.B.2).

Martin Marietta claims that the Proposed Use is consistent with the Agricultural Zone because some unspecified portion of the materials produced *might* be used on farms. MM Br., at 17-18. Martin Marietta supports this claim by highlighting Weld County's robust agricultural economy and arguing that Martin Marietta's apparent monopoly over construction materials in Weld County makes its activities essential to agriculture. *Id.*

This argument does not survive minimal scrutiny. The implication of this reasoning is that any facility producing fungible commodities that have any use for farming—no matter how indirect—must be considered "directly related to" agriculture and may be located in an Agricultural Zone. Under Martin Marietta's theory, Weld County could permit a textile factory or an auto plant in the middle of an agricultural zone because farmers wear clothes and drive trucks. The Proposed Use is not seeking to produce fertilizer or irrigation equipment and there is

no direct connection to agriculture. In its own words, Martin Marietta's Proposed Use will overwhelmingly support northern Colorado's non-agricultural growth. Trans., at 27:13-21.[5]

There is no credible evidence that the Proposed Use is "directly related to, or dependent upon, agriculture" and the Weld County Commissioners' approval of the Application therefore constitutes a *de facto* rezoning that undermines the fundamental purpose of zoning. There is substantial, competent evidence that this non-agricultural use will interfere with existing agricultural uses in violation of section 23-2-230.B.2, and the approval must be reversed.

D. The Proposed Use Is Antithetical to Existing Uses.

The Weld County Brief relies upon Martin Marietta's attorney's unsourced definition of "compatibility" to argue that industrial and residential uses may be compatible in the abstract. WC Br., at 22. The issue before the Court is not a hypothetical. The undisputed evidence in the record demonstrates that to the Proposed Use will fundamentally and irrevocably change the Proposed Site and do so in a manner that is incompatible with all surrounding uses.

Martin Marietta argues that Plaintiffs define compatibility too narrowly and cites *Sundance Hills Homeowners Association v. Board of County Commissioners*, 534 P.2d 1212, 1215 (Colo. 1975), for the proposition that "a more intense development than surrounding area [can be] compatible with surrounding land uses." MM Br., at 18. In *Sundance*, the trial court rejected a zoning change that converted an existing residential zone to a denser residential use. 534 P.2d at 1215. The *Sundance* court reversed because the zoning change at issue merely

[5] The incompatibility of the Proposed Use is perhaps best demonstrated by the USR that the Weld County Commissioners approved for Plaintiff Rockin S Ranch LLC to operate a farm-themed event space adjacent to the Proposed Site. Trans., at 55:16-57:23.

increased the density of the existing residential use, was to a bordering residential development, and was consistent with a comprehensive plan. *Id.*

Unlike in *Sundance*, the Proposed Use is objectively different than surrounding land uses. Martin Marietta is attempting to take a modest three-building construction yard and 113 acres of Prime farmland and convert the Proposed Site into a sprawling industrial complex with 100-foot smokestacks, a railroad loop, nineteen new buildings, and a distribution facility requiring thousands of daily truck trips. The Proposed Use will fundamentally change the character of the neighborhood.

Martin Marietta also claims that the Proposed Use is compatible with this neighborhood because its other Weld County facility is located near residences. MM Br., at 18. However, the record is devoid of any evidence as to how this non-conforming use came to be, and an unlawful decision in the past is not competent evidence regarding this Application.

Instead, the uncontroverted evidence demonstrates that all of the existing land uses in the immediate vicinity of the Proposed Site are residential or agricultural and that the greater vicinity includes very little commercial or industrial development. If not reversed, the Proposed Use is expected to shut down several neighboring small businesses. Transcript, at 55:16-57:23, 177:9-12. Because it cannot change these facts, Martin Marietta attempts to confuse the issues and claims that its discredited map of "existing" zoning designations can support a finding of existing compatibility because the County Code also requires a consideration of potential future uses. MM Br., at 19. This improperly conflates section 23-2-230.B.3 (compatibility with existing uses) with section 23-2-230.B.4 (compatibility with future uses).

Finally, Martin Marietta claims mitigation efforts will "ensure that the Proposed Use is compatible with adjacent neighborhoods." MM Br., at 20-21. As demonstrated above, these conditions of approval are too vague to enforce. As long as the Proposed Use includes 100-foot smokestacks and a heavy railroad within 500 feet of established residences and farms, BATES000085, BATES000843, these uses are incompatible.

