

DISTRICT COURT, WELD COUNTY, COLORADO
915 10th Street, Greeley, CO 80631
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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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Case Number: 2015CV30776

Division 4

DEFENDANT WELD COUNTY'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with the applicable word limits set forth in C.A.R. 28(g)(1).

Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains 7,686 words. (C.A.R. 28(g)(1) states: An opening brief and an answer brief must contain no more than 9,500 words. A reply brief must contain no more than 5,700 words. Headings, footnotes, and quotations count toward the word limitations. The caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block do not count toward the word limit.)

By: *s/ Bruce T. Barker*
Bruce T. Barker, No. 13690

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COMES NOW the Board of County Commissioners of Weld County, Colorado (“the Board”), including all of the individual Commissioners in their official capacities, by and through its undersigned counsel, and hereby submits the following Answer Brief:

STATEMENT OF JURISDICTION

The Court’s jurisdiction arises under C.R.C.P. 106(a)(4). Plaintiffs have asked the Court to determine if the Board exceeded its jurisdiction or abused its discretion as quasi-judicial factfinder and decision-maker on August 12, 2015, in approving an amendment to a Use-by-Special Review (“USR”) permit for Weld LV, LLC, and Gerrard Investments, LLC, c/o Martin Marietta Materials, Inc. (“the Applicants” for USR 15-0027).

STATEMENT OF THE ISSUE

Whether the record is so devoid of evidentiary support for the Board’s decision to approve USR 15-0027 that such decision can only be explained as an arbitrary and capricious exercise of authority.

STATEMENT OF THE CASE

On August 12, 2015, the Board approved USR 15-0027, which was an amendment to USR-1584. BATES000001-12. The property in question consists of 131 acres located one-half (½) mile south of U.S. Highway 34, just off Weld County Road (“WCR”) 13 and immediately adjacent to the Union Pacific Railroad line. Transcript (“TR”), 18:9-11. A portion of the property is owned by Gerrard Investments, LLC (“Gerrard”). It includes the existing USR-1584, which allows for industrial use (operation of a construction business). The remainder of the property is owned by Weld LV, LLC (“Weld LV”). TR, 18:15-19. Maps of the site are shown at BATES002558-2559.

The amendment to USR-1584 (USR 15-0027) expanded that USR to both parcels for the operation of an asphalt batch plant; a ready-mix concrete batch plant; materials processing, including recycling and wholesale and retail sales of aggregate; and an approximately 6,400 foot rail loop spur to accommodate up to 117 train cars and four (4) locomotives for transloading. TR, 4:21-24. Additionally, Gerrard's construction business could continue at the site, consisting of two (2) office buildings, two (2) shop buildings, and outdoor storage. TR, 4:13-14; 18:17-20. (The amendment to USR-1584 is hereinafter referred to as "USR 15-0027.") Gerrard intends to purchase the parcel owned by Weld LV. Gerrard will then lease the two (2) parcels to Martin Marietta Materials, Inc. ("Martin Marietta").

The Board's hearing on August 12, 2015, went from 9:30 a.m., until 11:07 p.m. TR, 2:10; 306:19. During the hearing, the Board heard testimony from County staff, witnesses called for and on behalf of the Applicants, and witnesses both for and against the proposal (all testimony is included in the Transcript). The Board reviewed documents, slides shown on screen, videos, and portions of W.C.C. Chapters 22 and 23, all of which is included in the Certified Record.

At the end of the hearing, the Board approved USR 15-0027, on a unanimous vote. TR, 305:3-306:8. The written Resolution of approval includes Conditions of Approval and Development Standards. BATES000001-12. It also states that the Board made the following findings:

1. The submitted materials are in compliance with the application requirements of Section 23-2-260 of the Weld County Code.
2. It is the opinion of the Board of County Commissioners that the applicant has shown compliance with Section 23-2-230.B of the Weld County Code as follows:

- A. Section 23-2-230.B.1 -- The proposed use is consistent with Chapter 22 and any other applicable Code provisions or ordinances in effect.
- B. Section 23-2-230.B.2 -- The proposed use is consistent with the intent of the A (Agricultural) Zone District.
- C. Section 23-2-230.B.3 -- The uses which will be permitted will be compatible with the existing surrounding land uses.
- D. Section 23-2-230.B.4 -- The uses which will be permitted will be compatible with future development of the surrounding area as permitted by the existing zoning and with the future development as projected by Chapter 22 of the Weld County Code, and any other applicable code provisions or ordinances in effect, or the adopted Master Plans of affected municipalities.
- E. Section 23-2-230.B.6 -- The applicant has demonstrated a diligent effort to conserve prime agricultural land in the locational decision for the proposed use.
- F. Section 23-2-230.B.7 -- The Design Standards (Section 23-2-240, Weld County Code), Operation Standards (Section 23-2-250, Weld County Code), Conditions of Approval, and Development Standards ensure that there are adequate provisions for the protection of the health, safety, and welfare of the inhabitants of the neighborhood and County.

BATES000002.

