

DISTRICT COURT, WELD COUNTY, COLORADO  
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**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

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**▲ COURT USE ONLY ▲**

Case Number: 2015CV30776  
Division 4

**MARTIN MARIETTA MATERIALS, INC.'S AND  
GERRARD INVESTMENTS, LLC'S ANSWER BRIEF**

Defendants Martin Marietta Materials, Inc. (“Martin Marietta”) and Gerrard Investments, LLC (“Gerrard”), by and through their respective undersigned counsel, hereby submit their Answer Brief in response to the Opening Brief filed by Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino (“Plaintiffs”).

#### CERTIFICATE OF COMPLIANCE

Pursuant to the Court’s January 12, 2016 Order Granting Plaintiffs’ Unopposed Motion for Leave to Submit Briefing in Excess of Presumptive Page Limit, requiring a certification as to the number of words in the parties’ briefs similar to what is required by C.A.R. 32(h) & C.A.R. 28(a)(1), Martin Marietta certifies that this Answer Brief contains 9,077 words under the criteria established by C.A.R. 28(g)(1).

Dated March 8, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Wayne F. Forman

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## **STATEMENT OF THE CASE**

Plaintiffs, who are landowners and leaseholders in Weld and Larimer Counties, filed this litigation under C.R.C.P.106(a)(4) to challenge a unanimous decision by the Board of County Commissioners of Weld County (“BOCC”) approving Martin Marietta’s application (“Application”) for an amendment to a site-specific development plan and for a Use by Special Review (“USR”) permit to operate a “Mineral Resource Development Facility” that includes an asphalt plant, a concrete batch plant, a ready-mix concrete plant, and a transloading facility in Weld County (“Proposed Use”). Plaintiffs’ complaint argues that the BOCC’s approval of the Application was arbitrary, capricious and contrary to law.

The record demonstrates that the BOCC approved the Application after considering ample evidence presented by Martin Marietta and interested neighbors and citizens demonstrating that the Proposed Use met all applicable provisions in the Weld County Comprehensive Plan and Code. This evidence included extensive testimony from experts on the impacts of the Proposed Use on nearby properties with respect to air emissions, noise, visual impact, health and safety, odor, and compatibility with current and future uses in the area.

Accordingly, Plaintiffs have no viable basis for challenging the BOCC’s approval of the Proposed Use. As the record shows, the BOCC approval is supported by competent evidence and based on appropriate legal criteria.

### The Proposed Use and Site Selection Process

The Proposed Use is comprised of an asphalt, concrete batch, ready-mix, and transloading facility approximately one half mile south of U.S. Highway 34 in unincorporated Weld County. BATES0173-0195. While Plaintiffs state that the site has been used to grow crops for the past 25 years, Plaintiffs' Opening Brief ("Op Br.") at 5, they fail to mention that the site is currently not being used for agricultural production. The western portion of the site (the portion currently owned by co-defendant Gerrard Investments, LLC ("Gerrard")) is already being used to operate a large construction and excavation business, as approved in USR permit 1584. BATES0156-0159, 0316. The eastern portion of the site has been kept in pasture grass and is not a significant generator of food product for people or animals. BATES0159.

Plaintiffs also mischaracterize Martin Marietta's site selection process as being driven entirely by financial gain. Op. Br. at 6-8. In fact, Martin Marietta spent three years evaluating more than 13 sites for the Proposed Use and considered compatibility with neighboring uses in the site selection process. In the Site Selection Report completed in March 2015, Martin Marietta evaluated 13 factors in selecting the site for the Proposed Use, including whether the sites were near areas "with few neighbors" and whether the sites "avoid[ed] haul routes that run in front of subdivision entrances." BATES0398. The report concluded that of the 13 sites considered, the proposed site received the highest score and was the most favorable location. *Id.* Of note, the Proposed Use site received the highest score for traffic being able to avoid subdivision

entrances, finding that the “short haul route to State Highway 34 does not run in front of a subdivision main entrance.” *Id.* Further, at the hearing before the BOCC, David Hagerman, Regional General Manager for Martin Marietta who headed up the site selection process, stated that the selected site presented the least amount of impacts to the overall community. Trans. at 190:17-21. Mr. Hagerman discussed several of the other 13 sites considered and provided testimony that these alternative locations would have encroached more significantly on nearby residential areas. Trans. at 189:18-191:20.

As determined by Martin Marietta during its site selection process, the Proposed Use will be located in an area already zoned and used for commercial and industrial areas, and adjacent to State Highway 34, County Road 13, and the Union Pacific and Great Western railroads. Evidence presented to the BOCC demonstrated that there are fewer residential areas in the vicinity of the Proposed Use than industrial and commercial areas. Trans. at 30:8-20; BATES2558, 2580-2581.

Finally, Plaintiffs ignore Martin Marietta’s significant efforts to mitigate impacts from the Proposed Use. In finding that the Proposed Use was compatible with surrounding existing uses, the BOCC relied in part on the extensive mitigation efforts proposed by Martin Marietta, as well as the technical reports submitted as evidence demonstrating that these mitigation measures would be effective in reducing potential impacts. Trans. at 294:12-297:4. As discussed in detail below, these mitigation

measures include providing a 12-acre buffer zone from the closest residences in Indianhead Estates Subdivision to the railroad loop, establishing a \$100,000 landscaping fund in escrow to be managed by Martin Marietta and interested community members to fund landscaping on the lots of adjacent landowners, implementation of state-of-the-art technology at the asphalt plant to significantly reduce odor, and operation of a noise monitor program and noise mitigation measures to significantly reduce noise from the Proposed Use.

#### The County Approval and Public Outreach Process

Martin Marietta's public outreach during the Application process was robust. As soon as Martin Marietta completed a conceptual plan for the facility, it scheduled an open house to hear from the neighbors. The first neighborhood meeting was held on January 27, 2015. BATES0185. Martin Marietta mailed a notice of the meeting to all neighbors within 500 feet. BATES0185-186. Over 100 people attended. *Id.* Martin Marietta took note of the concerns raised by the public, and maintained careful records of all comments received. On June 9, 2015, Martin Marietta held a second formal neighborhood meeting, which 95 people attended. Trans. at 32:1-16; BATES0660.

Additionally, on June 24, 2015, Martin Marietta hosted a landscape charrette, in which it discussed the best landscape plan to put in and around the site to mitigate visual impacts and enhance the views. Trans. at 32:12-16, 206:21-24; BATES0197. And on July 8, 2015, Martin Marietta hosted a business community meeting regarding

the economic impact and other potential impacts to the business community as a result of the proposed project. BATES2583.

