DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: January 27, 2017 2:57 PM CASE NUMBER: 2015CV30776
Plaintiffs: **Motherlove Herbal Company**; **Indianhead West Homeowners Association, Inc.**; **Rockin S Ranch LLC**; **John Cummings**; **David Kisker**; **Gary Oplinger**; **Wolfgang Dirks**; and **James Piraino** *v.* *Defendants:* **The Board of County Commissioners of Weld County, Colorado**; **Martin Marietta Materials, Inc.**; **Garrard Investments, LLC**; **Weld LV LLC**; and **Weld LV II, LLC**	▲ COURT USE ONLY ▲ Case No. 2015 CV 30776 Division 4

Order on the Plaintiffs' Appeal of the Weld County Board of County Commissioners' Decision to Approve Special Use Permit

This case involves the decision of the Board of County Commissioners of Weld County to approve Defendant Martin Marietta's application for a special use permit. Martin Marietta wants to build and operate a continuous (drum mix) asphalt plant, a batch concrete plant, a ready-mix concrete plant, and a transloading facility to bring raw materials to the these plants and then transport the finished products to their intended destinations. Martin Marietta was granted permission to operate this industrial complex on land zoned for prime agricultural use.

The plaintiffs seek judicial review of the Board of County Commissioners' decision, contending that the Board abused its discretion because it misapplied the law and because its findings of fact are not supported by the record. The plaintiffs own land, homes, and farms located near where Martin Marietta wants to build the industrial complex. The plaintiffs believe that Martin

Marietta's proposed activities will have a negative effect on the use and enjoyment of their property; on their property value; and on their health, safety, and welfare.

Consequently, under C.R.C.P. 106(a)(4), I must decide whether the Board properly applied the Weld County Code when it determined that Martin Marietta had met the requirements for the special use permit, and whether the Board's decision is supported by competent evidence in the record. The plaintiffs also contend that one of the county commissioners had a conflict of interest that should have disqualified her from participating in making the decision.

STANDARD OF REVIEW

In a C.R.C.P 106(a)(4) proceeding, the district court's review is limited to whether the governmental body lacked jurisdiction or its decision was an abuse of discretion, based on the evidence in the record before the body. C.R.C.P. 106(a)(4)(I); *Shupe v. Boulder County*; 230 P.3d 1269, 1272 (Colo. App. 2010). The court is not permitted to weigh the evidence or substitute its own judgment for that of the governmental body exercising judicial or quasi-judicial functions. *See Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008).

A governmental body abuses its discretion if its decision is not reasonably supported by competent evidence in the record, or if the governmental body has misconstrued or misapplied the applicable law. *Giuliani v. Jefferson Cnty. Bd. of Cnty. Comm'rs*, 2012 COA 190, ¶ 39. Lack of competent evidence occurs when the record is so devoid of evidentiary support for the decision that it can only be explained as an arbitrary and capricious exercise of authority. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sherriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008).

In evaluating legal interpretations of zoning ordinances, the reviewing court must "look first to the plain language" of the code, and "presume that the governing body enacting the code meant what it clearly said." *Shupe,* 230 P.3d at 1272. If the language of the code is ambiguous, the Court must give "great deference to the … interpretation"—so long as there is a "reasonable basis" for the interpretation of the law and it is supported by the record. *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). The party challenging the administrative action bears the burden of overcoming this presumption of validity. *City & County of Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo. App. 2002).

FACTS

Defendant Martin Marietta, a North Carolina corporation, applied for a special use permit to develop 131 acres of property zoned for agricultural use. The property is located near the western edge of Weld County, close to the shared county line with Larimer County.

The plaintiffs are various individuals and entities who own or lease property near Martin Marietta's development site. Many of the plaintiffs also live or work, or both, on their properties. Those plaintiffs that use their property for business purposes are primarily engaged in agriculture. The Indianhead West Homeowner's Association represents owners of 100 single-family homes situated on one-acre lots. The plaintiffs are convinced that Martin Marietta's proposed use is incompatible with current zoning and will detrimentally affect them. The plaintiffs fear that they will suffer economic injury and injury to their health, safety, and welfare.