The Commissioners each made findings on the record. TR, 294:11-305:2:

Commissioner Kirkmeyer found the Highway 34 corridor in the area surrounding the site is changing to light industrial, industrial, farming, commercial, and residential, and will continue to change in that manner. TR, 297:6-8. As a result, she believes USR 15-0027 is compatible with the existing surrounding land uses and future land uses. TR, 297:8-10; 298:14-19. Commissioner Kirkmeyer concluded that USR15-0027 is consistent with Comprehensive Plan (“Comp Plan”) A.Goal 7, which encourages changes from agricultural to commercial and industrial uses when the subject site is in an area that can support can support such development and is compatible with the

region. TR, 296:11-15. She believes A.Goal 8 has been met because adequate services and facilities are currently available or reasonably obtainable to accommodate the new land use change. TR, 296:15-16. She found USR 15-0027 is consistent with A.Goal 9, because it is, with mitigation, compatible with the region. TR, 296:17-297:10. Commissioner Kirkmeyer found USR15-0027 to be consistent with I.Goal 1, as the site is along railroad infrastructure and where adequate services are currently available or reasonably obtainable. TR, 297:23-298:4. Finally, she believes USR 15-0027 is consistent with I.Goal 3, because of the transportation infrastructure in place to support it, and I.Goal 4, where the change to industrial use will “pay its own way” through the conditions of approval and development standards attached to the Resolution. TR, 298:7-11.

Commissioner Conway found with the required mitigation, USR 15-0027 is compatible. This includes mitigated hours of operation, a residential noise standard of 55/50, and road improvements going south on WCR 13. TR, 300:15-20. He also found that health concerns have been addressed. Ambient dust and potential pollutants from USR 15-0027 will not impact organic farming. TR, 300:20-24. The Community Working Group or citizen’s group will meet quarterly, and there will be a fund for landscaping and mitigation purposes. TR, 300:24-301:2. There will be an Emergency Plan. TR, 301:3-4.

Commissioner Freeman believes the area surrounding USR 15-0027 includes industrial uses, and will continue to grow with commercial, industrial and agriculture. He therefore concluded USR 15-0027 is “in the right place.” TR, 11-14. He believes the agreed to mitigation measures are fashioned to meet the needs of the neighbors. For example, the noise level is set for a residential standard. TR, 302:15-17.

Commissioner Cozad agreed with Commissioner Kirkmeyer that the USR complies with A.Goal 7., and A.Policy 7.1, which states the County’s land use regulations should support commercial and industrial uses that are directly related to or dependent upon agriculture. TR, 303:20-23. She believes agriculture is dependent upon this USR because the materials produced there are used to build the roads farmers use to get their products to market. Additionally, the aggregates are used on farms and ditches, so agriculture is dependent upon the products made at the USR. TR, 303:23-304:2. She stated that there are at least eight (8) or nine (9) Goals and Policies that support the development. They include: the location and importance of railroad infrastructure to industrial uses, and the compatibility with surrounding land uses and future land uses. Commissioner Cozad concluded that the required conditions of approval and development standards makes the USR compatible. TR, 304:3-11.

Commissioner Moreno moved to approve the USR with the conditions of approval and development standards. TR, 305:3-12. He had previously stated he did not see the USR as being “not compatible.” TR, 245:10-15.

STANDARD OF REVIEW

C.R.C.P. 106(a)(4) provides for relief as follows:

Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

- (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

The scope of C.R.C.P. 106(a)(4) review is limited. The only issue for consideration is whether the governmental body, in the exercise of its quasi-judicial authority, exceeded its

jurisdiction or abused its discretion. The Court is not to reweigh the evidence in the record, or to interfere with or substitute its opinion, judgment or philosophy for that of the governmental body if there is any competent evidence in the record to support the decision. *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987); *Ross v. Fire and Police Pension Ass'n*, 713 P.2d 1304 (Colo. 1986). “No competent evidence” means that the governmental body's decision is “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Bd. Of County Com'rs of Routt County v. O'Dell*, 920 P.2d 48, 51 (Colo. 1996), citing *Ross*. The Court must look to the entire record and must uphold the decision unless there is no competent evidence in the record to support it. *Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988). A quasi-judicial decision will not be deemed arbitrary and capricious or an abuse of discretion unless the court finds there is no competent evidence in the record to support it. So long as the record provides competent evidence to support the governmental body's decision, it must be affirmed even if reasonable persons could differ as to its merits. *Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237 (Colo. 1974).

ARGUMENT

The record is not “so devoid of evidentiary support” for the Board's decision to approve USR 15-0027 that such decision can only be explained as an arbitrary and capricious exercise of authority. To the contrary, the record contains ample evidence that USR 15-0027 complies with the seven (7) criteria set forth in W.C.C. Section 23-2-230 B. 1-7., as follows:

I. W.C.C. Section 23-2-230 B.1: That the proposal is consistent with [in] Chapter 22 and any other applicable code provisions or ordinances in effect.

A. W.C.C. Sec. 22-2-20. - Agriculture goals and policies.

1. A.Goal 2 and A.Policy 2.2

Sec. 22-2-20. - Agriculture goals and policies.

B. A.Goal 2. Continue the commitment to viable agriculture in Weld County through mitigated protection of established (and potentially expanding) agricultural uses from other proposed new uses that would hinder the operations of the agricultural enterprises.

2. A.Policy 2.2. Allow commercial and industrial uses, which are directly related to or dependent upon agriculture, to locate within agricultural areas when the impact to surrounding properties is minimal or mitigated and where adequate services and infrastructure are currently available or reasonably obtainable. These commercial and industrial uses should be encouraged to locate in areas that minimize the removal of agricultural land from production.

The record includes evidence that USR 15-0027 is consistent with A.Goal 2 and A.Policy 2.2.