On April 28, 2015, Martin Marietta submitted the Application to the Weld County Planning Department. BATES0173. The Planning Department found that the Proposed Use was not compatible with existing land uses in the Area. BATES0101.

The Weld County Planning Commission held a public meeting on July 21, 2015, to consider the Application. BATES0081. After the hearing, the Planning Commission voted 4-3 to recommend denial of the Application. BATES0075. At the time of the hearing, the Department of Planning Services received 763 letters and many phone calls concerning this Application. 534 letters were in support of approval of the USR, while 229 letters expressed opposition. BATES0071. In the Resolution recommending denial, the Planning Commission stated that “should the Board of County Commissioners approve the proposal, the Planning Commission recommends the following conditions,” and then listed several pages of requirements. BATES0073-74. Each of these conditions were either satisfied by Martin Marietta or included as a condition of approval to the BOCC’s final approval of the Proposed Use. Compare BATES0073-74 with BATES0003-12.

On August 12, 2015, the BOCC held a 13-hour hearing which included substantial comment from the public. Trans. at 294:12-14; BATES0013. Martin Marietta presented numerous expert reports and testimony as part of its Application,

including a Sound Analysis Report, an Assessment of Air Emissions modeling the expected emissions from the Proposed Use, a report by Dr. Scott Phillips discussing the possibility of the Proposed Use impacting the health and safety of nearby residents, and a Traffic Impact Study. Each of these reports is discussed in detail below.

After the hearing, the five members of the BOCC unanimously approved the Proposed Use. BATES0043. The approval was finalized by the execution of a resolution dated September 15, 2015 (“Resolution”). BATES0001-12 (for the convenience of the Court, a copy of the Resolution is attached hereto). In the Resolution, the BOCC made specific findings that the Propose Use satisfied each of the required criteria under the Code. BATES0002-03.

The Resolution also conditioned approval of the USR permit upon satisfaction of an extensive list of conditions and studies. BATES0003-12. These conditions include compliance with specific hours of operation, execution of an Improvements and Road Maintenance Agreement requiring Martin Marietta to complete off-site road improvements and maintenance obligations, adherence to noise level limits for residential areas as measured at the property line of adjacent residential lots, and establishment of a \$100,000 landscaping fund for landscaping on the adjacent landowner lots. BATES0004-11. Additionally, as noted above, all of the conditions recommended by the Planning Commission in the event of approval were included in the Resolution. Compare BATES0073-74 with BATES0003-12.

## STANDARD OF REVIEW

As admitted by Plaintiffs in their Complaint, this case is governed by C.R.C.P. 106(a)(4). Under C.R.C.P. 106(a)(4), the Court is to determine “whether the body or officer has exceeded its jurisdiction or abused its discretion.” *Snyder v. City of Lakewood*, 542 P.2d 371, 375 (Colo. 1975). The Court’s review is limited to the record before the Board, *see* C.R.C.P. 106(a)(4)(I), and “the decision must be affirmed unless there is no competent evidence in the record to support it.” *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008). No competent evidence means that the Board’s decision is “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *IBC Denver II, LLC*, 183 P.3d at 717.

“[C]ourts should not interfere with the decision of zoning authorities absent a clear abuse of discretion.” *Bd. of Cnty. Comm’rs v. O’Dell*, 920 P.2d 48, 50 (Colo. 1996). “In the case of a zoning proceeding, a court is not the fact finder and may not substitute its own judgment” for that of the Board. *Id.*; *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008). “Governmental proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of the governmental body’s rulings must be resolved in its favor.” *Kruse*, 192 P.3d at 601. Accordingly, even if evidence is conflicting and there is public opposition, “this kind of decision [rezoning] is not a popularity contest. [T]he Board is charged with the final

decision making.” *Sundance Hills Homeowners Ass’n v. Bd. of Cnty. Comm’rs*, 534 P.2d 1212, 1216 (Colo. 1975).

## **ARGUMENT**

### **I. THE PROPOSED USE IS WITHIN THE SCOPE OF ALLOWED USRs.**

Plaintiffs argue that the BOCC abused its discretion by approving the Application because the Proposed Use is not within the allowed USRs under the Weld County Code (“WCC” or “Code”). WCC §23-3-40 specifies the types of buildings, structures and uses allowed within the Agricultural Zone District upon approval of a USR permit. They include: “Mineral resource development facilities including: ...4. asphalt and concrete batch plants.” WCC §23-3-40.A.4. Plaintiffs argue that the phrase “asphalt and concrete batch plants” contemplates a very specific type of asphalt plant – an asphalt batch plant – which differs from the asphalt plant proposed by Martin Marietta, because batch plants don’t operate continuously. Op. Br. at 14-15. Plaintiffs’ arguments are undermined by basic principles of statutory interpretation and the explicit provisions of the Code.

Under the plain language of WCC §23-3-40, mineral resource development facilities are allowed USRs in the Agricultural Zone, “including” seven itemized categories of structures, buildings, and uses. By using the word “including,” the County has not provided an exclusive or exhaustive list of all permissible uses, and certainly didn’t intend to specify a specific kind of asphalt facility. Rather, it has described categories of facilities that are allowed as USRs in the Agricultural Zone District. *See*

*Preston v. Dupont*, 35 P.3d 433, 438 (Colo. 2001) (“We have held that a statutory definition of a term as ‘including’ certain things does not restrict the meaning to those items specified. [citation omitted] Indeed, the word ‘include’ is ordinarily used as a word of extension or enlargement.”). This interpretation is supported by the County’s interpretative rule that examples of permissible uses in the Code are not to be read narrowly: “All Uses Allowed by Right, Temporary Uses and Uses by Special Review listed in this Chapter are representative and are not all inclusive.” WCC §23-1-50.J.

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. And consistent with the Code, the BOCC found that the Application included facilities contemplated as USRs. BATES0001-0002. This is a reasonable interpretation of the Code to which the Court should defer. *Quaker Court Ltd. Liab. Co. v. Bd. of Cnty. Comm’rs*, 109 P.3d 1027, 1030 (Colo. App. 2004) (if governmental body’s interpretation of code provision or rule is reasonable, it will be affirmed in a C.R.C.P. 106 review).

Plaintiffs’ argument also fails because the Proposed Use will not operate “continuously.” Martin Marietta agreed, as reflected in the Resolution, to have strict operating hours on each of the facilities associated with the Proposed Use.