E. The Alleged Importance of the Proposed Use Has No Bearing on Compatibility with Future Uses.

Martin Marietta argues that the Proposed Use satisfies section 23-2-230.B.4 because of the "importance" of the building materials to be produced vis-à-vis expected population growth in Northern Colorado. MM Br., at 22. Martin Marietta does not provide any support for this sweeping claim and is directly contradicted by the text of section 23-2-230.B.4, which requires that a USR "be compatible with the future DEVELOPMENT of the surrounding area as permitted by the existing zone and with future DEVELOPMENT as projected." Section 23-2-230.B.4 says nothing about the perceived importance or "need" for a proposed use. Martin Marietta's tortured interpretation would permit the siting of a toxic landfill next to a playground because an expected increase in population will inevitably require additional capacity for waste disposal. Regardless of whether Weld County allegedly needs the Proposed Use to meet future needs,[6] the siting of the facility must still be compatible with future surrounding uses.

The uncontroverted evidence demonstrates that the Proposed Use is anathema to all planned development near the Proposed Site. All of the surrounding jurisdictions, including the government that intends to annex the Proposed Site, submitted comments in opposition to the Application. BATES000740-41; BATES000759-60; BATES00716-17; BATES000742. The

[6] Notably, this “need” will result from Martin Marietta’s closure of another facility. Trans., at 28:6-13.

Weld County Commissioners abused their discretion in finding that the Application complied with section 23-2-230.B.4 despite the absence of any credible evidence.

F. Martin Marietta Made No Effort to Preserve Prime Farmland.

Martin Marietta admits that it did not consider Prime farmland in selecting the Proposed Use. Instead, Martin Marietta argues (against the plain meaning of the statute and the designation of the Proposed Site as Prime by the USDA) that because the Proposed Site is allegedly not currently used to produce food, it can be destroyed without any concern for preservation. MM Br., at 15-16. Martin Marietta cites no authority for its supposition that an alleged lack of production can excuse compliance with section 23-2-230.B.6.

The Weld County Brief concedes that section 23-2-230.B.6 applies to the Proposed Site regardless of its present use and that there is nothing in the record suggesting that Martin Marietta made any attempt to preserve Prime farmland in selecting the Proposed Site. WC Br., at 24. Nevertheless, Weld County argues that because the Proposed Use will refrain from plowing up less than one half of one half of the Proposed Site, Martin Marietta has made a "diligent" effort. *Id.* In reality, the uncontroverted evidence demonstrates that the Proposed Use will result in the destruction of 101 of the 113 acres of the Prime farmland at the Proposed Site. More importantly, section 23-2-230.B.6 requires "diligent efforts" to preserve Prime farmland in making the "locational decision for the proposed USE"—that is, the protection of Prime farmland must be considered in site selection. Here, the evidence is undisputed that Martin Marietta did not consider Prime farmland in selecting the Proposed Site. The Weld County Commissioners abused their discretion in finding that section 23-2-230.B.6 was satisfied.

G. There Is No Competent Evidence that the Proposed Use Will Not Impair Human Health, Air Pollution, and Traffic.

Defendants argue that the Weld County Commissioners' decision is entitled to deference because evidence regarding health, safety, and welfare impacts was mixed. A more careful examination of the record reveals that the evidence Defendants provided to soften these negative impacts was not credible. Hence, the Weld County Commissioners abused their discretion in finding that the Application satisfied section 23-2-230.B.7.

Human Health and Air Pollution

Martin Marietta confirms that its human health consultant did not perform any independent analysis and merely made a conclusory finding that if the Proposed Use complies with state pollution standards, it will not cause negative health effects. MM Br., at 24. Martin Marietta also does not rebut Plaintiffs' contention that its human health assessment was limited to the asphalt plant and failed to consider the negative health effects of transloading, concrete production, and aggregate processing. BATES002282-96.

With respect to both human health and air pollution, Martin Marietta cites its air pollution consultant's analysis to argue that the Proposed Use will not impair human health. *Id.* at 23-24. However, the record demonstrates that Dr. Stewart's initial analysis was based upon erroneous assumptions and included numerous mathematical errors. After these errors were identified by opponents, Dr. Stewart revised his analysis and submitted a new report, but many of these flaws persist. BATES002393-405. Among other issues, Dr. Stewart's revised report ignores particulate pollution and does not analyze the higher emission level ("truck mix") concrete that can be produced by the proposed concrete plant. BATES002268-79; "CLR-34 Neighborhoods Assn. Neighborhoods Opposition Report" at 76-95. Many of Dr. Stewart's calculations are

incorrect or otherwise underreport the true level of polluting emissions. BATES002274. Dr. Stewart's analysis also fails to consider the threat posed by fugitive dust despite uncontroverted evidence that microscopic particulates can result in serious adverse health effects. BATES002287-95.