USR 15-0027 allows for the industrial use of operating of an asphalt batch plant; a ready-mix concrete batch plant; materials processing, including recycling and wholesale and retail sales of aggregate; and transloading. TR, 4:21-24. The concrete and aggregate materials and asphalt produced at the site will be available to build farms, barns, feed areas, agricultural processing plants, and roads to access those facilities. The products are also used in agricultural ditches, ditch roads, concrete pipelines, water storage spillways, and pump stations. TR, 27:22-28:3; BATES002570. Martin Marietta supplies approximately eighty percent (80%) of the asphalt used by Weld County for County roads. TR, 18:2-3. Thus, this industrial use has a direct relationship to agriculture.

The Resolution approving USR 15-0027 includes 15 Conditions of Approval (“COA”), and 42 Development Standards (“DS”), most of which are intended to mitigate the impact on surrounding properties, including agricultural properties, as discussed at length below. BATES000001-12.

The site is near U.S. Highway 34, about two (2) miles from I-25. The Union Pacific rail line is located immediately adjacent to the property. It has access to WCR 13. The combination of existing roads, highway and rail make the site uniquely suited for this industrial use. TR, 18:9-15; BATES002577, 002579. Through COA 1.E., prior to recording the USR map, the Applicants are required to install a southbound left deceleration lane, northbound right acceleration lane, and northbound right deceleration lane at the facility entrance. They are also required to install a traffic signal at the intersection of WCR 13 and U.S. Highway 34, and upgrade the existing auxiliary turn lanes on Highway 34. BATES000003-4. So, adequate services and infrastructure are currently available or reasonably obtainable.

The site consists of two (2) parcels, one of which was previously approved for industrial use for the operation of a construction business under USR-1584. That parcel was taken out of agricultural production prior to August 12, 2015. TR, 18:15-19; BATES002559. The second parcel is owned by Weld LV. TR, 18:16. The USR 15-0027 site is designed so that most of the use is on the Gerrard side, and over half of the Weld LV side will remain as open space and be planted in native grasses. It may be reclaimed for agricultural production once USR 15-0027 is discontinued. TR, 188:17-21. Thus, USR 15-0027 minimizes the removal of agricultural land from production.

2. A.Goal 7, A.Policy 7.2, and A.Policy 7.3

Sec. 22-2-20. - Agriculture goals and policies

- G. A.Goal 7. County land use regulations should protect the individual property owner's right to request a land use change.
2. A.Policy 7.2. 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.
 3. A.Policy 7.3. Conversion of agricultural land to urban residential, commercial and industrial uses should be considered when the subject site is located inside an Intergovernmental Agreement area, Urban Growth Boundary area, Regional Urbanization Area or Urban Development Nodes, or where adequate services are currently available or reasonably obtainable. A municipality's adopted comprehensive plan should be considered, but should not determine the appropriateness of such conversion.

The record contains evidence that USR 15-0027 is consistent with A.Goal 7, A.Policy 7.2, and A.Policy 7.3.

The roads, highways, and rail line adjacent to the USR 15-0027 site support industrial development. TR, 18:9-15; BATES002577, 002579. Martin Marietta projects its initial traffic volumes as 560 round trips per day (1,120 trips per day) when the facility opens in 2017. That number is projected to increase to 1,130 round trips per day (2,260 trips per day) by 2035. TR, 12:5-7. As an arterial, WCR 13 is designed to handle about 17,000 trips per day. TR, 23:6-11. U.S. Highway 34 currently carries about 42,000 trips per day, and is projected to increase to 68,000 trips per day in 2035. Martin Marietta's traffic contribution to the area is projected to be two to three percent (2-3%) to as high as 8.4% of total traffic volume on U.S. Highway 34. TR, 23:11-17; TR, 243:12-18; BATES000256-304.

The region has a relatively high degree of commercial land and industrial uses currently in place. This is driven by the infrastructure. TR, 31:8-17. The maps at BATES002579-2582 depict

how residential uses in the area are less prevalent than commercial and industrial. TR, 31:17-23. Thus, the industrial use of USR 15-0027 is compatible with the region.

Referral comments were received from the Towns of Johnstown and Windsor, and from the City of Greeley. BATES000740-741; 000759-760; and 000715-737. Neither Windsor's, nor Greeley's, comprehensive plans or growth management areas encompass the USR 15-0027 site. BATES000759-760; TR, 239:21-240:2. An intergovernmental agreement between Windsor and Greeley covers the site, but it does not include Weld County as a signatory and only addresses the depicted properties if and when they are annexed to one of the municipalities. BATES000117-135. Johnstown's comprehensive plan was updated in 2006 and shows the property as designated "low-density, single-family residential homes." TR, 76:21-23; BATES000740. But Johnstown never received input from the property owner prior to making that designation. Additionally, the Johnstown comprehensive plan does not acknowledge that the portion of the property owned by Gerrard has already been changed to industrial use through USR-1584. BATES000141-144. The Board at hearing was skeptical of the merits of the Johnstown plan. TR, 297:1-6. However, A.Policy 7.3 requires only that, "A municipality's adopted comprehensive plan should be considered, *but should not determine the appropriateness of such conversion.*" (Emphasis added.)

3. A.Goal 8, A.Policy 8.3, and A.Policy 8.4

Sec. 22-2-20. - Agriculture goals and policies

H. A.Goal 8. Ensure that adequate services and facilities are currently available or reasonably obtainable to accommodate the requested new land use change for more intensive development.

3. A.Policy 8.3. The land use applicants should demonstrate that the roadway facilities associated with the proposed development are adequate in width, classification and structural capacity to serve the proposed land use change.

4. A.Policy 8.4. The land use applicants should demonstrate that drainage providing storm water management for the proposed land use change is adequate for the type and style of development and meets the requirements of county, state and federal rules and regulations.

