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<tr><td>COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203
DISTRICT COURT, WELD COUNTY, COLORADO
Case No. 2015CV30776
Hon. Judge Todd Taylor</td><td rowspan="3">▲ COURT USE ONLY ▲

Case No. 2017CA463

(Appeal from Weld County District Court Case No. 2015CV30776)</td></tr>
<tr><td>Plaintiffs/Appellants:

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/Appellees:

THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO (including all of the individual Commissioners in their official capacities: Chair Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steven Moreno, and Julie Cozad), MARTIN MARIETTA MATERIALS, INC., a North Carolina corporation, GERRARD INVESTMENTS, LLC, a Colorado limited liability company, WELD LV, LLC, a Nevada limited liability company, and WELD LV II, LLC, a Nevada limited liability company.</td></tr>
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<tr><td colspan="2">APPELLANTS' OPENING BRIEF</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth therein. Specifically, the undersigned certifies that:

This Brief complies with the word limit set forth in C.A.R. 28(g).

☒ Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains **9468** words.

This Brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

☒ **For each issue raised by the appellants**, this Brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where issue was raised and where the court ruled, not to an entire document.

I hereby acknowledge that this Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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

TABLE OF CONTENTS

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

Nature of the Case 2

Background 4

The Proposed Industrial Use 4

The Proposed Site and MMM's Locational Decision 6

Use By Special Review in Weld County 10

MMM's Application 12

Procedural History 15

District Court Orders Presented for Review 16

SUMMARY OF THE ARGUMENTS 17

ARGUMENT 19

I. **There Is No Competent Evidence That the Proposed Industrial Use Is Consistent with the Existing Surrounding Agricultural and Residential Uses** 19

A. Standard of Review 19

B. Preservation of the Issue 20

C. Discussion 20

II. **There Is No Competent Evidence That MMM Made a Diligent Effort To Conserve Prime Farmland When Selecting the Proposed Site** 25

A. Standard of Review 25

B. Preservation of the Issue..26

C. Discussion..26

III. **There Is No Competent Evidence That the Proposed Industrial Use Can Comply with the Applicable Noise Standard** 29

A. Standard of Review 29

B. Preservation of the Issue..30

C. Discussion..30

IV. **The Proposed Industrial Use Is Not "Directly Related to" Agriculture and the Approval of the Application Constitutes De Facto Spot Rezoning from Agricultural to Industrial Use** 33

A. Standard of Review 33

B. Preservation of the Issue..33

C. Discussion..34

V. **The District Court Erred by Refusing To Order Production of Ex Parte Communications Between MMM and the BOCC While This Action Was on Remand** 41

A. Standard of Review 41

B. Preservation of the Issue..41

C. Discussion..41

CONCLUSION 47

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TABLE OF AUTHORITIES

Case Law

Alward v. Golder, 148 P.3d 424 (Colo. App. 2006) 19

Alpenhof, LLC v. City of Ouray, 2013 COA 9 33

Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver, 928 P.2d 1254 (Colo. 1996) 37, 38

Black v. Sw. Water Conservation Dist., 74 P.3d 462 (Colo. App. 2003) 44

Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs, 172 P.3d 905 (Colo. App. 2006) 46

Carron v. Bd. of Cnty. Comm'rs, 976 P.2d 359 (Colo. App. 1998) 39, 40

Clark v. Boulder, 362 P.2d 160 (Colo. 1961) 35, 36, 37

Colo. Energy Advocacy Office v. Pub. Serv. Co., 704 P.2d 298 (Colo. 1985) 42

Colo. Med. Bd. v. Office of Admin. Courts, 2014 CO 51 28

Drews v. City of Hattiesburg, 904 So. 2d 138 (Miss. 2005)............................ 39, 40

Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't, 196 P.3d 892 (Colo. 2008) 19