Traffic

Martin Marietta's efforts to rehabilitate its traffic consultant suffer a similar fate. At the hearing, an opposing, independent traffic consultant with forty-nine years' experience confirmed that Martin Marietta's consultant failed to appropriately account for the impact that substantial truck traffic (compared with cars) will have on congestion. Trans., at 49:6-54:14.

Martin Marietta downplays the impact that the Proposed Use will have on WCR 13 by erroneously lumping it in with U.S. 34 and claiming that traffic will only increase by 2-3 percent. Martin Marietta's own consultant confirmed that the Proposed Use will cause traffic on WCR 13 to increase by 400 percent in the short-term and 800 percent in the long-term. BATES000265, BATES000271, BATES000272 (current northbound peak of 22 vehicles hourly will jump to 78 in the short-term and 152 at full build out).

Defendants similarly ignore the absence of any analysis in the record of the public safety impacts of increased train traffic in addition to increased vehicle traffic.

H. Martin Marietta Did Not Analyze the Relative Quality of the Prime Soils .

Martin Marietta does not address Plaintiffs' argument that there is no evidence that Martin Marietta attempted to design its facility in a manner that protects the highest quality Prime soils. The Weld County Brief claims that Martin Marietta reviewed a USDA soil map when it designed the layout for the Proposed Use, WC Br., at 24; however, there is no evidence

supporting this contention, and this was never determined by the Weld County Commissioners. There is no competent evidence that the Proposed Use complies with the design standard set forth in section 23-2-240.A.11, and should be reversed.

I. Martin Marietta's Consultant Confirmed the Proposed Use Will Violate Adjacent Residential Noise Standards.

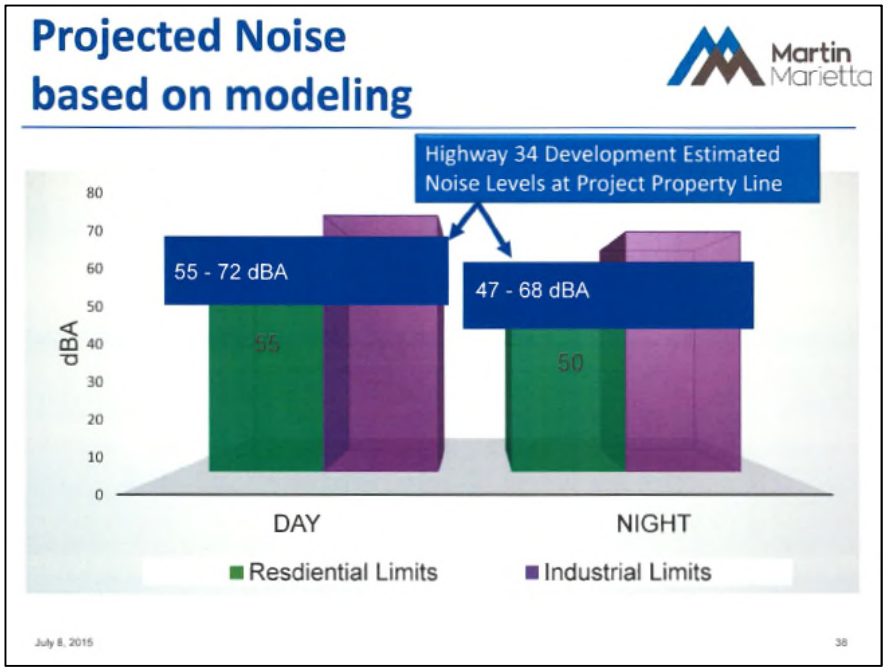
Section 23-2-230.B provides that an applicant must prove compliance with all operations standards, including noise standards. Martin Marietta accuses Plaintiffs of "misstat[ing]" the evidence and seeks to shirk the indisputable fact that its noise consultant found the Proposed Use will exceed residential noise standards at adjacent residential property boundaries, BATES000305-11, by instead focusing on the noise its consultant found will occur at "receiver locations"—that is, the residences themselves and not the lot boundaries. MM Br., at 29-30.