BATES0007-08. The Resolution provides that the asphalt facility will “typically” operate Monday through Saturday, and the hours of plant operation will be limited to

one hour before sunrise to one hour after sunset. *Id.* The only exception is that the plant may operate at night “when material is requested by cities, counties, or CDOT, for night paving projects.” *Id.* Operations will be considered “night operations,” when they take place between the hours of one hour after sundown to one hour before sunrise.” *Id.* When Martin Marietta learns of projects that require night operations, it must notify the Weld County Planning Director regarding the plans to operate outside of daylight hours, who the project is for, how long it will be occurring, and where the materials are being delivered. *Id.* Thus, contrary to Plaintiffs’ assertions, Martin Marietta’s proposed asphalt plant will not be in continuous operation.

As further proof that Martin Marietta will not be continuously operating the asphalt plant, Martin Marietta’s air permit to be issued by the State’s Air Pollution Control Division restricts production at the facility, thereby substantially limiting its operating hours. Specifically, the permit will restrict asphalt production to an annual production level of 450,000 tons per year, which includes 90,000 tons per year for recycled asphalt and 360,000 tons per year for new asphalt. BATES2393-2394. The asphalt plant has the capacity to produce 500 tons of asphalt per hour. *Id.* This equates to a total of 900 hours operating at maximum production levels. Given that there are 8,760 hours in a year, this production restriction limits the Proposed Use to intermittent, rather than continuous, operation.

Plaintiffs finally suggest that Martin Marietta was somehow “cagey” during the Application process in attempting to hide its intention to construct a continuous (drum mix) asphalt plant. Op. Br. at 14. This is simply not the case. Martin Marietta made it clear throughout the Application process that the asphalt plant would not be operating continuously and willingly agreed to restriction on its operating hours. Indeed, during the BOCC hearing, Martin Marietta described in detail the unusual circumstance when the asphalt plant would need to operate at night or on Sundays. Trans. at 222:11-224:9. Martin Marietta testified that there would only be occasional night-time operations, and only when there is a specific demand by a governmental entity for night-time paving. Trans. at 40:9, 186:2-15; BATES2600.

## **II. THE PROPOSED USE IS COMPATIBLE WITH EXISTING AND FUTURE NEIGHBORING USES.**

The BOCC found that the Application met every one of the seven USR criteria. BATES0002-03. Contrary to Plaintiffs’ assertions, there is competent record evidence supporting these findings.

### **A. The Site has Adequate Fire Protection to Serve the Proposed Use.**

Plaintiffs claim that the Proposed Use is not consistent with the Weld County Comprehensive Plan because Martin Marietta has not demonstrated “that adequate services and facilities are currently available or reasonably attainable to accommodate the requested new land use for more intensive development.” Op. Br. at 18, citing WCC

§22-2-20. Plaintiffs focus specifically on the lack of adequate fire equipment. Op. Br. at 19.

Evidence in the record demonstrates otherwise. The project area is within the Front Range Fire Rescue Authority's ("FRFRA") service area. Martin Marietta met several times with FRFRA Fire Marshal Jesse Molinar Jr. to discuss the necessary fire measures it should employ, and continues to coordinate with him to make sure the District's requirements are satisfied. Trans. at 227:5-17; BATES0184. In the FRFRA's referral comments to the Weld County Planning Department, Mr. Molinar stated: "I have been in contact and had several meetings with the applicants' representative. We have discussed access, emergency access, needed water supply and have submitted to a third party reviewer for the application. We want to ensure that all fire codes and safety standards are met and followed." BATES0713.

As a result of these meetings, Martin Marietta has incorporated into the Proposed Use a secondary emergency access connecting to WCR 13 to the center of the railroad loop. This secondary access is a 20 foot wide, at-grade emergency access constructed at the north end of the property over the rail loop spur. Trans. at 18:20-24; BATES0184. As Mr. Molinar wrote on May 29, 2015, to the Weld County Planning Department: "The F.R.F.R.A. is requiring Martin Marietta to have a secondary emergency access point into the proposed property. Placing the secondary emergency access onto

WCR 13 south of the primary entrance . . . is acceptable to the fire department.”

BATES0714.

In addition, Martin Marietta is working with FRFRA to develop an Emergency Action Plan for the facility which will dictate fire suppression equipment at the site. Trans. at 227:5-17; BATES0193. As David Hagerman of Martin Marietta testified at the hearing before the BOCC: “[A]t every one of our locations we have Emergency Action Plans developed and these Emergency Action Plans encompass everything from a natural disaster to a fire . . . how we respond to the fire, . . . where the evacuation points are, rallying points, how we handle first responders . . . coordinat[ing] with local fire departments.” Trans. at 227:5-19. Mr. Hagerman also stated: “We have very detailed plans that we develop in working with local emergency response teams to understand everything that’s required. And if there’s certain equipment that we need to have on site to deal with things we make sure we have those things on site with the fire districts[,]” including fire suppressant foam. Trans. at 227:14-20.

Based on this evidence, the BOCC appropriately determined that Martin Marietta would have adequate fire protection measures on site.

**B. The Proposed Use does not Violate the Right to Farm Policy or the USR Criterion on Conserving Prime Farmland.**

Plaintiffs make several allegations that the Proposed Use does not adhere to the Right to Farm Policy in the Weld County Comprehensive Plan. Plaintiffs’ first claim is that the Proposed Use violates the County’s Right to Farm Policy because it will “force

neighboring farms to shutter in violation of the Right to Farm.” Op. Br. at 19-20.

Plaintiffs also allege that Martin Marietta selected the site without any consideration for preserving prime farmland. Op. Br. at 26-27.

As to the first allegation, the BOCC appropriately determined that the Right to Farm Policy in the Comprehensive Plan does not impose a rigid requirement that all land remain as farmland. Trans. at 294:12-296:10. Instead, the Policy is intended to advise property owners of the impact of agricultural land uses and allows in appropriate circumstances the conversion of farmland to other uses. Trans. at 295:15-24; WCC §22-2-20.G.2 (“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, and should attempt to be compatible with the region.”).

Additionally, the Proposed Use is not forcing the shuttering of farms because its impact will be minimal on those farms. The BOCC appropriately determined that Martin Marietta had demonstrated compliance with the Right to Farm Policy by diligently mitigating any impact from its operations on nearby farmland. Trans. at 295:5-24; 296:1-18. Evidence in the record supports this finding. As detailed below, Martin Marietta has taken extensive steps to mitigate the impacts of its project on nearby property, including mitigation measures with regard to noise, visual impacts, odors, traffic, and air emissions. As the record also makes clear, it is quite unlikely that organic crops in the vicinity of the Proposed Use will be significantly impacted. Trans.

at 201:15-19; 202:1-4, 19-21; BATES0360-361, BATES0702-709. Martin Marietta's air expert Dr. Andrew Stewart stated during the BOCC hearing that the likelihood of negative impacts to organic farming is very low because of the distance from the facility and the requirement that the facility meet National Ambient Air Quality Standards ("NAAQs"). Trans. at 201:15-19; 202:1-4; BATES0704.