There is evidence in the record that shows USR 15-0027 is consistent with A.Goal 8, A.Policy 8.3, and A.Policy 8.4.

WCR 13 and U.S. Highway 34 will have adequate width, classification and structural capacity to serve the vehicles accessing USR 15-0027. BATES000256-304; 002728-2730. The immediate improvements required to be installed by the Applicants will enhance that capacity. TR, 211:3-10; 212:2-11. The Applicants are also required to enter into an improvements agreement which requires them to install auxiliary lanes at the intersection of WCR's 13 and 54 when triggers are met. BATES000003; TR, 214:11-23. COA 1.C. of the Board's Resolution also includes a requirement that, if after a diagnostic study by Union Pacific of crossings on WCR's 13, 15, 17, and 52 it is determined that the increased train traffic caused by USR 15-0027 warrants the installation of crossing arms or signals, the Applicants will be responsible for the local portion of the project cost. BATES000003, 000137-140.

The Applicants submitted into evidence a Final Drainage Report for the property which "examines the undeveloped flow patterns of off-site and on-site drainage basins and the proposed storm water facilities designed to mitigate downstream impact of increased storm water runoff." The Report is prepared in accordance with Weld County requirements. BATES000401-422; TR, 231:21-232:10. The drainage system on the USR 15-0027 site is designed to contain pollutant sources to ensure no runoff to adjacent properties occurs. TR, 192:14-196:9; 197:6-16. An irrigation ditch that serves the property will continue to be used for irrigation of the vegetated areas

of the site. TR, 196:11-22. Concerns regarding drainage expressed by the Reorganized Farmers Ditch Company and the Hill and Brush Ditch Company were addressed through two (2) letters submitted into the record by the Applicants, both dated June 26, 2015, and found at BATES000153-160, 000161-164. Drainage on and from the USR 15-0027 site is addressed in a letter from Jared Dains, P.E., Water Resource Engineer, Applegate Group, Inc., at BATES000344-345.

4. A.Goal 9, A.Policy 9.2, A.Policy 9.3, A.Policy 9.5

Sec. 22-2-20. - Agriculture goals and policies

- I. A.Goal 9. Reduce potential conflicts between varying land uses in the conversion of traditional agricultural lands to other land uses.
 2. A.Policy 9.2. Consider the individuality of the characteristics and the compatibility of the region of the County that each proposed land use change affects, while avoiding requirements that do not fit the land use for that specific region.
 3. A.Policy 9.3. Consider mitigation techniques to address incompatibility issues. Encourage techniques and incentives, such as but not limited to clustered development and building envelopes, to minimize impacts on surrounding agricultural land.
 5. A.Policy 9.5. Applications for a change of land use in the agricultural areas should be reviewed in accordance with all potential impacts to surrounding properties and referral agencies. Encourage applicants to communicate with those affected by the proposed land use change through the referral process.

The record contains evidence that USR 15-0027 is consistent with A.Goal 9, A.Policy 9.2, A.Policy 9.3, and A.Policy 9.5.

A substantial portion of the hearing on August 12, 2015, was spent reviewing the impacts of USR 15-0027 on surrounding lands and the region and considering mitigation techniques. In order to determine impacts and methods to mitigate them, Martin Marietta conducted outreach

meetings on January 27, June 9, June 24, and July 9, 2015. TR, 31:23-33:3; BATES000185. Information regarding the January 27, 2015, meeting is in the record at BATES000609-680. A response to 20 questions raised by persons who attended the June 9, 2015, meeting is in the record at BATES002382-2392. That response details many of the mitigation measure proposed by the Applicants for USR 15-0027. Information regarding the meeting of July 9, 2015, is in the record at BATES392-394.

A map showing various local concerns is in the record at BATES000198. The concerns are summarized at BATES002584. TR, 33:9-16. Each of these concerns was addressed in the USR application and its associated letter. BATES000173-195. Martin Marietta engaged various experts to address these concerns, with the list summarized at BATES002585. TR, 33:16-34:8. The concerns and their mitigation is as follows:

a. Air Quality Mitigation

Air quality permits for the facility must be obtained from the Colorado Department of Public Health and Environment (“CDPHE”). TR, 34:11-35:6. The slide at BATES002586 shows the air quality permitting responsibilities. David R. Stewart, President and CEO of Stewart Environmental Consultants, Inc., provided an Air Emissions Assessment, which is in the record at BATES000349-363. He submitted follow-up letters at BATES000165, 0002393-2405. Dr. Stewart concludes that generally, particulate matter concentrations at the property boundary and nearest residence will be at or below National Ambient Air Quality Standards (“NAAQS”) levels. The CDPHE will not issue an air quality permit until Martin Marietta demonstrates compliance with NAAQS. BATES002402. Mr. Stewart studied hazardous air pollutants (“HAP”) emissions

modeling for the facility that included benzene, ethylbenzene, formaldehyde, hexane, toluene, and xylenes. He concludes that: “The HAP values are well below both the EPA Safe Concentration Threshold and Reference Exposure Levels (RELS) for the State of California’s Office of Environmental Health Hazard Assessment (OEHHA). California has instituted the most stringent emission policies in the country, and the Highway 34 Facility complies with those levels. Our conclusion is that this facility will not negatively impact the surrounding environment or affect human health as it will meet all environmental standards.” BATES000361. In his July 20, 2015, letter, Mr. Stewart revised his estimates regarding formaldehyde, but concluded that, “actual formaldehyde emissions are expected to be within the carcinogenic screening level. In addition, the Highway 34 Facility will be adding activated carbon to the control measures, which was not included in the original calculation.” BATES002403. Concern was expressed during the hearing about metals emitted from the facility that would have an adverse effect on an adjacent organic farm. TR, 178:5-19. Mr. Stewart addressed the issue, concluding, “that if I took all the metal that came out of [the] facility and placed them on top of the [organic] farm, it would represent less than one percent of the metals that already exist” on the farm. TR, 201:12-204:5.