Hellas Constr., Inc. v. Rio Blanco Cnty., 192 P.3d 501 (Colo. App. 2008) 19

Kane v. City Council, 537 N.W.2d 718 (Iowa 1995) 38

L.G. Everist, Inc. v. Water Quality Control Comm'n of Colo. Dept. of Health, 714 P.2d 1349 (Colo. App. 1986)...46

Linden Methodist Episcopal Church v. Linden, 173 A. 593 (N.J. 1934) 35

Margolis v. Dist. Court, 638 P.2d 297 (Colo. 1981) 42

Merrimac Planning Bd. v. Moran, 17 LCR 92 (Mass. Dist. 2009).........................38

People v. Waddle, 97 P.3d 932 (Colo. 2004)...34

Peoples Natural Gas. Div. of N. Natural Gas Co. v. Pub. Util. Comm'n, 626 P.2d 159 (Colo. 1981) 46

Wells v. Del Norte Sch. Dist., 753 P.2d 770 (Colo. App. 1987).............................42

Whitelaw v. Denver City Council, 2017 COA 47 .... 36, 39, 41

Zuviceh v. Indus. Comm'n, 544 P.2d 641 (Colo. App. 1975).................................47

Other Authorities

W.C.C. § 22-2-20 .... 14, 34, 37, 38

W.C.C. § 23-2-200 11

W.C.C. § 23-2-230 .... *passim*

W.C.C. § 23-2-240 .... 11, 27

W.C.C. § 23-2-250 .... 11, 29, 33

W.C.C. § 23-3-10 .... 10, 34

W.C.C. § 23-3-20 10

W.C.C. § 23-3-300 10

Colo. Code of Judicial Conduct, Canon 2 42

ISSUES PRESENTED

1. Whether the BOCC Erred in Approving a USR Application Without Competent Evidence That the Proposed Industrial Use Is Consistent with Existing Surrounding Uses?

2. Whether the BOCC Erred in Approving a USR Application Without Competent Evidence That the Applicants Made Diligent Efforts To Conserve Prime Farm Land?

3. Whether the BOCC Erred in Approving a USR Application Where the Uncontroverted Evidence Demonstrated That the Proposed Industrial Use Will Violate the Applicable Noise Standard?

4. Whether the BOCC Engaged in Unlawful *De Facto* Spot Zoning When It Approved a USR Application for a Proposed Industrial Use That Has No Relationship to Agriculture in the Agricultural Zone?

5. Whether the District Court Erred in Refusing To Order the Record To Be Supplemented With All *Ex Parte* Communications Between the BOCC and the Applicants While the USR Application Was on Remand Before the BOCC?

STATEMENT OF THE CASE

Nature of the Case

This a land use appeal challenging Weld County's unlawful approval of an application to construct a heavy industrial asphalt and concrete production, processing, and rail-to-truck transloading facility (the "Proposed Industrial Use") on a 131-acre parcel zoned for agricultural use in unincorporated Weld County (the "Proposed Site"). The Appellants are a coalition of neighbors (the "Appellant Neighbors") that opposed the application before Appellee the Weld County Board of County Commissioners (the "BOCC"). Ultimately, the BOCC approved the application (the "Application") of Appellees Martin Marietta Materials, Inc. and Gerard Investments, LLC (collectively, "MMM") to allow the Proposed Industrial Use over the opposition of: (1) the Weld County Planning Department; (2) the Weld County Planning Commission; (3) neighboring governments; and (4) hundreds of neighboring land users.

This challenge was initiated by the Appellant Neighbors in the Weld County District Court (the "District Court") pursuant to C.R.C.P. 106(a)(4). The District Court initially remanded the case for further findings, but ultimately affirmed the BOCC's second resolution (the "Second Resolution") approving MMM's proposed heavy industrial use.