As approved, these receiver locations (which are further from the Proposed Site than the lot lines) are irrelevant because the USR requires compliance with the residential noise standard at "the property line of the adjacent residential lots." BATES000010. The residential noise standard requires that noise not exceed 55 dBA during the daytime and 50 dBA at night. Martin Marietta's noise consultant modeled the expected noise at the adjacent residential lot lines as follows:

Table 6A. Predicted Project Noise Levels at Property Line Locations

Property Line Location	*With No Mitigation (dBA)*		*With Mitigation (dBA)*		*Notes: Max allowable 80 dBA day, 75 dBA night*
	Daytime level	*Nighttime level*	*Daytime level*	*Nighttime level*	
PL1A	65	61	58	48	All meet maximum allowable "Industrial" property line limit, with or without mitigation, day or night
PL1B	72	63	72	51	
PL2	64	62	55	47	
PL3	73	68	67	52	
PL4A	67	66	55	53	
PL4B	73	71	64	55	
PL5	74	74	68	68	

BATES000310 (as explained in the consultant's report, PL1A – PL5 correspond to the adjacent property boundaries for seven residential lots) (highlighting added). This graphic is misleading in that it claims that all of the boundaries "meet maximum allowable 'Industrial' property line limit." The approved USR requires compliance with the residential standard at these boundary lines. Accordingly, even if Martin Marietta dispatches all possible noise mitigation (as assumed above), the residential noise standard will be violated at five of seven adjacent residential property lines—day and night. BATES000305-11. Martin Marietta's presentation materials confirm that the noise levels at adjacent residential boundaries will exceed the applicable residential noise standards:



BATES002589. Under the approved USR, the industrial noise standards are irrelevant.

Martin Marietta's own evidence confirms that the Proposed Use cannot meet the applicable noise standard, and the approval of the Application was an abuse of discretion.

III. The Weld County Commissioners Relied Upon Legally Impermissible Criteria in Violation of Zoning's Core Principle.

Defendants do not dispute that the Weld County Commissioners focused on the potential economic benefits of the Proposed Use and the perceived need for such a facility to support Weld County's growth. Instead, they argue that there is nothing wrong with considering factors outside the legal criteria set forth in section 23-3-240.B.

While this may be true in the abstract, the record demonstrates that these irrelevant, extralegal considerations were the primary motivation for approval. Zoning exists to ensure predictable development and, in turn, protect neighbors' investments from one another's otherwise unpredictable actions. When considerations outside the applicable land use law factor so heavily in a land use decision, this scheme is turned on its head.

The Colorado Supreme Court explained the bedrock importance of predictability to zoning in *Clark*, where it held that a land use decision must be reversed when "there is no indication that the [decision] was intended to further the comprehensive general plan" and "has all the earmarks of a special act enabling the [applicant] to build" an incompatible development." 362 P.2d at 161. A land use decision should not "single[ ] out a small area for special treatment." *Id.* at 162. A reviewing court must consider "whether the change in question was made for the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations." *Id.*

Here, the Weld County Commissioners did not make particularized findings. Accordingly, the Weld County Commissioners, which repeatedly highlighted the economic benefits of the Proposed Use and ignored many of the required legal considerations, are not

entitled to the benefit of the doubt. *Sundance*, 534 P.3d at 1216 ("competent and substantial documentary and testimonial evidence" required in the absence of particularized findings).

The Weld County Commissioners' focus on irrelevant and politically expedient factors—at the expense of legally mandated criteria—threatens to upend a system that seeks to promote harmonious and compatible development above all else. This matter must be remanded for a review of the Application solely on the legal requirements set forth in section 23-2-230.

IV. The Fundamental Fairness of the County's Approval was Fatally Undermined by the Undisclosed Conflict of Interest.

Martin Marietta argues that Plaintiffs were on notice of Commissioner Cozad's insider status regarding the Application by citing to evidence outside the record that allegedly confirms that she had publicly held herself out as a former TetraTech employee at the time of the hearing. Martin Marietta does not provide any support for the argument that Plaintiffs should have been on constructive notice of Commissioner Cozad's LinkedIn and county government profiles.

Regardless, the conflict raised by Plaintiffs is not simply that Commissioner Cozad worked at TetraTech until four months before the hearing. Following the hearing, Plaintiffs learned that Commissioner Cozad directly supervised Martin Marietta's lead consultant for the Application and directly oversaw the preparation of the Application and preliminary County review process on behalf of Martin Marietta. First Amended Complaint, ¶¶ 63-64. This insider status constitutes a direct and substantial conflict of interest that needed to be disclosed.[7]

[7] This is the same type of conflict that causes a newly-appointed appellate judge to recuse himself from cases he touched as a trial judge.

Commissioner Cozad's prior employment with TetraTech and management of the Application constitutes an impermissible appearance of impropriety that undermines the fundamental fairness of the proceeding and warrants reversal.

CONCLUSION

Plaintiffs respectfully request that this Court find that the Weld County Commissioners abused their discretion and reverse the approval of the Application approval.

DATED: March 22, 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 March 22, 2016, **PLAINTIFFS' COMBINED REPLY BRIEF** was filed and served via ICCES on the following:

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