These concerns understandably raise strong emotions. A number of people expressed their deeply-held opinions at the hearing held by the Board on Martin Marietta's request for a special use permit. The Board was presented with evidence and information that tends to validate the plaintiffs' concerns. But the Board also heard from people who favored the proposed industrial development, and was presented with evidence and information that tends to support Martin Marietta's position that the asphalt and concrete plants will not cause the detrimental results feared by the plaintiffs.

The special use permit deals with two parcels of property that total 131.42 acres, located about a half-mile south of U.S. Highway 34, just off Weld County Road 13, in unincorporated Weld County. The property sits within Weld County's "A (Agricultural) Zone District."

Defendant Gerrard Investments, a Colorado limited liability company, owns the first parcel, which is around 40 acres and which was already subject to a special use permit (USR-1584). The prior special use permit allows for the operation of a construction business, which is considered to be an industrial use. Defendants Weld LV, LLC and Weld LV II, LLC are Nevada limited liability companies and previously owned the second parcel. Since the Board approved the special use permit at issue here, USR 15-0027, Gerrard purchased the parcel owned by Weld LV and Weld LV II and then leased the two parcels to Defendant Martin Marietta.

Because the property is zoned for agricultural use, Martin Marietta was required to obtain the special use permit. Under Weld County Code § 23-3-40, a property owner or leaseholder may obtain approval to use land located in an agricultural zone for, among other things, "mineral resource development facilities," which includes asphalt and concrete batch plants.

Martin Marietta intends to develop the property to include:

- a 100-foot-tall asphalt (continuous drum) plant;
- a 110-foot-tall batch concrete plant;
- a ready-mix concrete plant;
- a transloading facility that will include a 6,400-foot rail loop to accommodate 117 train cars and four locomotives, for a total of 121 train cars for transloading;
- a materials processing plant, including recycling, wholesale, and retail sales of aggregate;
- a 14,400 square-foot office building, a 14,500 square-foot maintenance building, a 4,800 square-foot scale house, an 1,800 square-foot asphalt trailer, Conex buildings, and maintenance sheds;
- an electrical substation, a fueling station, a wash plant, and a truck wash;
- three vertical asphalt cement tanks ranging from 40 to 45 feet in height (30,000 gallons each);
- a vertical emulsified asphalt tank from 40 to 45 feet in height (24,000 gallons);
- two large capacity asphalt cement storage tanks, 100 feet in diameter and 45 feet high; and
- on-site storage of chemicals, which are anticipated to include diesel (37,000 gallons), coal fly ash (180 tons), chemical color additives (40,000 pounds), propane (10,000 gallons), and lesser quantities of other, various chemicals.

The anticipated hours of operation are:

- Asphalt plant: Monday through Saturday, one hour before sunrise to one hour after sunset (and at night, or 24/7, when materials are requested by cities, counties, or CDOT).
- Concrete batch plant: Monday through Saturday, generally one hour before sunrise and one hour after sunset, and up to three times per month between March and October, as early as 3 am and never more than 16 hours per day, but trucks may return after shutdown to be cleaned and washed.
- Aggregate and Recycling: Monday through Saturday.
- Sales and recycling: Daylight hours (dawn to dusk) dependent upon weather and business levels.
- Train unloading: trains are expected to arrive three times per week and unloading can occur anywhere between 6 am and 8 pm (dependent upon train arrival which could be at any time including at night).

Martin Marietta intends to use two railroad spurs—one belonging to Union Pacific and the other to Great Western—to transport aggregate into Weld County from its Wyoming location. From the foregoing description, it is clear that Martin Marietta's proposed use will involve intensive, industrial activities.