Dr. Scott Phillips, a Denver physician, addressed air-borne health concerns of the facility in a document found at BATES000346-348. Dr. Phillips does not see anything coming from the facility that would give him concern “for causing any acute or chronic health effects.” TR, 200:12-14.

DS 28 of the Board’s Resolution requires that the facility comply with the Air Pollution Emission Notice (“APEN”) permit issued by the CDPHE.

b. Dust Mitigation

The Dust Abatement Plan for the facility, dated June 24, 2015, includes a number of dust mitigation techniques which will be incorporated into the facility. BATES000242. Inactive exposed areas will be vegetated. A partially enclosed hopper and water sprays will be used to control dust from unloading of train cars. Water trucks will spray exposed areas and main roads will be paved. The facility will be designed to minimize dust enclosure, including baghouse enclosures and water sprays. A street sweeper will be utilized on paved surfaces. TR, 35:15-20; BATES000242, 002587.

DS 18 requires compliance with the accepted Dust Abatement Plan and the Colorado Air Quality Commission's regulations. BATES0000009.

c. Odor Mitigation

Three different odor control measures will be incorporated into the facility. BATES002588. These measures will include vertical liquid asphalt/cement tanks, which will minimize the surface area of the liquids to emit less odor. An emission capture and carbon filters will also minimize odors. TR, 35:20-36:4. The goal is to remove odors, not mask them. TR, 230:11-231:19.

Odor standards will be enforced by the certified "Nose Rangers" of the Weld County Health Department. TR, 15:15-21; 241:9-17. Weld County staff has not received any complaints of odor from any of the asphalt plants operating in Weld County since 2001. TR, 242:1-4.

DS 30 requires that odors detected off-site are not to exceed a seven-to-one (7:1) dilution

threshold, as required by and measured pursuant to Regulation 2 of the Colorado Air Pollution Control Regulations.

d. Noise Mitigation

A noise analysis by Paul Burge, INCE Bd. Cert., of AECOM, dated March 26, 2015, was submitted for the record. BATES000305-312. He provided an addendum to his analysis dated August 10, 2015. BATES02731-2734. As modeled, noise levels will be within required limits at property line and at nearby residences. BATES002370-2371, 002589.

Mitigation measures will include redesigning the rail loop with a 700 foot setback from the northeastern property line, clustering of industrial activity on the west half of the property, and installing several vegetated berms. TR, 36:18-38:3; BATES002590. The below grade hopper for unloading trains, enclosing the concrete plant in a building, and a circular truck route will also mitigate noise impacts. TR, 38:3-8; BATES002591-2592. With these mitigation measures in place, the decibel rating at residences will be no more than 50-55, which is similar to a normal conversation. TR, 204:10-205:20.

A noise monitoring program will be followed by Martin Marietta. BATES000312. Staff from the Weld County Department of Public Health and Environment will enforce the noise requirements. TR, 15:15-21.

DS 24 of the Board's Resolution requires a maximum permissible noise level meeting the Residential standard at the property line of adjacent residential lots, as detailed in W.C.C. Sec. 14-9-30, and the Industrial standard at all other locations on the site. BATES000010. DS requires Martin Marietta to have vertical AC storage tanks, carbon filters, and an emission capturing system

on the asphalt plant, and to have a certified “Nasal Ranger” on site when the asphalt plant is operating. BATES000011. It should be noted that the decibel standards set forth in W.C.C. Sec. 14-9-30 for the Residential and Industrial Zones are identical to those set forth in C.R.S. § 25-12-103(1). BATES000704-704.

e. Visual Mitigation

“Visual” deals with the view of the facility from surrounding properties. Slides submitted into the record by the Applicants show depictions of the site from various locations. TR, 38:12-39:8; BATES002593-2598. The 700 foot setback from the neighboring residential properties in Indianhead Estates on the northeast side of the site, coupled with the berm will enhance screening. BATES000151-152, 000177, 002561. The ready-mix concrete plant is 1,450 feet away from the closest residence. The asphalt plant is more than 1,900 feet away from the closest residence. TR, 39:9-12.

The Applicants submitted into the record a landscaping plan for the property. BATES000197. Martin Marietta has agreed to establish a \$100,000 landscaping fund to pay for landscaping on adjacent properties to enhance screening. TR, 39:22-40:2; 207:3-19. The fund will be administered by a community advisory group. TR, 39:27-40:2. The advisory group will address not just landscaping, but also other concerns about the facility, with a goal of looking for potential solutions. TR, 208:4-209:3; BATES000240. Martin Marietta is also agreeable to installing decorative fencing at certain locations. TR, 230:1-6.

Martin Marietta expressed agreement to modify paint schemes. TR, 225:19-226:21.