The Appellant Neighbors seek this Court's *de novo* review of the BOCC's illegal decision approving a non-conforming heavy industrial use on land that is zoned for agriculture and surrounded on all sides by established farms and single-family homes. The Appellant Neighbors ask this Court to reverse the BOCC's adoption of the Second Resolution for five separate reasons:

(1) The BOCC's decision is not supported by competent evidence that the Proposed Industrial Use is compatible with the existing surrounding agricultural and residential uses;

(2) There is no evidence in the record that MMM made any effort to conserve "Prime farmland" at the Proposed Site when making its "locational decision" to select the site;

(3) The undisputed evidence confirms that the Proposed Industrial Use will violate the applicable noise standard and must have been denied;

(4) The Proposed Industrial Use is unrelated to agriculture and has the effect of reclassifying the zoning of the Proposed Site from agricultural to industrial for the narrow benefit of MMM; and

(5) The BOCC fatally undermined the fundamental fairness of this proceeding by engaging in improper and still secret *ex parte* communications with MMM while this action was on remand.

Each issue provides independent grounds for reversing the BOCC's unlawful approval of MMM's plan to convert more than 90-acres of Prime agricultural land into a heavy industrial asphalt and concrete factory.

Background

The Proposed Industrial Use

MMM intends to construct and operate a large-scale, heavy industrial asphalt and concrete production facility. (R. Tr. (Aug. 12, 2015),[1] pp. 16:22-23, 27:23; AR,[2] pp. 173-95.) This industrial facility will involve the construction and operation of:

a. A 110-foot tall batch concrete plant;

b. A 100-foot tall continuous (drum mix) asphalt plant powered by on-site natural gas electric generation;

c. A rail spur and 6,400-foot train loop to accommodate the entire length of 121-car trains (including 4 locomotives) completely stopping onsite to dump—over the course of eight-hour unloading periods—full trainloads of aggregate and/or asphalt cement to the site up to three times per week;

d. A materials processing facility for recycling and sales, which will include on-site crushing, washing, screening, sorting,

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[1] Because this is an appeal from a C.R.C.P. 106 action, all references to the "transcript" refer to the quasi-judicial hearing before the BOCC. In the electronic record, the transcript pdfs use the prefix "TRBOCC081215_Martin Marietta." Although oral argument was presented to the District Court, that proceeding was neither transcribed nor submitted as part of the appellate record. This Court reviews the BOCC's adoption of the Second Resolution *de novo*.

[2] All citations to the administrative record (the "AR") refer to the record before the BOCC below. All pin cites to AR refer to the BATES labels affixed to each page of the AR by the Clerk of the BOCC. In the electronic record, the AR pdfs use the prefix "USR15-0027 Martin Marietta."

stockpiling, unloading, and loading of sand, rock, gravel, clay, and topsoil;

e. A 14,400 square foot office building, an electrical substation, and at least fifteen other new buildings and modular trailers;

f. Storage of up to 680,000 cubic yards of construction materials, including sand, rock, gravel, aggregate, cement, and various additives; and

g. Storage of 4.5 million gallons of asphalt cement, 24,000 gallons of emulsified asphalt cement, 40,000 pounds of chemical color additives, 285 tons of cement, 180 tons of coal fly ash, 37,000 gallons of diesel fuel, and 10,000 gallons of propane.

(R. Tr., pp. 4:21-5:20, 19:13-20:20; AR, pp. 97-99, 209, 352.)

MMM estimates that the Proposed Industrial Use will initially generate 1,120 "site trips" per day—that is, 1,120 trucks will arrive and depart from the site each day. (AR, p. 179.) At full capacity, the daily traffic is estimated to increase to 2,260 daily "site trips." (*Id.*) MMM may engage in operations at the Proposed Site twenty-four hours a day/seven days per week.[3] (CF, p. 727.) MMM has no control over when trains will arrive to dump tons of raw aggregate at the site for

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[3] The Proposed Industrial Use will "typically" operate Monday to Saturday from an hour before sunrise to an hour after sunset. (CF, p. 727.) As approved, however, MMM has unfettered discretion to engage in Sunday and overnight operations whenever materials are "requested." (*Id.* ("Depending on the request of the jurisdiction purchasing the asphalt, night operations could occur seven days per week."); R. Tr., p. 5:5-6 ("The hours of operation for Martin Marietta are 24 hours a day – seven days a week.").)

processing—the trains will idle for up to eight hours while dumping material and will arrive in the middle of the night. (R. Tr., pp. 20:6-8, 225:5-7.) The Proposed Industrial Use will generate increased traffic, noise, odors, dust, air pollution and result in visual impacts as well as water quality and runoff issues. (AR, pp. 68-75, 305-12; 349-63; 401-22.)