There is also no basis to Plaintiffs' assertion that in selecting the site Martin Marietta made no effort to conserve prime farmland. Plaintiffs miss the fact that the selected site is currently not being used for agricultural production. The western portion of the site (the portion currently owned by Gerrard) is already being used for commercial and manufacturing uses, as approved in USR 1584. Martin Marietta is placing nearly all of its operations on this portion of the site and preserving as much of the prime soils as possible on the eastern portion of the site. Trans. at 20:8-24, 21:1-13; BATES2563-2564. Martin Marietta's proposed design clearly constitutes diligent efforts to conserve remaining irrigable land at the site. The eastern portion of the site, which has been kept in pasture, will remain vegetated, creating a visual greenspace between the industrial activity and Indianhead Estates. Trans. 20:13-15. Accordingly, contrary to Plaintiffs' assertions, the BOCC's finding that Martin Marietta diligently sought to conserve prime farmland is supported by competent evidence.

Moreover, as the BOCC made clear, any concern for preserving farmland must be balanced with the protection of private property. Trans. at 294:12-296:10. Indeed,

the Right to Farm policy provides that County land use regulations should “protect the individual property owner's right to request a land use change[,]” and encourages conversion of agricultural land to commercial and industrial uses where appropriate. WCC §22-2-20.G.

For all of these reasons, the BOCC appropriately determined that the Proposed Use does not violate the Right to Farm Policy or fail to reflect diligent efforts to conserve prime farmland.

**C. The Proposed Use Is Consistent with the A (Agricultural) Zone District.**

Plaintiffs next claim that the Proposed Use is inconsistent with the A (Agricultural) Zone District because it does not maintain and promote agriculture. Op. Br. at 20. As an initial matter, Plaintiffs overlook the fact that Martin Marietta obtained a USR permit allowing the Proposed Use. The USR procedure exists precisely to permit uses which have been determined to be more intense or have a potentially greater impact than uses allowed by right. Indeed, the “intent” of the A (Agricultural) Zone District is “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.” WCC §23-3-10. In evaluating a USR application in the A District, therefore, the BOCC examines whether the proposed use is “compatible” with existing and planned land uses in the area, and not exclusively as to whether the proposed use maintains agriculture. WCC §23-2-200.A.

Additionally, as mentioned above, the County Comprehensive Plan provides that County land use regulations should “protect the individual property owner's right to request a land use change,” and encourages conversion of agricultural land to commercial and industrial uses in appropriate circumstances. WCC §22-2-20.G.,G.2. By approving the Application, the BOCC allowed Martin Marietta to convert its property to an appropriate land use that supports the economic goals of Weld County and communities along the Highway 34 Corridor. The site’s location along the Union Pacific Railroad, proximity to WCR 13 (a major north-south road through the County), and Highway 34 where CDOT is already proposing a signalized intersection, can certainly support development for the Proposed Use. BATES0180.

Comprehensive Plan Policy 2.2 also encourages the location of industrial uses which are related to agriculture to locate within agricultural areas where adequate infrastructure exists. WCC §22-2-20.B.2. Martin Marietta’s business of supplying aggregate product, concrete, and asphalt benefits the agricultural industry, as many agricultural businesses depend on these products to operate their business. BATES0181. Indeed, Martin Marietta currently supplies about 80% of the asphalt needed for a variety of uses to Weld County and the City of Greeley, and will likely be the primary source of aggregate in Weld County in the future. Trans. 18:2-4; 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 projects to be supplied to their different markets. Trans. at 27:22-24, 28:1-18; BATES0685. To pretend that Martin Marietta's business does not benefit the agricultural industry in Weld County ignores the record evidence and prevailing economic realities within the County.

In sum, the BOCC's determination that the Proposed Use is consistent with the intent of the A (Agricultural) Zone District is substantially supported by competent evidence in the record and the Code.

**D. The Proposed Use is Compatible with Existing Land Uses.**

Plaintiffs claim that the Proposed Use is incompatible with existing land uses because the site is "surrounded by agricultural and residential uses on all sides." Op. Br. at 22. But Plaintiffs attach too narrow a definition to the compatibility criteria. The fact that one may be more intense than the other does not mean that they are incompatible. *See Sundance Hills Homeowners Ass'n.*, 534 P.2d at 1215 (holding rezoning to allow more intense development than surrounding area was compatible with surrounding land uses). Indeed, testimony during the hearing made clear that it is quite common in Weld County to see two types of uses located next to each other that are quite different. Trans. at 30:19-23; BATES2582. For example, a residential area is across the street from Martin Marietta's 35<sup>th</sup> Avenue facility and much closer to that facility than residential areas would be to the Proposed Use. Trans. at 30:23-24, 31:1-4; BATES2578.

The BOCC reasonably interpreted the compatibility requirement in approving the Proposed Use, when it determined that the Proposed Use was compatible with the existing surrounding land uses. The Proposed Use will be located on the Gerrard Property which is already zoned and used for commercial and industrial areas, and adjacent to U.S. Highway 34, County Road 13, and the Union Pacific and Great Western railroads. BATES2580.

Moreover, it is simply inaccurate to claim that the site is “surrounded” by agricultural and residential uses on all sides. On the contrary, there are fewer residential areas in the vicinity of the Proposed Use than industrial and commercial areas. Trans. at 30:8-20; BATES2558, 2580-2581. At the hearing before the BOCC, Martin Marietta presented a series of maps showing designated land uses in the vicinity of the Proposed Use. BATES2580, 2578-2582. As these maps demonstrate, there is a convergence in this area of industrial and commercial uses due, in part, to the proximity of HW 34 and CR 13 and the two railroads. *Id.* In response to this map, Commissioners Kirkmeyer and Cozad stated that the Proposed Use was plainly compatible with the substantial number of areas in the vicinity designated as industrial or commercial. Trans. at 298:12-19, 304:3-11.<sup>1</sup>

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<sup>1</sup> Plaintiffs allege that these maps should be discredited because they contain only zoning *designations*—as opposed to actual, existing land *uses*—for the broader region around the Proposed Site. Op. Br. at 23. But the USR criteria analysis undertaken by the BOCC must address a proposed project’s compatibility with potential surrounding future development, which can only be ascertained by current zoning designations. WCC § 23-2-230.B.4 (“The