In April 2015, Martin Marietta submitted its *Application for an Amendment to a Site Specific Development Plan and for a Use by Special Review (USR) permit, USR 15-0027 (formerly USR 1584)*, to the Weld County Department of Planning Services. The Department of Planning Services recommended that the application be denied.

In July 2015, the Weld County Planning Commission held a public hearing to consider the application. Following the hearing, the Planning Commission voted 4-3 to recommend that that the application be denied.

Both the Department of Planning Services and the Planning Commission concluded that the proposed use is not consistent with Weld County's *Comprehensive Plan*. *See* Weld County Code, Chapter 22; W.C.C. § 23-2-230.B.1. Both concluded that the proposed use is not directly related to, or dependent upon, agriculture and concluded that the proposed use would improperly remove around 90 acres of prime (irrigated) farmland from production. Both expressed concerns about the impact to surrounding properties, including noise from trains (which are apparently exempt from noise regulations), and odors from the facility. The Department of Planning Services and the Planning Commission also concluded that the area could not support the proposed development and that it is not compatible with the region.

The Department of Planning Services and the Planning Commission also concluded that the proposed use is not consistent with Weld County's *Comprehensive Plan* because the surrounding roadways and facilities are not adequate to support the proposed industrial development. Martin Marietta's application states that the traffic generated by the proposed development will be up to 2,260 daily site visits, and based on the existing facilities, both the Department of Planning Services and the Planning Commission concluded that the project poses safety concerns for the surrounding communities and commuters on U.S. Highway 34. Both concluded that the noise, odors, and traffic from the proposed development will cause disruption to the nearby residential properties, as well as safety concerns.

Martin Marietta's application was also sent to four, surrounding municipalities and to the Board of County Commissioners for Larimer County. The site is located within the three-mile referral area of the Towns of Windsor and Johnstown, the Cities of Greeley and Loveland, and of Larimer County. The majority of the responses from these governmental entities concluded that the proposed use is incompatible with the surrounding land use and area because the proposed heavy, industrial use would disturb the existing residential area and is not compatible with the existing land uses or the future development of the region.

In August 2015, the Board held the public hearing to consider the application. Despite considerable opposition to Martin Marietta's application, the Board unanimously approved the special use permit in a 5-0 vote. But the Board also imposed a number of conditions intended to mitigate the concerns raised by the plaintiffs. Because the plaintiffs believe that these conditions will not avoid the negative consequences they anticipate from Martin Marietta's industrial activities, they seek judicial review of the Board's decision and reversal under the authority of C.R.C.P. 106(a)(4).

The Board's initial resolution did not, however, give reasons for its approval. Instead—unlike the resolution approving USR 1584, which included detailed reasons as to why the Board approved that application—the initial resolution approving the permit at issue here, USR 15-0027, merely restated the criteria that the Board was required to apply. I therefore remanded this case to the Board to make findings of fact in support of its conclusion that Martin Marietta had met the requirements for a special use permit.

In October 2016, the Board issued its amended resolution, which includes findings of fact and detailed reasons why the Board decided to approve the

special use permit. The parties have had an opportunity to submit supplemental briefs addressing the amended resolution. I therefore proceed to apply the standard of review to the amended resolution to determine whether the Board abused its discretion by misapplying the law or by making findings that are not supported by competent evidence in the record.

ANALYSIS

1. The Board's approval of the permit was not an instance of unlawful spot-zoning.

The plaintiffs contend that the Board's approval of the permit is an instance of unlawful spot-zoning. But prohibited spot-zoning occurs only when a rezoning order is designed to relieve a particular property from applicable zoning restrictions, *see Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961), and not when, as here, an applicant seeks a special use permit. The grant of a variance or special exception that has the same effect as a small parcel rezoning, like the permit here, cannot be attacked as spot-zoning. This distinction is explained in footnote 1 of volume 3 of Rathkopf's *The Law of Zoning and Planning* § 41:2 (4th ed.):

> The distinction lies in the difference between the traditionally legislative process of amending a zoning ordinance and the administrative act of granting a variance or special exception. Neither of the latter two involve a zone change, but are permitted when certain conditions exist.