The Proposed Site and MMM's Locational Decision

The Proposed Site is a 131-acre parcel located on the east side of Weld County Road 13 in unincorporated Weld County. (R. Tr., p. 4.) For at least the past twenty-five years the Proposed Site has primarily been used to grow corn, wheat, and alfalfa. (AR, pp. 887, 1165-66.) The entire Proposed Site sits within Weld County's "A (Agricultural) Zone District" (hereinafter, "Agricultural Zone") and has been designated by Weld County and the U.S. Department of Agriculture as "Prime (Irrigated) Farmlands of National Importance." (AR, pp. 1, 423-439, 1434-35.)

The existing uses surrounding the Proposed Site are all either single-family residences on large lots (approximately one acre) or productive "Prime" farmland:

(AR, pp. 1434-35, 2233; CF, p. 105.) The Appellant Neighbors, which include nearby homeowners, a specialty organic farm, and a proposed dairy farm-themed event space, are representative of all the existing surrounding land uses near the Proposed Site. (*See generally* R. Tr., pp. 42:6-47:4, 54:15-57:23, 58:6-60:12, 89:5-24, 174:7-180:10, 181:14-184:8.) Prior to the BOCC's approval of the Application, the Proposed Site appeared as follows (from the southeast looking northwest):

(AR, p. 1888.)

MMM publicly announced its selection of the Proposed Site for the Proposed Industrial Use in January 2015. (R. Tr., pp. 31:24-32:6; AR, p. 2577.) Following immediate public opposition to the proposal, MMM produced a "Site Selection Report" in March 2015 that attempts to justify its locational decision selecting the Proposed Site. (AR, pp. 395-99.) The report explains that MMM sought to identify a site along a rail line so that it could cheaply import raw materials from a quarry it operates in Wyoming. (*Id.*) The report further states that MMM sought a location near its end users to minimize MMM's costs. (AR,

pp. 396-97.) The report confirms that MMM only considered thirteen properties for the Proposed Industrial Use and did so based solely on private economic considerations. (AR, p. 397; R. Tr., p. 29:7-14 (explaining that MMM will save $18 million in transportation costs by locating the Proposed Industrial Use at the Proposed Site).)

MMM's report does not take into account the zoning at each site or if the Proposed Industrial Use would destroy Prime farmland. (AR, p. 398.) The report further confirms the incompatibility of the Proposed Industrial Use with the Proposed Site's existing surrounding uses by awarding the Proposed Site the lowest possible score with regards to the effect it will have on its many "neighbors." (*Id.*) Other potential sites received significantly better scores with respect to this compatibility factor, but were rejected by MMM due to financial and/or topographic considerations. (*Id.*)

In making its locational decision, MMM did not consider or study at least five industrial sites in Weld County identified by opponents. (R. Tr., p. 53:4-15.) The Proposed Industrial Use could have been located at any of these existing industrial sites without destroying Prime farmland. (*Id.*)

Use By Special Review in Weld County

The Weld County Code establishes that land within an Agricultural Zone (like the Proposed Site) is "considered a valuable resource which must be protected from adverse impacts resulting from uncontrolled and undirected business, industrial and residential land USES . . . . The A (Agricultural) Zone District is intended to provide areas for the conduct of agricultural activities and activities related to agriculture and agricultural production without the interference of other, incompatible land USES." Weld County Code § 23-3-10 (hereinafter, "W.C.C.").[4] In addition to some limited public uses, only agricultural and related, complimentary uses are permitted by right in an Agricultural Zone. *Id.* § 23-3-20. In contrast, the Code provides that the purpose of the "I (Industrial) Zone District" (hereinafter, "Industrial Zone") is "to reduce to a minimum the impact of industries on surrounding, nonindustrial land USES to prevent detrimental impacts which may negatively affect the future USE or DEVELOPMENT of ADJACENT properties or the general NEIGHBORHOOD." *Id.* § 23-3-300.