Finally, Plaintiffs ignore that the Resolution required Martin Marietta to take specific mitigation measures to ensure that the Proposed Use is compatible with adjacent neighborhoods. BATES0003-0012. In finding that the Proposed Use was compatible with surrounding existing uses, the BOCC relied on the extensive mitigation efforts required for approval of the Proposed Use. The mitigation efforts include:

- Martin Marietta will establish a 30-acre buffer zone from the closest houses in Indianhead Estates Subdivision to the main area of activity and a 12-acre buffer from the Indianhead Estates Subdivision to the railroad loop. BATES2385. In addition, the concrete and asphalt plants are planned to be more than 2,000 feet away from the nearest Indianhead houses. *Id.*; BATES0495.
- Martin Marietta will incorporate additional landscaping into its application to enhance the buffering already provided. Based on comments from neighbors, this landscaping will include clumps of deciduous and evergreen trees around the perimeter as well as proposed screening berms which will have vegetative cover. Trans. 37:13-19; BATES2731-2733. Additionally, Martin Marietta agreed to set up a \$100,000 landscaping fund in escrow to be managed by Martin Marietta and a newly-establish Community Work Group to fund landscaping on the lots of adjacent landowners with views of the facility. BATES0010, 2838; Trans. at 39:22-24, 40:1-2.
- Martin Marietta will install an emission capture system with carbon filters to minimize the chance of odors becoming a problem at an additional cost of \$200,000. BATES0181, 2383. Martin Marietta will also employ vertical liquid AC storage tanks to decrease the surface exposure of the tanks. BATES0181. Finally, each tank will have vapor condensers so that when vapor comes up, the condenser captures the vapors and returns them to the tank. Trans. at 230:15-22. This will be the only asphalt plant in Colorado that uses all three of these technologies. Trans. at 36:3-4; BATES2588.
- Martin Marietta will undertake a number of measures to mitigate dust at the Proposed Use, including paving the main roads in and out of the

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applicant shall demonstrate . . . [t]hat the USES which would be permitted will be compatible with the future DEVELOPMENT of the surrounding area[.]”).

facility and around the ready mix and asphalt facilities, using a partially-enclosed hopper to unload train cars bringing product to the site, and using a street sweeper and water truck to control dust associated with handling material once it is unloaded from the train. BATES0196.

- Martin Marietta will institute a noise monitoring program to help ensure that applicable noise standards are met. Martin Marietta is working with AECOM to develop the program. BATES0240. Additionally, noise mitigations techniques are being implemented at the site, including the use of berms, white noise back-up alarms, a below-grade hopper, and acoustical enclosures. *Id.*

Based upon all of this evidence, the BOCC correctly determined that the Proposed Use would be compatible with existing land uses in the vicinity of the project.

**E. The Proposed Use is Compatible with Planned Future Uses.**

Plaintiffs also claim that the Proposed Use is incompatible with nearby planned future uses. Op. Br. at 24. The record evidence supports a contrary conclusion.

In approving the Proposed Use, the BOCC specifically determined that Martin Marietta had demonstrated compliance with the requirement in WCC §23-2-230.B.4 of the Code that the Proposed Use be compatible with future development of the surrounding area. Trans. at 294:24-298:19; BATES0002. In reaching this conclusion, the BOCC relied, in part, on the evidence discussed above regarding the substantial number of nearby properties zoned for commercial or industrial, the desirability of the selected site for industrial use in light of the location of U.S. Highway 34, I-25, County Road 13, and the Union Pacific and Great Western railroads, and the substantial mitigation measures being undertaken by Martin Marietta to reduce or eliminate the

impacts of the Proposed Use on residential areas. Trans. at 242:9-243:18, 294:24-298:19.

The BOCC also appropriately relied on the importance of the Proposed Use in future development of the area. According to the Census Bureau, Weld County is one of the fastest growing metropolitan areas in the nation with an expected growth of 75-100% over the next twenty years. BATES0016. This growth will result in a high demand for aggregate, asphalt to accommodate increased infrastructure and business development. *Id.* This is precisely the reason that much of the land in the vicinity of the Proposed Use is zoned as industrial or commercial (including the Gerrard Property itself), as discussed above. BATES2580-2582.

Despite this growing demand for aggregate, there is a dwindling supply of aggregate material in northern Colorado, particularly along the Front Range. BATES0190. Currently, most businesses in Weld County must obtain aggregate from Wyoming because of a local shortage of production. Trans. at 187:15-17. And the need for the new facility is heightened because Martin Marietta's 35<sup>th</sup> Avenue asphalt plant will close in the next five years when that source is mined out. Trans. at 28:6-13. Without the Proposed Use, there is a strong potential that Weld County would not have an operating asphalt plant after closure of the 35th Avenue site. BATES0389-0390. This would significantly raise the cost of constructing public and private roads, parking

lots, and building developments. *Id.* This evidence too supports the BOCC’s finding that the Proposed Use is consistent with future land uses.

**F. The Proposed Use Adequately Protects the Health, Safety and Welfare of the Inhabitants of the Neighborhood and the County.**

1. Human Health.

Plaintiffs argue that Martin Marietta did not present any evidence regarding the potential impacts from the Proposed Use with regard to increased dust and air emissions. Op. Br. at 28. Plaintiffs also complain that Dr. Scott Phillips, a physician specializing in internal medicine and medical toxicology, stated only that the Proposed Use will comply with CDPHE standards for air pollution, and failed to address “potential localized effects on human health.” Op. Br. at 28.

In fact, Martin Marietta presented substantial evidence regarding the impact of air and dust emissions from the Proposed Use. As set forth in detail below, Martin Marietta’s air expert, Dr. Stewart, concluded that, based on extensive air modeling, all emissions from the facility will be below the NAAQs and all other required air emission standards. Dr. Stewart also concluded that the combined asphalt plant and recycled asphalt plant emissions would be well below the safe chronic and acute concentration thresholds established by federal emissions standards. Based on this evidence, the Weld County Environmental Health Services Department and the BOCC separately reached the identical conclusion that the amount of permitted emissions from the Proposed Use would not pose a health risk to employees or residents. BATES0002, 0707.