COA 1.H.5) of the Board’s Resolution requires the USR map to delineate approved

landscaping/screening, including “decorative fencing in key areas based upon the applicant’s consultation with the Community Working Group.” BATES000004. COA 1.H.11) mandates that all structures be painted in earth tone color. BATES000005. DS 9 requires the landscaping/screening to be maintained. BATES000008. Establishment of the Community Work Group is mandated in DS 34, and DS 35 requires the establishment of the of the \$100,000 landscaping fund. BATES000011.

f. Hours of Operation and Lighting Mitigation

By letter dated June 26, 2015, Martin Marietta offered modified hours of operation for asphalt, ready mix concrete, and aggregate and recycling. BATES000387-388. At hearing, there was extensive discussion about limiting hours for the three areas of operation, but giving flexibility for times when materials are needed during summer months for cities, counties, and the Colorado Department of Transportation (“CDOT”). TR, 221:16-225:18.

Two (2) types of lighting will be used on the facility. The first type is operational lighting, and Martin Marietta agreed to reduce its pole heights from 35 to 25 feet. The 25 foot height is typical of “dark sky ordinances” found elsewhere. TR, 232:18-233:2. All lighting is “directional full cutoff,” meaning it shines only down on the ground. TR, 233:2-5. Security lighting is on motion sensors. TR, 233:13-15. Lighting is fully explained in the USR application. BATES000179.

COA 1.H.6) of the Board’s Resolution requires the USR map to delineate the lighting for the USR 15-0027 site, and mandates that all light poles be limited to 25 feet in height. BATES000004. DS 32 requires lighting to be shielded so light rays will not shine onto adjacent

properties. BATES000010.

g. Traffic Mitigation

As detailed above, the roads, highways, and rail line adjacent to the USR 15-0027 site support industrial development. TR, 18:9-15; BATES002577, 002579. Martin Marietta has agreed to mitigate the increases in traffic volumes on WCR's 13 and 54, and U.S. Highway 34, by installing a traffic light at the 13 and 34 intersection and by installing acceleration, deceleration and/or turn lanes on those roadways. BATES000003-4. All of the improvements are detailed in a memorandum from Janet Lundquist, Traffic Engineer, Weld County Public Works, dated July 6, 2015. BATES000700-701.

It should be noted that the signal at WCR 13 and U.S. Highway 34 is in CDOT's highway plans. The signal is planned as an "interim measure" until a highway interchange is constructed. BATES000711. The Town of Johnstown annexed 212 acres of commercial and mixed use development and 220 acres of mixed density residential, known as "Encore" and located on the southwest corner of WCR 13 and U.S. Highway 34, in 2005. TR, 72:2; 73:13-74:4. The Encore development is projected to generate 28,000 trips per day through that intersection. TR, 74:14-21; BATES002565. Johnstown expects the intersection to be signalized. TR, 72:11-73:2. Thus, the signal improvement for the WCR 13 and U.S. Highway 34 intersection required of Martin Marietta not only fits within the highway plans promulgated by CDOT, but also the Town of Johnstown's requirements of its developer of the Encore property.

B. W.C.C. Sec. 22-2-80. – Industrial Development Goals and Policies.

In her findings, Commissioner Kirkmeyer found USR 15-0027 to be consistent with Comp

Plan I.Goal1, I.Goal3, and I.Goal4. Those goals cover many of the same topics and reasoning discussed above for the Agricultural goals and policies. Martin Marietta's application letter addresses I.Goal1, I.Goal3, and I.Goal4 and others at BATES000187-190.

II. W.C.C. Sec. 23-2-230 B.2: That the proposal is consistent with the intent of the district in which the USE is located.

Diana Aungst, AICP, of the Weld County Department of Planning Services, explained at hearing that USR 15-0027 was to amend USR-1584 to both of the subject parcels *“for asphalt batch plant, a ready-mix concrete batch plant and approximately 6,400 foot rail loop spur to accommodate up to 117 train cars and four (4) locomotives for transloading. A materials processing, including recycling and wholesale and retail sales of aggregate.”* TR, 4:21-24. (Emphasis added.) These uses are consistent with the A (Agricultural) Zone District, because they are listed as uses which may be permitted by the Board as uses-by-special-review, pursuant to W.C.C. Sec. 23-3-40. That Section states as follows:

Sec. 23-3-40. - Uses by special review.

The following BUILDINGS, STRUCTURES and USES may be constructed, occupied, operated and maintained in the A (Agricultural) Zone District upon approval of a permit in accordance with the requirements and procedures set forth in Article II, Division 4 of this Chapter.

A. Mineral resource development facilities including:

3. Open pit MINING and **materials processing**, subject to the provisions of Article IV, Division 4 of this Chapter.
4. **Asphalt and concrete batch plants.**
7. **TRANSLOADING.**

(Emphasis added.)

The evidence in the record also shows that USR 15-0027 is consistent with the Comp Plan

agricultural goals and policies, as detailed above, and therefore the application is consistent with the intent of the district in which it is located.

In Section I of their Opening Brief, the Plaintiffs challenge whether the asphalt plant as proposed is an “asphalt batch plant.” They state on page 16 of their Opening Brief: “The Weld County Commissioners, the Planning Department, and even the Weld County Attorney incorrectly treated that Application as if it includes an asphalt batch plant.” Although there is no definition of “asphalt batch plant” in W.C.C. 23-3-40 A.4, the Plaintiffs argue that the term “batch” does not include the “drum-mix” plant Martin Marietta intends to construct.

W.C.C. Sec. 23-1-50 J. states as follows:

Sec. 23-1-50. - Interpretation.

J. All Uses Allowed by Right, Temporary Uses and Uses by Special Review listed in this Chapter are representative and are not all-inclusive. (Emphasis added.)