Because MMM's proposal to construct and operate a transloading, asphalt, and concrete facility is not a use by right within the Agricultural Zone, MMM was required to apply for a use by special review ("USR") permit from the BOCC to

[4] The portions of the Weld County Code referenced herein are submitted as Appendix I to this Opening Brief.

locate the Proposed Industrial Use at the Proposed Site within an Agricultural Zone. The County Code requires an intensive review before an application for a USR within an Agricultural Zone may be approved to ensure compatibility with surrounding uses. W.C.C. § 23-2-200.A. Specifically, an applicant must demonstrate compliance with Design Standards (W.C.C. § 23-2-240), Operation Standards (W.C.C. § 23-2-250), and seven additional factors:

> 1. That the proposal is consistent with Chapter 22 of this Code and any other applicable code provision or ordinance in effect.
>
> 2. That the proposal is consistent with the intent of the district in which the USE is located.
>
> 3. That the USES which would be permitted will be compatible with the existing surrounding land USES.
>
> 4. That the USES which would 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 this Code or MASTER PLANS of affected municipalities.
>
> 5. That the application complies with Article V of this Chapter if the proposal is located within the Overlay District Areas identified by maps officially adopted by the COUNTY.
>
> 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.

7. That there is adequate provision for the protection of the health, safety and welfare of the inhabitants of the NEIGHBORHOOD and the COUNTY.

Id. § 23-2-230. To obtain approval for a USR in an Agricultural Zone, the applicant bears the burden of proof to demonstrate compliance with all nine required elements. W.C.C. § 23-2-230.B. If an applicant fails to meet its burden with respect to *any* element, the BOCC must deny the application.

MMM's Application

MMM submitted its Application to the Weld County Planning Department on April 28, 2015. (AR, p. 173.) The Planning Department solicited comments regarding the Application from neighboring governments within three miles of the Proposed Site and received the following responses:

a. Johnstown adopted a resolution that provides: "if [the Proposed Industrial Use] is permitted it would create undesirable, offensive and harmful consequences, inconsistent with the Town of Johnstown's long-range planning and inconsistent with the best growth and development along the U.S. Highway 34 corridor." (AR, pp. 740-41.)

b. The Windsor Planning Department submitted a letter in opposition explaining that the Proposed Industrial Use is incompatible with the "vision that the Town of Windsor and City of Greeley have developed for this area. The [Proposed Industrial Use] is an intensive industrial use unsuited for the nature of this corridor and its impacts likely cannot be fully mitigated." (AR, pp. 759-60.)

c. Greeley's Division of Community Development-Planning opined that the Proposed Industrial Use "is incompatible" with the existing and future uses in the surrounding area, which include "residences, retail, restaurants, neighborhood commercial, and institutions." (AR, p. 716.) Greeley further stated that the Proposed Use "is an intensive industrial use unanticipated considering the nature of this corridor." (AR, p. 717.)

d. Larimer County opined that the Proposed Industrial Use "represents a significant change to the area with regards to traffic, noise, dust and odors, to mention a few." (AR, p. 742.)

Accordingly, the Planning Department found that "the placement of a heavy industrial use, such as Martin Marietta is proposing, is a disturbance to the existing residential area and is not compatible with the existing land uses or the vision for this region." (AR, p. 101.) It further noted that comments received from nearby land owners opposed the Application by a margin of 175 to 5. (AR, p. 103.) Ultimately, the Planning Department concluded that "[t]he noise, odors, and traffic from the proposed uses will cause disruption to the nearby residential properties" and "that the negative impacts are such that there are **<u>no conditions</u>** that could be placed on this USR **<u>that would ensure the compatibility</u>** with the surrounding existing land uses." (AR, pp. 104-05 (emphasis added).)