The permit here seeks a special exception to allow an industrial operation on land zoned as agricultural. It does not seek to rezone the land. The Board's decision cannot therefore be characterized as illegal spot-zoning.

2. W.C.C. § 23-3-40 is not an exhaustive list of mineral resource development facilities, and is not limited to asphalt "batch" plants.

The plaintiffs next contend that the Board abused its discretion by approving the special use permit because Martin Marietta intends to construct and operate a continuous (drum mix) asphalt plant. The plaintiffs assert that a "continuous drum mix" plant is not contemplated by W.C.C. § 23-3-40, which they argue allows only for "batch" plants. But I conclude that this distinction is too fine to be persuasive.

W.C.C. § 23-3-40 provides a list of buildings, structures, and uses that may be constructed, occupied, operated, and maintained in an agricultural zone upon approval of a special use permit. Under W.C.C. § 23-3-40.A, "Mineral Resource Development Facilities" is defined by a list that includes "Asphalt and Concrete Batch Plants."

The use of the word, *including*, in the ordinance indicates that the list is not exhaustive. The word *include* is ordinarily used as a word of extension or enlargement. *See Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226, 1248 n.4 (Colo. 2011) (citing *Cherry Creek School Dist. No. 5 v. Voelker*, 859 P.2d 805, 813 (Colo.1993)). Along with asphalt and concrete batch plants, the list of mineral resource development facilities in § 23-3-40.A includes other large industrial operations, such as open pit mining and coal gasification facilities. By using *including*, the list thus leaves open the possibility of other types of mineral resource development facilities, including new technologies. If Weld County had intended to restrict continuous, drum-mix asphalt plants, it could have explicitly stated that restriction in the text of the ordinance rather than listing "asphalt and concrete batch plants" after the word *including*.

W.C.C. § 23-3-40 contemplates the approval of a special use permit for many different structures. While a continuous, drum-mix plant may be a more intensive, industrial process, which operates for longer hours and produces substantially more asphalt than a batch plan, ultimately both production processes use the same raw materials to make the same product. The portions of the Weld County Code relied on by the plaintiffs do not suggest that Weld County intended to prohibit an asphalt or concrete plant from consideration for a special use permit based on the intensity of the industrial process involved. Furthermore, any permit issued by the Colorado Air Pollution Control Division will restrict production at the plant Martin Marietta intends to build, and in approving the special use permit, the Board also imposed restrictions on the hours of operation. Thus, Martin Marietta will not be able to operate the asphalt plant on a continuous basis.

The statutory authorization for a special use permit, W.C.C. § 23-3-40, is therefore broad enough to include the proposed development at issue here.

3. The Board's approval of Martin Marietta's application is supported by evidence in the record.

In deciding whether to approve Martin Marietta's request for a permit, the Board was required, under W.C.C. § 23-2-230.B, to "consider the recommendations of the Planning Commission." And then, "from the facts presented at the public hearing and the information contained in the official record which includes the Department of Planning Services case file," the Board could only approve the request "if it finds that the applicant has met the standards or conditions" found in §§ 23-2-230.B, 23-2-240, and 23-2-250.

The burden of proof was on Martin Marietta to show that these standards had been met. Thus, Martin Marietta was required to show that:

(1) the proposed use is consistent with the Weld County Comprehensive Plan;

(2) the proposed use is consistent with the intent of the agricultural district;

(3) the proposed use is compatible with existing surrounding land uses;

(4) the proposed use is compatible with future development of the surrounding area as permitted by the existing zone and compatible with existing uses of affected communities;

(5) it had made a diligent effort to conserve prime farmland in the locational decision for the proposed use; and

(6) it had made an adequate provision for the protection of the health, safety, and welfare of the inhabitants of the neighborhood and county.

W.C.C. § 23-2-230.B. Martin Marietta was also required to show that the proposed use complies with Weld County's design and operation standards. W.C.C. §§ 23-2-240, 23-2-250.