As approved, the Board’s Resolution for USR 15-0027 permits “asphalt and concrete batch plants (materials processing) and transloading in the A (Agricultural) Zone District.” BATES000001. In making this decision, the Board could rely upon W.C.C. Sec 23-1-50 J., to interpret that the asphalt plant proposed by Martin Marietta fits within W.C.C. 23-3-40 A.4.

The Plaintiffs are asking the Court to interpret the term differently. But “construction of an ordinance by administrative officials charged with its enforcement should be given deference by the courts.” *Abbott v. Board of County Commissioners of Weld County*, 895 P.2d 1165, 1166 (Colo. App. 1995).

III. W.C.C. Sec. 23-2-230 B.3: That the USES which would be permitted will be compatible with the existing surrounding land USES.

At hearing,Carolynne White, attorney for the Applicants, interpreted “compatibility” as follows: “Compatibility means the ability of two things which may not be the same to coexist together without conflict or without trouble with minimal impacts. The mere fact that two uses are different does not mean that they are incompatible. The mere fact that one may be more intense than the other does not mean they are incompatible. And, the mere fact that one is industrial and the other is residential, in and of itself, does not necessarily mean that they are incompatible.” TR, 30:14-19. This interpretation is consistent with the agricultural goals and policies set forth above that encourage change of use from agricultural to industrial when the area can support the development, and the use is, or may through mitigation, be made compatible with the region. W.C.C. Sec. 22-2-20. A.Goal7, A.Goal 7.2, A.Goal 9, and A.Policy 9.2.

The USR 15-0027 site is surrounded in the region by properties that are zoned and used for agricultural, residential, commercial, and industrial purposes. BATES002579-2582. The roads, highways, and rail line adjacent to the USR 15-0027 site support industrial development. TR, 18:9-15; BATES002577, 002579. Martin Marietta has agreed to mitigate the increases in traffic volumes on WCR’s 13 and 54, and U.S. Highway 34, by installing a signal at the 13/34 intersection and by installing acceleration, deceleration and/or turn lanes on those roadways. BATES000003-4. The numerous mitigation measures agreed to by the Applicants and contained in the Conditions of Approval and Development Standards of the Board’s Resolution make the use compatible with the existing surrounding land uses. BATES000001-12. Each of the Commissioners made this finding. TR, 245:10-15; 294:11-306:8.

The Plaintiffs disagree on compatibility. In Section II,C of their Opening Brief, they are asking the Court to reweigh the evidence and to determine, by and through the evidence in the record they point to, that the Applicants did not meet their burden of proving that USR 15-0027 will be compatible with the existing and surrounding land uses. But the Court may not act in this manner. *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987); *Ross v. Fire and Police Pension Ass'n*, 713 P.2d 1304 (Colo. 1986). Rather, it is only to determine if there is *competent evidence* in the record. Again, “No competent evidence means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Bd. Of County Com'rs of Routt County v. O'Dell*, 920 P.2d 48, 51 (Colo. 1996), citing *Ross*.

As detailed above, the record is replete with evidence proving compatibility, especially with the mitigation measures agreed to by Martin Marietta and as required in the Board's Resolution. BATES000001-12.

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

The maps found in the record at BATES002579-2582 show that the area surrounding USR 15-0027 is changing from agriculture to a combination of agriculture, residential, commercial and industrial. The concrete, asphalt and aggregate materials produced at the USR 15-0027 site will be used in the agricultural operations in the district and the County roads that serve them. TR, 18:2-3; 27:22-28:3; BATES002570. The improvements by Martin Marietta to install the signal at the intersection of WCR 13 and U.S. Highway 34, will comply with planning of CDOT and the

Town of Johnstown. BATES000711; TR, 72:2; 73:13-74:4. The evidence in the record shows USR 15-0027 is compatible with the future development of the surrounding area.

V. W.C.C. Sec. 23-2-230 B.5: That the application complies with Article V of this Chapter if the proposal is located within any Overlay District Area identified by maps officially adopted by the County.

The Field Check performed by Ms. Aungst does not show that the site is located within an Overlay District Area. BATES000116.

VI. W.C.C. Sec. 23-2-230 B.6: That if the USE is proposed to be located in the A (Agricultural) Zone District, the applicant has demonstrated a diligent effort has been made to conserve PRIME FARMLAND in the locational decision for the proposed use.

At hearing, Dave Hagerman discussed the reasoning behind Martin Marietta choosing the site for USR 15-0027. TR, 189:18-190:21; 191:8-12. A Site Selection Report was submitted into evidence in the record as BATES000395-399. Although “the preservation of prime farmland” is not on the list of items on BATES000398, it was considered. Again, the USR 15-0027 site is designed so that most of the use is on the Gerrard side (which was previously taken out of agriculture through USR-1584), and over half of the Weld LV side will remain as open space and be planted in native grasses. It may be reclaimed for agricultural production once USR 15-0027 is discontinued. TR, 188:17-21. This is consistent with the soils map at BATES000430, which shows the less desirable soils being located on the western half of the property. BATES000423-491.

VII. W.C.C. Sec. 23-2-230 B.7: That there is adequate provision for the protection of the health, safety and welfare of the inhabitants of the neighborhood and the County.

With respect to emergency response and fire safety at the site, the record includes a referral from the Front Range Fire Rescue Authority (“FRFRA”). BATES000712-714. FRFRA asked for

a secondary emergency access, which was allowed onto WCR 13. BATES000249 and 002560. Martin Marietta will be developing an Emergency Action Plan. That Plan will address how teams respond to the fire or incident, the location of evacuation points and rally points, and how they will deal with first responders and coordinate with FRFRA. TR, 226:22-227:20. COA 6.B of the Board’s Resolution requires that prior to operation, the Applicants must “develop and Emergency Action and Safety Plan with the Office of Emergency Management and the Fire District.” BATES000005.