The Planning Commission then held a public hearing on the Application on July 21, 2015. (AR, p. 81.) After nearly twelve hours of testimony, the Planning Commission recommended denial of the Application. (AR, p. 75.) In its

Resolution, the Planning Commission explained that the Proposed Industrial Use does not support agricultural uses as required by W.C.C. § 22-2-20.G.1 and is "**incompatible with the area**, region, and the vision for the future of this gateway to Weld County," and that the resulting health, pollution, and infrastructure concerns could not be mitigated. (AR, pp. 68-73 (emphasis added).)

The BOCC then held its hearing to consider the Application on August 12, 2015 (the "Hearing"). (AR, p. 13.) Unrebutted testimony confirmed that the Proposed Site is surrounded on all sides by farms and single-family homes and that the nearest "industrial" land use is a light industrial warehouse located nearly a mile away. (R. Tr., at 78:20-23.) Although the issue was raised by several opponents to the Application, there was no evidence presented that MMM made any effort to conserve Prime farmland in its "locational decision" when it selected the Proposed Site. (R. Tr., pp. 54:15-55:15.) The unrebutted evidence—as presented by MMM's own noise consultant—confirmed that the Proposed Industrial Use will violate the applicable noise standard at adjacent residential lots. (AR, p. 310.)

Undeterred, the BOCC approved the Application by final resolution dated September 15, 2015. (AR, pp. 1-12, 43.) This resolution was a perfunctory

document that sets forth the USR approval criteria and, without particularized findings, concluding they were met by MMM. (AR, p. 2.)

Procedural History

The Appellant Neighbors timely filed suit challenging the BOCC's approval of the Application pursuant to C.R.C.P. 106(a)(4). (CF, pp. 106-40.) Specifically, the Appellant Neighbors, who all have standing by virtue of their ownership and/or use of nearby properties, asked the District Court to find that the BOCC violated the Weld County Code and/or abused its discretion in approving the Proposed Industrial Use at the Proposed Site.

Following briefing and oral argument, the District Court remanded the case back to the BOCC for additional findings of fact. (CF, pp. 705-07.) The District Court ruled that the BOCC "did not make *any* findings of fact" in its original resolution and remarked that "the state of the evidence does not warrant automatic approval" in light of the recommendations for denial submitted by both planning staff and the Planning Commission. (CF, p. 706.) The District Court's remand order instructed the BOCC "to make the requisite findings of fact necessary for judicial review of its decision to approve the application." (CF, p. 707.)

Following remand, this action was again before the BOCC from August 9, 2016, until October 5, 2016, when the BOCC approved and submitted the Second

Resolution to the District Court. (CF, pp. 708-32.) While the case was on remand, the Appellant Neighbors learned that counsel for MMM communicated with the Weld County Attorney (counsel for the BOCC) on at least two occasions. (CF, p. 746.) The Appellant Neighbors asked the BOCC to turn over records of any *ex parte* communications with MMM during the remand period, but the BOCC refused this request on the basis that such communications were privileged and protected by a "Common Defense Agreement" between the parties. (CF, pp. 738-39.) The Appellant Neighbors then moved the District Court to order the Appellees to supplement the record with all communications between MMM and the BOCC while the case was on remand. (CF, pp. 743-52.) The District Court denied this request in an interim order dated October 28, 2016, citing the purported applicability of the Appellees' joint defense agreement irrespective of the remanded status of the case. (CF, p. 810.)

Thereafter, the District Court declined to reverse the Second Resolution on January 27, 2017. (CF, pp. 866-89.) The Appellant Neighbors timely appealed to this Court. (CF, pp. 890-900.)