The plaintiffs maintain that the Board's decision is not reasonably supported by competent evidence in the record. And it is true that the record contains evidence tending to show that the industrial complex Martin Marietta wants to build is not compatible with the existing, surrounding uses. But the Board made findings of fact in the *Amended Resolution* and concluded that Martin Marietta had met its burden to show that each of the statutory requirements for a special use permit had been met. Because the record also contains evidence that tends to support the Board's findings and conclusions, the law requires I that affirm the Board's decision.

For example, the Board found, with record support, that the region along the U.S. Highway 34 corridor "is converting to commercial and industrial land

uses." Relying on the presence of the two railroad spurs, the Board also found that the proposed development site complies with first goal of Weld County's industrial development goals and policies, found in W.C.C. § 22-2-80.A, which is to promote "the location of industrial uses … along railroad infrastructure …."[1]

The Board further found that the proposed use is consistent with W.C.C. § 22-2-20.B, which allows commercial and industrial uses that are "directly related to or dependent upon agriculture, to locate within agricultural areas when the impact to the surrounding properties is minimal or mitigated and where adequate services and infrastructure are currently available or reasonably obtainable." In support of its conclusion that Martin Marietta had satisfied this requirement, the Board reasoned that the industrial complex Martin Marietta plans to build is "directly related to" agriculture because "[i]t will supply aggregate to construct and maintain farm-to-market roads" and will provide building material for agricultural uses.

Under other circumstances, the Board's reasoning would be troubling. As pointed out by the plaintiffs, using this same logic the Board could justify allowing a clothing company like Carhartt to build a factory in an agricultural zone simply because many farmers and ranchers wear work clothes made by Carhatt. Or the Board could justify allowing the Ford Motor Company to build a truck factory in an agricultural zone simply because many farmers and ranchers drive Ford pickup trucks. So the logic used by the Board is suspect because almost any industrial use could be justified based on some marginal relationship to agriculture.

[1] Although not relied on by the Board, W.C.C. § 22-2-80.G also recognizes "the importance of railroad infrastructure to some industrial uses."

I am instead persuaded by the statutory scheme the Board was required to apply that Weld County intended for developments like the one proposed by Martin Marietta to be eligible for a special use permit. While asphalt plants, concrete plants, and transloading facilities may not appear to have more than a marginal relationship to agriculture—the Weld County Code in § 23-3-40.A allows for these types of industrial facilities to be located on property zoned for agricultural use (unlike clothing factories and car factories). Thus, I agree with Martin Marietta's argument that the plaintiff's position, if accepted, would nullify the statutory intent embodied in § 23-3-40.A. If the plaintiffs' position was accepted that asphalt and concrete plants are not directly related to agriculture, then those types of facilities could never qualify for a special use permit and including them in § 23-3-40.A would be meaningless. I thus reject the plaintiff's position and conclude that the Weld County Code recognizes asphalt and concrete plants as being sufficiently related to agriculture to justify the approval of a special use permit, assuming all the other requirements are met.

The Board also made adequate findings, with record support, that Martin Marietta's proposed use is compatible with the existing surrounding land uses and with the anticipated future development of the area. The Board noted that the "proposed use is uniquely suited for the area, being located next to two … major rail lines." To mitigate the anticipated impact that Martin Marietta's activities will have on the neighboring properties, the Board imposed a number of requirements. The Board further found that the surrounding "area is … suitable for commercial and industrial uses because of the road infrastructure and the Union Pacific and Great Western rail lines in the area," and because

"there is a high likelihood that existing transportation infrastructure will attract more commercial and industrial development in the area."

The plaintiffs argue that Martin Marietta failed to show that it had made an effort to preserve prime farmland. But the Board found, with record support, that the property had already been taken out of agricultural production and that, by leaving around a quarter of the property as open, irrigated grassland (to be used as a buffer to adjacent properties), Martin Marietta had made "diligent efforts to preserve as much prime farmland as possible." The Board balanced the goal of preserving prime farmland with the other development goals: noting again that the property is located near the road and rail infrastructure required for an asphalt and concrete plant, which makes the site qualified to support the proposed development.