Finding 2.F of the Board’s Resolution found compliance with W.C.C. Sec. 23-2-230 B.7, because, “The Design Standards (Section 23-2-240, Weld County Code), Operation Standards (Section 23-2-250, Weld County Code), Conditions of Approval, and Development Standards ensure that there are adequate provisions for the protection of the health, safety, and welfare of the inhabitants of the neighborhood and County.” BATES000002. The Board went to great lengths crafting the Conditions of Approval and Development Standards to address all of the concerns raised during the hearing. The Applicants agreed to all of them. TR, 245:20-293:24; 302:15-19.

VIII. Responses to Arguments Made in Plaintiff’s Opening Brief

Responses to two (2) of Plaintiffs arguments are included in Sections II and III, above. The following are additional responses:

A. “Right to Farm Statement”

In Section II.A.2 of their Opening Brief, Plaintiffs refer to the “Weld County Right to Farm Statement” of W.C.C. Sec. 22-2-20. Plaintiffs mischaracterize what it means. They appear to be arguing that, in essence, the “Right to Farm” precludes adjacent uses that the farmer believes will

adversely affect his or her farming operations. Plaintiffs point to the first sentence, second paragraph in support of their assertion. But they ignore the reference in that paragraph to C.R.S. § 35-3.5-102, which precludes nuisance actions brought against the farmer by the adjacent landowners who claim that certain “methods or practices that are commonly or reasonably associated with agricultural production” are causing a private or public nuisance. Plaintiffs interpretation ignores the remainder of the “Right to Farm,” which warns “urban users” coming into the A (Agricultural) Zone District in Weld County to expect a rural lifestyle and farming operations and all that goes with it. They should not consider those things to be nuisances that may be stopped through litigation.

B. Incorrect Application of Criteria

In Section III of their Opening Brief, Plaintiffs clearly overreach. They would like the Court to believe that questions posed by County Commissioners and comments they made about jobs, economic benefit or need reveal a thought process tainted by politics. Plaintiffs argue this proves the Commissioners “abused their discretion by ignoring the applicable legal standard set forth in W.C.C. § 23-2-230.” But this claim ignores the true legal standard the Court must follow. Without admitting so, even if it is assumed the Commissioners considered criteria outside of W.C.C. Sec. 23-2-230, the Court is still tasked to determine if the record, when reviewed in its entirety, contains competent evidence to support their decision. *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987); *Ross v. Fire and Police Pension Ass’n*, 713 P.2d 1304 (Colo. 1986). As detailed above, the record is full of evidence proving that the criteria set forth in W.C.C. Sec. 23-2-230 B.1-7 were met.

C. Commissioner Cozad Alleged Conflict of Interest

Section IV of the Plaintiffs' Opening Brief alludes to information outside the record in an attempt to prove Commissioner Cozad had a conflict of interest and was biased.

The conduct of Weld County officials performing their official acts is governed by the Colorado Standards of Conduct found at C.R.S. Title 24, Article 18.

C.R.S. § 24-18-109(2)(b) says the following:

(2) A local government official or local government employee shall not:

- (b) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent;

The term, "financial interest" is defined in C.R.S. § 24-18-102(4), which states:

As used in this part 1, unless the context otherwise requires:

(4) "Financial interest" means a substantial interest held by an individual which is:

- (a) An ownership interest in a business;
- (b) A creditor interest in an insolvent business;
- (c) An employment or a prospective employment for which negotiations have begun;
- (d) An ownership interest in real or personal property;
- (e) A loan or any other debtor interest; or

(f) A directorship or officership in a business.

What is apparent by looking at these sections is they are stated in *present tense*. They prohibit a local official from performing an official act which will substantially affect his or her *current* financial interest; not some speculative economic interest that may have existed in the past.

In paragraph 64 of the Plaintiffs' First Amended Complaint alleges that Commissioner Cozad "was employed by Tetra Tech as recently as December 2014," and "at some point in recent time she held a financial and/or professional stake in the success of Martin Marietta's Application and Proposed Use at the Proposed Site." Paragraph 63 alleges that Commissioner Cozad was, "while previously employed by Tetra Tech," a direct supervisor of a consultant who represented Martin Marietta at the land use hearing.

Even considering these allegations to be true, they refer to *previous* interests and/or relationships Commissioner Cozad may have had; not ones she had on August 12, 2015.

To overcome the presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities [*See Best v. La Plata Planning Commission*, 701 P.2d 91, 96 (Colo. App. 1984)], Plaintiffs must point to some facts which show a current interest and/or relationship that puts the local government officials in violation of C.R.S. § 24-18-109(2)(b). Plaintiffs have not cited to anything in the record that reveals such current interest and/or relationship, or for that matter, bias or impartiality on the part of Commissioner Cozad.

CONCLUSION

The record is not “so devoid of evidentiary support” for the Board’s decision (approving USR 15-0027) that it can “only be explained as an arbitrary and capricious exercise of authority.” To the contrary, the record contains ample evidence that USR 15-0027 complies with the seven (7) criteria set forth in W.C.C. Section 23-2-230 B. 1-7. The Board respectfully requests the Court to deny the Plaintiffs’ C.R.C.P. 106(a)(4) appeal, and to dismiss the case accordingly.

Dated March 8, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2016, I filed a true and correct copy of the foregoing document, titled WELD COUNTY’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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