District Court Orders Presented for Review

The Appellant Neighbors appeal two orders of the District Court to this Court. First, the Appellant Neighbors ask this Court to review the District Court's

January 27, 2017 final order (the "Final Order") affirming the BOCC's adoption of the Second Resolution and approval of MMM's USR Application. Second, the Appellant Neighbors seek this Court's review of the District Court's October 28, 2016 interim order (the "Interim Order") refusing to order the disclosure and supplementation of the record with all *ex parte* communications between MMM and the BOCC while this action was remanded before the BOCC.

SUMMARY OF THE ARGUMENTS

The Appellant Neighbors respectfully seek this Court's *de novo* review of the BOCC's unlawful adoption of the Second Resolution. Specifically, the BOCC abused its discretion in adopting the Second Resolution without competent evidence for approval under the Weld County Code. There is no competent evidence in the record that the Proposed Industrial Use is compatible with existing surrounding uses at the Proposed Site. Likewise, there is no competent evidence that MMM made any effort to conserve Prime farmland in making its "locational decision" to select the Proposed Site for its Proposed Industrial Use. Under the County Code, MMM was required to show that it made "diligent efforts to conserve Prime farmland"—in reality, it made no effort. MMM similarly failed to provide any competent evidence that the Proposed Industrial Use will comply with the applicable noise standard as required by the Weld County Operation Standards.

In fact, the uncontroverted evidence in the record—supplied by MMM's own noise consultant—confirms that even if all noise mitigation efforts are employed, the Proposed Industrial Use will still violate the applicable noise standard. Ultimately, MMM's failure to produce competent evidence with regard to any one of these material elements is fatal, and mandates denial of the Application.

Moreover, the BOCC's adoption of the Second Resolution was unlawful because the Proposed Industrial Use has no connection to agricultural uses and constitutes unlawful *de facto* spot zoning—converting the Proposed Site within an Agricultural Zone to an Industrial Zone. The Proposed Industrial Use is completely divorced from agriculture, and the Application was granted for the narrow benefit of MMM and to the widespread detriment of all surrounding land users in violation of Colorado law.

Finally, the fundamental fairness of the remand proceeding before the BOCC was compromised by *ex parte* communications between MMM and the BOCC. Once this case was remanded to the BOCC, the BOCC reverted to its impartial, quasi-judicial role. The secret, *ex parte* coordination between MMM and the BOCC—the nature and extent of which remains unknown—violated the Appellant Neighbors' right to due process and fatally undermined the fundamental fairness of the BOCC's adoption of the Second Resolution.

<u>ARGUMENT</u>

I. There Is No Competent Evidence That the Proposed Industrial Use Is Consistent with the Existing Surrounding Agricultural and Residential Uses.

A. <u>Standard of Review</u>

This Court sits in the same position as the District Court under C.R.C.P. 106(a)(4) and therefore reviews the District Court's Final Order *de novo* to determine whether the BOCC abused its discretion. *Alward v. Golder*, 148 P.3d 424, 428 (Colo. App. 2006).

A government abuses its discretion when its decision is not reasonably supported by competent evidence. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo. 2008). "Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only explained as an arbitrary and capricious abuse of authority." *Id.* at 900. Generic conclusions are insufficient to satisfy this standard, and the record must include "specific evidence" supporting the decision. *Hellas Constr., Inc. v. Rio Blanco Cnty.*, 192 P.3d 501, 507 (Colo. App. 2008).

The BOCC abused its discretion if there is no credible evidence in the record that the Proposed Industrial Use is consistent with existing surrounding uses. W.C.C. § 23-2-230.B.3.

B. Preservation of the Issue

The Appellant Neighbors argued before the District Court that the record is devoid of any competent evidence that the Proposed Industrial Use is compatible with existing surrounding uses. (CF, pp. 135, 172, 476-78, 544-45, 798-800.)