Finally, the Board made findings about how the mitigation requirements it had imposed on Martin Marietta's activities would ensure compliance with noise standards and would protect the public health, safety, and welfare. These findings reflect that the Board considered the concerns raised by the plaintiffs and the other objectors at the hearing. They also reflect that the Board decided that these concerns could be adequately addressed by imposing the mitigation requirements, rather than denying Martin Marietta's request for a special use permit.

The Board required Martin Marietta to:

- develop a safety and fire plan;
- supply any improved infrastructure needed for the surrounding roads, including upgrading the railway crossings if necessary;
- address the concerns raised by the Northern Colorado Water Conservancy District (about including the property within the

Municipal Subdistrict's boundaries before water can be delivered by the Little Thompson Water District);

- develop a spill prevention, control and countermeasure plan;
- comply with the noise regulations for the residential zone, as measured at the property line adjacent to residential lots, and to comply with the noise regulations for the industrial zone elsewhere;
- submit a noise mitigation plan;
- comply with air pollution regulations and odor regulations; and
- comply with all building and landscaping codes.

The plaintiffs contend that the record contains substantial evidence that the existing surrounding uses are incompatible with the 131-acre heavy-industrial facility that Martin Marietta seeks to develop. The plaintiffs can point to much in the record that supports their position. Both the Department of Planning Services and the Planning Commission concluded that the proposed use is not compatible with the existing surrounding land uses. The Department of Planning Services went so far as to conclude "that the negative impacts are such that there are no conditions that could be placed on this [special use permit] that would ensure the compatibility with the surrounding existing land uses." BATES000073. And the Planning Commission was concerned that a number of single family homes are located less than 1,000 feet from the proposed site. The Indianhead Estates Subdivision—a residential subdivision with approximately 100 lots—is located adjacent to the northeast corner of the proposed site. Several farms are also located in the immediate vicinity of the proposed site, including an organic farm that grows crops to be used in products for pregnant and breastfeeding women, and their babies. The Board heard from a number of the residents and farmers at the public hearing who expressed serious concern

about the detrimental effects the proposed use would have on their lives and livelihood. Numerous residents, farmers, and others from the area wrote letters in opposition to the proposed use.

But the defendants are also correct that simply because a proposed land use may be more intense than the existing land use does not mean that the two uses are incompatible. *See Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 534 P.2d 1212 (Colo. 1975) (affirming the decision of a board of county commissioners to rezone 101 acres from agriculture to higher density Planned Unit Development (PUD)). Our Supreme Court made clear in *Sundance Hills* that a reviewing court's "role is not and should not be to sit as a zoning board of appeals." *Id.* at 1212.

And like in *Sundance Hills*, the evidence presented here to the Board was highly contested at a hearing that included "loud and energetic opposition." *Id.* Nonetheless, vigorous opposition likely means that the "issues [are] fairly debatable," *id.*, not that the Board abused its discretion because it rejected that opposition. Vigorous opposition does mean, however, that the Board had to make a difficult decision: "While general public opinion and contradictory compilations are important and to be encouraged, this kind of a decision is not a popularity contest." *Id.* And, in the end, "[t]he Board is charged with the final decision making." *Id.*

Based on the record here the Board could have decided to deny Martin Marietta's special use permit, and that decision likely would have been upheld after judicial review as well. To say that a quasi-judicial, governmental body has discretion "means that it has the power to choose between two or more courses of action and is therefore not bound in all cases to select one over the other.'" *Mun. Subdist., N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990

P.2d 701, 710 (Colo. 1999) (quoting *People v. Milton*, 732 P.2d 1199, 1207 (Colo. 1987) (referring to a district court's discretion); *see also People v. Hoover*, 165 P.3d 784, 802 (Colo. App. 2006) ("[D]iscretion is abused only where no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.").