Plaintiffs' second argument finding fault with Dr. Phillips' testimony is equally misguided. As recognized by the BOCC, the State establishes strict emission standards for criteria and hazardous air pollutants and compliance with these standards ensures that the emissions will not have the "potential localized effects on human health" cited by the Plaintiffs. Trans. at 199:15-203:23. Dr. Phillips looked carefully at modeled emissions level from the Proposed Use and actual emissions from existing asphalt plants and concluded that nothing from the site would cause acute or chronic health effects. Trans. at 200:11-14, BATES0346-348. As Dr. Phillips stated, "CDPHE will set emissions limits for the asphalt plant to be protective of human health and the environment. The amount or level permitted to be released at this plant would not pose a health risk to employees or residents." BATES0347.

This testimony is consistent with evidence presented by Martin Marietta that no clinical evidence suggests that asphalt plant production has contributed to illness or cancer. BATES0346, 2386. Studies by the Agency for Toxic Substances and Disease Registry under the U.S. Department of Health and Human Services have verified that emissions from asphalt facilities do not present an environmental or public health hazard. *Id.* Based upon these and other studies, the Weld County Environmental Health Department concluded that "[h]uman studies have found no clinical evidence that asphalt plant production has contributed to illness or cancer." BATES0707.

## 2. Traffic.

Plaintiffs also argue that the Proposed Use should not have been approved because traffic resulting from it will be substantial, and Martin Marietta has not proposed any infrastructure improvements to accommodate this increased traffic apart from agreeing to install a traffic signal at the intersection of CR 13 and U.S. 34. Op. Br. at 29.

The Proposed Use will increase traffic in the vicinity by about 1,120 trips per day. BATES0286. This estimated increase will constitute approximately 2-3% of the total traffic on WCR 13 and U.S. Highway 34, which is well within the capacity of these roads. Trans. at 23:4-23; BATES0016. And the increase in traffic from the Proposed Use is estimated to be substantially less than for other potential uses on the site. For example, 400 single family homes on the property would generate 3,808 daily trips, light industrial use would generate 6,889 trips, a King Soopers shopping center would generate 9,533 trips, and a proposed “Encore” residential development which is currently before the Town of Johnstown Board on the northwest corner of Highway 34 and WCR 13 would generate 28,026 trips per day. Trans. at 22:5-18; BATES2565.

Moreover, it is simply untrue that Martin Marietta is not undertaking substantial infrastructure improvements. As part of the Resolution:

- Martin Marietta will enter into an Improvements and Road Maintenance Agreement which will require conditions for maintenance, dust control, damage repair, specified haul routes and future traffic triggers for improvements will be included.

- Martin Marietta will construct a haul route north to U.S. Highway 34 and south to CR 54 to carry much of the traffic resulting from the Proposed Use.
- Martin Marietta is required to construct the following roadway improvements: (1) a southbound, left turn lane on CR 13 entering into the proposed facility; (2) a proposed acceleration lane northbound on CR 13; (3) a northbound right acceleration lane at the facility entrance; (4) a northbound right deceleration lane at the facility entrance; and (5) upgrade of the existing auxiliary turn lanes on U.S. Highway 34. The turn lanes will be brought up to standard for length, taper, and storage, unless waived by CDOT.

BATES0003-04.

Finally, Plaintiffs also claim that Martin Marietta's traffic study erroneously minimized the impact of truck traffic that will result from the Proposed Use, because the study failed to treat one truck as equivalent to three passenger cars when analyzing traffic congestion. Op. Br. at 29-30. Plaintiffs are mistaken. Martin Marietta's traffic expert Gene Coppola, who has 44 years of traffic engineering experience, testified at the hearing and stated in his report that the three-to-one equivalency ratio is only used in traffic modeling protocol for determining the length of storage of vehicles in traffic, and not for the purpose of modeling anticipated traffic congestion. Trans. at 210:1-214:5; BATES2728-2730. This equivalency ratio is never used by certified traffic planners, as Plaintiffs suggest, for analyzing traffic congestion. Trans. at 210:14-21, 211:3-10; BATES2728-2729. Instead, it is standard traffic modelling to model no difference between trucks and cars from a capacity standpoint. Trans. at 210:10-12.

### 3. Air Pollution.

Plaintiffs allege that Martin Marietta's air expert, Dave Stewart, "confirmed that the Proposed Use will result in the emissions of seven criteria pollutants and six hazardous air pollutants." Op. Br. at 30. But whether a facility emits *any* levels of an air pollutant is irrelevant under the Code, which instead requires compatibility, which the BOCC has interpreted to require that facility emissions are below emissions permit levels established by the State. BATES0010, ¶28 (The facility shall comply with the Air Pollution Emission Notice permit requirements as established by the Air Pollution Control Division of the Colorado Department of Public Health.)

Dr. Stewart concluded that, based on extensive air modeling, all emissions from the facility will comply with permit requirements because emissions at the property boundary will meet NAAQs standards, which are set to protect even the most sensitive populations of any adverse health effects. Trans. at 198:18-199:14. In calculating these emissions, Dr. Stewart assumed a maximum production rate allowed in the permit of 450,000 tons per year at the Proposed Use, as established by the applicable air permit. BATES0353-0356.

Dr. Stewart also conducted an assessment of the public health impacts associated with the reported Hazardous Air Pollutant ("HAP") emissions (benzene, ethylbenzene, formaldehyde, hexane, toluene, and xylene) from the asphalt plant and asphalt recycling. The HAP modeling analysis considered both acute (short-term) and chronic (long-term) health effects of the pollutant of interest. BATES0358-0360, 2403. The

modelled results are well below both the EPA Safe Concentration Threshold and Reference Exposure levels. *Id.* The results are also below standards required by the State of California's Office of Environmental Health Hazard Assessment, which are the most stringent standards in the United States. *Id.* Based upon these modeling results and actual emissions at the Taft Hill plant, Dr. Stewart concluded that the combined asphalt plant and recycled asphalt plant emissions show acute and chronic impacts well below the safe concentration thresholds. BATES0360-0361, 2403-2404.

Plaintiffs only rejoinder to this evidence is that Dr. Stewart erred in claiming that dust from truck traffic will be reduced by ninety percent due solely to street sweeping and failed to analyze formaldehyde emissions from the drum mix aggregate dryer, silo filing, and truck loading facility. Op. Br. at 31. While that may be the view of Plaintiffs, Dr. Stewart presented contrary evidence. He evaluated the projected concentration of each air pollutant that likely would be emitted by each emissions source comprising the Proposed Use (BATES0353-356, 2403-2404). The BOCC evaluated Dr. Stewart's report and supplementary letter and heard his extensive testimony, and reasonably concluded that the Proposed Use complied with applicable federal and state emissions regulations and protected the health, safety and welfare of the inhabitants of the neighborhood and the County. BATES0002. When there is conflicting evidence, the credibility of witnesses and the weight to be given their

testimony is within the province of the administrative agency. *Sundance Hills Homeowners Ass'n.*, 534 P.2d at 1214.