But the question here is not whether I would have made the same decision based on the evidence in the record. I am prohibited by law from substituting my judgment for that of the Board. *See Sundance Hills*, 534 P.2d at 1216. The only question is whether the Board's decision to approve Martin Marietta's special use permit is supported by competent evidence in the record.

The Board's findings of fact show that it fully considered the deeply-held concerns voiced by the plaintiffs and others at the hearing; weighed those concerns against the competing policy considerations in favor of industrial development and a landowner's right to convert a property's use; and then decided that the negative impacts of the proposed industrial development can be avoided through imposing mitigation requirements.

Because the record contains competent evidence that supports the Board's decision, the Board did not abuse its discretion. I am therefore required to affirm the Board's decision to approve the special use permit.

4. The Board did not rely on impermissible criteria.

The plaintiffs contend that the Board impermissibly considered the potential economic benefit of Martin Marietta's proposed development in deciding to approve the special use permit. I am unpersuaded.

The plaintiffs essentially argue that—no matter whether the special use permit meets all the applicable criteria for approval—the Board's approval was illegal if the "real reason" the Board approved Martin Marietta's application is because of the perceived economic benefit. This line of argument was rejected, however, by a division of the Court of Appeals in *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714 (Colo. App. 2008), in an appeal related to a zoning decision by a city council. Because the city council's stated reasons for its decision were supported by competent evidence, the division concluded that it was not proper to "attempt to read the collective mind of the City Council to determine whether its members were motivated by improper considerations." *Id.* at 720.

Moreover, W.C.C. § 23-2-230.B.2 requires the Board to consider chapter 22 of the Weld County Code, which is Weld County's *Comprehensive Plan*. The *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." W.C.C. § 22-6-20.A.1.

I therefore conclude that the Board was free to consider economic considerations, along with all the other topics raised and discussed at the hearing. In any event, because the Board's decision to approve the special use permit is supported by competent evidence, the Board's motivation is not a relevant consideration.

5. The right to farm policy does not prevent approval of the special use permit.

The plaintiffs also contend that the Board improperly ignored Weld County's "right to farm" policy, which is found in W.C.C. § 22-2-20.J. This policy provides that "[a]gricultural users of the land should not be expected to change their long-established agricultural practices to accommodate the intrusions of urban users into a rural area." The plaintiffs argue that the record shows Martin Marietta's proposed use "will likely result in the closure of one or more neighboring farms." *Pl.'s Supp. Brief*, p. 11, (filed 10/28/16). I am unpersuaded.

First, the plaintiffs rely on speculation that Martin Marietta's activities will harm surrounding farms. Any harm is contingent on Martin Marietta actually taking actions which have not yet occurred. Should Martin Marietta engage in intentional, negligent, or unreasonably dangerous activity that results in the unreasonable and substantial interference with a farmer's use and enjoyment of his or her property, then that farmer will have grounds for a nuisance claim. *See Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001) (holding that PUC decisions are not adjudications of property rights, and thus do not preclude private rights of action seeking to adjudicate property rights or issues related to those rights).

Second, nothing in the policy prevents a landowner from converting farmland to another use. Instead, the policy is intended to give notice to "[p]ersons moving into a rural area [that they] must recognize and accept there are drawbacks, including conflicts with long-standing agricultural practices and a lower level of services than in town." W.C.C. § 22-2-20.J. So the policy provides notice to new owners of land located near existing farms, especially

those moving from a more urban area, that they cannot expect the owners of the surrounding farms to change their activities. The special use permit at issue here imposes requirements only on Martin Marietta. It does not require any of the surrounding farmers to change their agricultural practices to accommodate Martin Marietta's activities.

The right to farm policy does not therefore prevent approval of the special use permit.

6. Commissioner Cozad did not have a conflict of interest; and even if she had not participated in the hearing, the outcome would have been the same.

Finally, the plaintiffs contend that their due process rights were violated because one of the county commissioners, Commissioner Julie Cozad, failed to disclose an alleged conflict of interest and recuse herself from participating in the hearing. I am unpersuaded.

The plaintiffs contend that Cozad has a conflict of interest based upon her previous employment with Tetra Tech, the consultants who worked with Martin Marietta on this project and represented Martin Marietta at the public hearing before the Board. But Cozad stopped working for Tetra Tech after she was elected as a commissioner, and the plaintiffs concede that no evidence exists that suggests Cozad benefitted personally or financially from the Board's decision to approve the special use permit. The plaintiffs rely exclusively on Cozad's past relationship with Tetra Tech and on speculation that this past relationship might provide a basis for Cozad to receive a benefit.

A person serving in a quasi-judicial capacity is entitled to a presumption of integrity, honesty, and impartiality. *Meyerstein v. City of Aspen*, 282 P.3d 456, 467 (Colo. App. 2011). The challenger of a quasi-judicial decision therefore has the

burden of rebutting this presumption of impartiality. *Id*. Absent a showing that a decision-maker had a personal, financial, or official stake in the outcome that created a conflict of interest, an adjudicatory hearing is presumed to be impartial. *Id*. at 468; *see also Mountain States Tel. and Tel. Co. v. Pub. Util. Comm'n.*, 763 P.2d 1020, 1028 (Colo. 1988).

Generally speaking, a conflict of interest or bias affecting the appearance of impartiality in quasi-judicial zoning actions may be shown by partiality or prejudice stemming from an employment or business relationship. *2 Rathkopf's The Law of Zoning and Planning* § 32:14 (4th ed.). But the reported cases I have found all involve a conflict of interest based on a *current* employment or business relationship, rather than a past relationship. *See* 2 *Rathkopf's The Law of Zoning and Planning* § 32:21 (collecting conflict of interest cases).

The only case cited by the plaintiffs is the *Mountain States* opinion, in which our Supreme Court noted "that a decision maker may have a dual role as a witness at one step of the proceedings and as a member of a reviewing body at a later stage of the same proceedings." 763 P.2d at 1028. So, to the extent that Cozad worked on the Martin Marietta project before she was elected as a county commissioner, applying this principle from *Mountain States* here leads to the conclusion that Cozad's dual role as a witness at an early stage of the proceedings and as a decision-maker at the later stage does not create a conflict of interest.

And because the plaintiffs have presented no evidence that Cozad had a current relationship that might reasonably result in her receiving some personal or financial benefit from approving Martin Marietta's permit, the plaintiffs have not met their burden to rebut the presumption of Cozad's integrity, honesty, and impartiality. A former, favorable connection to a party or advocate

involved in the proceeding is not enough to show a conflict of interest. *Cf. Schupper v. People*, 157 P.3d 516, 517 (Colo. 2007) ("[A] judge is not required to disqualify himself where a friend with whom the judge has little present social involvement makes a single appearance before the judge on behalf of the district attorney's office.").

But even if the plaintiffs were able to meet their burden to show a conflict of interest, they still would not be entitled to relief. Assuming that Cozad had recused herself from participating in the hearing, or assuming I nullified her vote, because the remaining county commissioners all voted in favor of approving the permit, Martin Marietta's application would still be approved. Thus, even if Cozad had a conflict of interest, the plaintiffs cannot show that their due process rights have been violated because the outcome of the hearing would be the same.

Colorado courts have not adopted the theory of taint urged by the plaintiffs, and I reject the notion that the other county commissioners—who are sophisticated, political professionals beholden to the voters who elected them, rather than each other—could be manipulated by Cozad to vote to approve the special use permit.

The plaintiffs are therefore not entitled to have the Board's approval of the special use permit set aside on due process grounds.

ORDER

Accordingly, the Board's approval of the special use permit, USR 15-0027, is AFFIRMED.

So Ordered:
January 27, 2017

BY THE COURT:

Todd Taylor
District Court Judge