**G. The Proposed Use Complies with Applicable Noise Standards.**

Plaintiffs argue that the Proposed Use violates the State and County's noise standards and therefore should not have been approved. Op. Br. at 32. This claim misstates the evidence in the record.

In approving the Proposed Use, the BOCC required as a condition of approval that the facility "adhere to the maximum permissible noise levels allowed in the Residential Zone as delineated in WCC §14-9-30 as measured at the property line of the adjacent residential lots. In all other locations the facility shall adhere to the maximum permissible noise levels allowed in the Industrial Zone as delineated in Section 14-9-30 of the Weld County Code." BATES0008.

The BOCC appropriately determined that the Proposed Use would adhere to these noise standards. As part of its Application, Martin Marietta's consultant AECOM undertook a detailed noise analysis in which it conservatively assumed that all potential sources of noise on the entire 131-acre site would be operating at the same time, even at night. BATES0307-309, 2589. Accordingly, even though the ready-mix and asphalt plants will not routinely operate during nighttime hours, it was assumed that these plants would operate continuously at night in the modeling analysis. *Id.*, 2390-2391.

Using this assumption, AECOM's noise modeling study concluded that the noise from the Proposed Use would be below the maximum allowable industrial noise level

of 80 dBA during the day and 75 dBA at night at all analyzed property line points. BATES0310. AECOM also determined noise would be below the residential daytime limit of 55 dBA at all neighboring residential locations. *Id.* Finally, AECOM concluded that residential noise limits would be satisfied at all locations during occasional nighttime operations, except at three receptor points, which could be exceeded occasionally due to internal truck movements in the highly unlikely scenario that all potential sources of noise on site were operating at the same time during the evening. BATES0308-309. AECOM did not conclude, as Plaintiffs allege, that when measured from the adjacent property lines, that the Proposed Use would violate the state noise statute at all seven neighboring properties during the day and at six of the seven neighboring properties at night. Op. Br. at 32.

Plaintiffs also fail to mention the extensive noise mitigation measures that will be undertaken by Martin Marietta. The proposed noise control elements which will be constructed as part of the project include noise walls around a portion of the site and acoustical enclosures to provide at least 20 dBA of noise reduction at the asphalt plant and at least 10 dBA of noise reduction at the ready-mix plant. They also include the use of berms, white noise back-up alarms, and a below-grade hopper. BATES0181, 2591.

Considering these mitigation measures and the results of the noise modeling study by AECOM, the BOCC appropriately determined that the Proposed Use would meet the County's noise standard criteria.

### **III. THE BOARD DID NOT RELY ON IMPERMISSIBLE CRITERIA.**

Plaintiffs assert that the Commissioners’ “paramount concern” in approving the Application was to foster economic benefits for the County, rather than to ensure compliance with the USR criteria. Op. Br. at 32-3.

As an initial matter, Plaintiffs ask the Court to employ the wrong legal standard of review by ignoring the BOCC’s statement in the Resolution that the Proposed Use satisfied each of the applicable criteria for USR permit approval. BATES0002-04. The Colorado Court of Appeals rejected a similar claim in *IBC Denver II, LLC*, in which a landowner argued that, notwithstanding the city council’s written resolution, its real reason for denying the landowner’s rezoning application was based on impermissible considerations. While acknowledging that the council did discuss those considerations, the court found that because the council’s stated reasons for its decision were supported by specific findings in the written resolution, “we will not attempt to read the collective mind of the City Council to determine whether its members were motivated by improper considerations.” *IBC Denver II, LLC*, 183 P.3d at 720. Because the Board stated in the Resolution that the Proposed Use met each of the USR criteria, the Court should not consider Plaintiffs’ challenge based on the Board’s alleged improper considerations of economic benefits.

Moreover, Martin Marietta disagrees that the BOCC’s recognition of the economic benefits of the Proposed Use was not appropriate. WCC §23-2-230.B.2 requires consideration of chapter 22, which is the County’s Comprehensive Plan. The County’s

Comprehensive Plan, in turn, includes a set of economic development goals and policies, which “[e]ncourage the expansion of existing businesses and the location of new industries that will provide employment opportunities in the County,” and “promote the expansion and diversification of the industrial economic base to achieve a well-balanced industrial sector in order to provide a stable tax base and a variety of job opportunities for County citizens.” WCC §22-6-20.A.1.

But even as a factual matter, Plaintiffs’ assertions cannot withstand scrutiny, as the record confirms that the Commissioners appropriately considered the relevant USR criteria during the hearing. The record is replete with findings and statements by the BOCC covering virtually every aspect of the Project’s operations which directly correspond to the USR criteria. Indeed, Chairperson Kirkmeyer did not even mention the economic or employment benefits of the Project in her findings at the end of the hearing. She instead focused on the Project’s compatibility with existing and future surrounding land uses and the substantial mitigation efforts being undertaken by Martin Marietta. Trans. at 294:24- 295:12.

Similarly, Commissioner Conway in his concluding statement focused on the compatibility of the Proposed Use with surrounding existing and future land uses. He too cited the extensive mitigation of the Project impacts including those related to hours of operation, noise, and traffic, and the lack of anticipated health effects or effects on organic farming. Trans. at 300:15-24. He further noted that the Board was establishing

a community working group to address neighbor concerns, a fund for landscaping and mitigation purposes, and an emergency plan, and recognized that the fire district would be involved in making sure that it had adequate equipment. *Id.* These comments were similar to the other Commissioners' concluding remarks, Trans. at 302:1-305:2.

Finally, the broad focus of the BOCC is also demonstrated by the wide range of questions during the hearing, which focused on the compatibility of the Proposed Use with respect to: dust, noise and odor (Trans. at 36:14; 133:6-8; 205:10-12); fire and safety concerns (Trans. at 81:16-20; 97:1-4, 14, 16; 98:23-99:4, 99:6, 13-16, 18; 99:23-100:3; 100:5, 11-12; 103:19-22; 104:4-6, 8; 226:22-227:2; 227:3-4, 18); access and traffic (Trans. at 77:10-12, 14-15, 17-22; 78:1, 6-7; 248:10-12, 15-17; 249:1-3, 5, 8; 249:16-18; 250:3, 7-12); landscaping and aesthetics (Trans. at 108:16-17; 155:7-11, 14, 16-17; 207:16-17; 209:5-6; 219:17-20; 219:22-220:3; 220:12-13; 225:19-23; 226:11-16; 229:18-21); hours of operation (145:1-2, 6; 221:16-20; 222:8-10, 17-18, 21-24; 223:4-6, 13-14, 17, 22-23; 224:4-5, 17-21, 23; 225:1-3, 8-9, 12-15); impacts of potential emissions (Trans. at 62:4-5, 7; 9-10, 13-14; 108:22; 109:1-2; 152:21-23; 153:10-12, 14-15); and compatibility with the County's Right to Farm Policy (Trans. at 85:21-22; 86:1-2, 4, 10-13). Accordingly, there is simply no basis in the record to support Plaintiffs' assertion that the County Commissioners were only concerned with the economic and employment benefits of the Project.

**IV. PLAINTIFFS' DUE PROCESS CLAIM FAILS BECAUSE THERE WAS NO CONFLICT OF INTEREST.**

Finally, Plaintiffs allege the BOCC's decision violated their rights to procedural due process because Commissioner Cozad did not recuse herself or disclose she "worked for Tetra Tech (Martin Marietta's primary consultant during the USR application process) and served as the direct supervisor to the consultant that represented Martin Marietta at the Hearing . . . ." Op. Br. at 34. Plaintiffs claim fails for two reasons.

First, Plaintiffs failed to raise the issue at the hearing and therefore waived the right to assert a conflict of interest here. A party asserting a conflict of interest must raise the issue before the local government or administrative body. *See, e.g., Getsch v. Hawker*, 748 P.2d 1304, 1305 (Colo. App. 1987) (plaintiff waived his right to move for disqualification of a hearing officer in a 106(a)(4) appeal because he failed to raise the issue during the hearing). *See also Stamm v. City and Cnty. of Denver*, 856 P.2d 54, 57-58 (Colo. App. 1993) (In a C.R.C.P.106(a)(4) case, the district court erred in ruling on new legal argument not raised during the administrative proceedings).

Plaintiffs admit that the facts surrounding Commissioner Cozad's prior association with Tetra Tech were "not in the record because they were not known to Plaintiffs until after the Hearing." Op. Br. at 34, n. 8; Complaint, ¶ 63. But Plaintiffs' lack of knowledge is no excuse, particularly because Commissioner Cozad's prior

employment at Tetra Tech is highlighted on her County internet profile.<sup>2</sup> In addition, Commissioner Cozad's publicly-available LinkedIn page provides details surrounding her previous employment, including the period of employment and past activities.<sup>3</sup> Having failed to establish a record on the issue before the BOCC, Plaintiffs are now precluded from raising this argument. *See Getsch*, 748 P.2d at 1305; *Stamm*, 856 P.2d at 57-8.<sup>4</sup>

Second, Plaintiffs have failed to assert an actionable conflict of interest claim. In order to allege a colorable of conflict of interest claim, Plaintiffs must overcome the presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities. *See Meyerstein v. City of Aspen*, 282 P.3d 456, 467-68 (Colo. App. 2011). To do this, plaintiff must show Commissioner Cozad had an actual personal, financial or official stake in the decision. *Scott v. Englewood*, 672 P.2d 225, 227 (Colo. App. 1983). (“[T]he challenger of a quasi-judicial decision has the burden of rebutting this presumption of impartiality . . . by showing that there is a conflict of interest on the part of a participating decision maker.”)

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<sup>2</sup> *Meet the Commissioners*, WELD COUNTY: OFFICE OF THE COMMISSIONERS, <http://www.co.weld.co.us/Departments/Commissioners/MeettheCommissioners.html> (last visited Feb. 25, 2016).

<sup>3</sup> *Julie Cozad*, LINKEDIN.COM, <https://www.linkedin.com/in/julie-cozad-35a85011> (last visited Feb. 25, 2016).

<sup>4</sup> Plaintiffs cite to *Mountain States Tel. & Tel. Co. v. Pub. Util. Comm'n*, 763 P.2d 1020, 1028 (Colo. 1988), in support of their allegation that Commissioner Cozad was required to disclose her prior employment. Op. Br. at 34. But this case provides no support for that proposition, and instead holds that the failure to raise a conflict of interest issue at the administrative hearing waives any subsequent objection. *Id.*

WCC §3-3-100.A prohibits County officers from having “any interest in any enterprise or organization doing business with the County which might interfere with the unbiased discharge of his or her duty to the public and the best interest of the County.” WCC §3-3-100.B refers to the State Ethics Code which prohibits a local government official performing an official act regarding a business that results in a “direct and substantial” economic benefit to the official or in which the official has a “substantial financial interest.” C.R.S. § 24-18-109(2).

Plaintiffs’ allegations that Commissioner Cozad used to work for Tetra Tech fails to satisfy their obligation to show she had “direct and substantial” economic benefit in approval of the Application. Plaintiffs’ claims all relate to a past employment relationship with Martin Marietta’s consulting firm, which does not remotely represent a conflict under the Weld County Ethics Code. While Plaintiffs claim they are disadvantaged from making specific allegations of conflict of interest because Commissioner Cozad failed to disclose her previous employment with Tetra Tech, Op. Br.at 34, this assertion is plainly false, as Commissioner Cozad’s prior employment with Tetra Tech was publically available. In addition, the State Ethics Code only requires disclosure of a “private interest” that may “impinge on [an official’s] fiduciary duty and the public trust.” C.R.S. § 24-18-110. Nothing alleged by Plaintiffs required disclosure under this standard. Accordingly, as a matter of law, no disclosure was

required by Ms. Cozad, and Plaintiffs have failed to assert a cognizable conflict of interest claim.<sup>5</sup>

## CONCLUSION

For the reasons set forth above, Defendants Martin Marietta Materials, Inc. and Gerrard Investments, LLC respectfully request that this Court uphold the BOCC's approval of the Application to permit development of the Proposed Use.

Respectfully submitted March 8, 2016.

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<sup>5</sup> In their Opening Brief, Plaintiffs contrast Commissioner Cozad's nondisclosure with the recusal of two planning commission members. Op. Br. at 34. However, by Plaintiffs' own admission, both commissioners had a current interest affecting their consideration of the Application: One commissioner "had approached Martin Marietta about relocating the project to a different site *that would benefit him financially* . . . [and the other] commissioner recused himself because *his employer has a business relationship* with Martin Marietta." *Id.* (emphasis added). Both scenarios are distinguishable from the current case because Plaintiffs have not asserted that Commissioner Cozad had any interest whatsoever in the Application or the applicant.

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2016, I filed a true and correct copy of the foregoing document, titled MARTIN MARIETTA MATERIALS, INC.'S AND GERRARD INVESTMENTS, LLC'S 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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