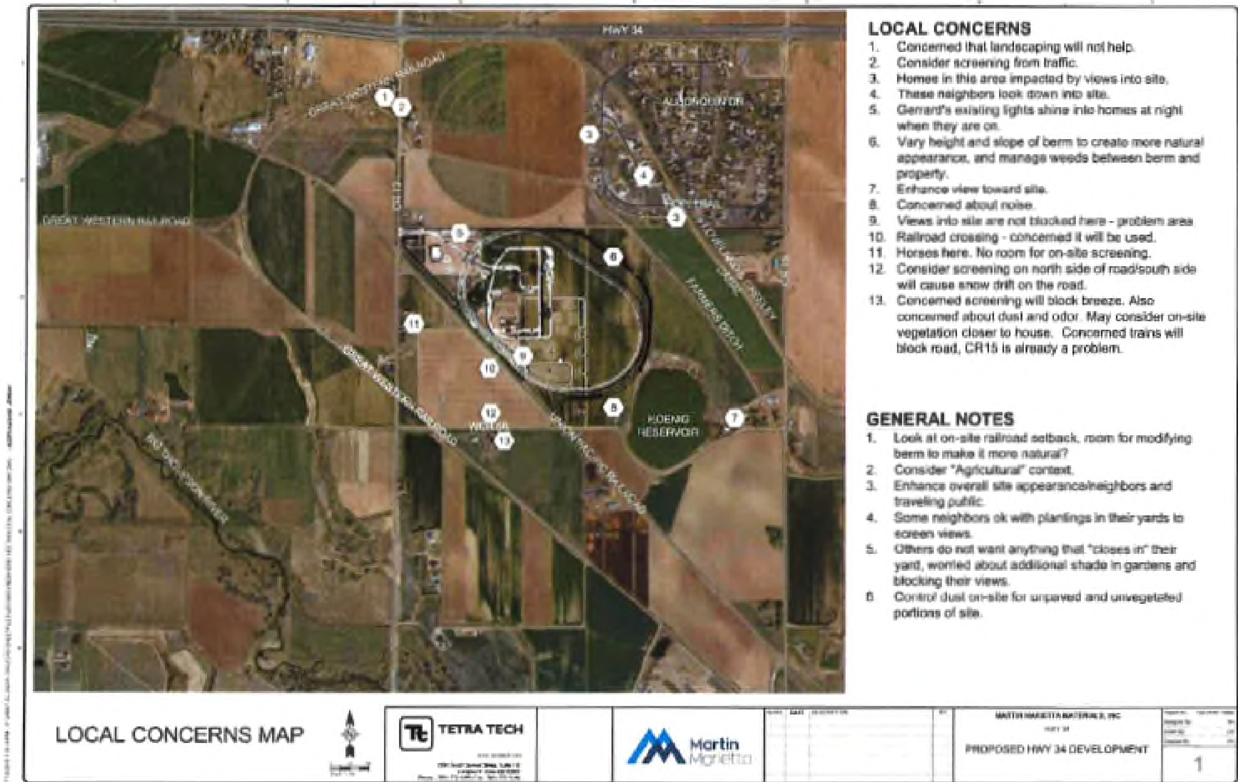
C. Discussion

W.C.C. § 23-2-230.B.3 provides that the BOCC may approve a USR application only after the applicant has met its burden to demonstrate that the proposed use is "compatible with the existing surrounding land USES." (Emphasis added.) Here, the record is devoid of any competent evidence that MMM's proposed heavy industrial use will be compatible with existing agricultural and residential uses surrounding the Proposed Site.

It is undisputed that the Proposed Site is surrounded by agricultural and residential uses on all sides:

Zoning		Land Use	
N	A (Agricultural)	N	Agricultural/Residential
E	A (Agricultural)	E	Agricultural/Residential
S	A (Agricultural)	S	Agricultural/Residential
W	Larimer County/Agriculture	W	Agricultural/Residential

(AR, p. 116.) Further, undisputed evidence confirms that there are at least fourteen single-family homes within 500 feet of the Proposed Site:



(AR, p. 198.) Each of these homes will be less than 1000 feet from the freight train loop that will encircle the Proposed Site to accommodate the three weekly trainloads of aggregate that will arrive at the Proposed Site at unpredictable hours. (AR, pp. 70, 495; R. Tr., pp. 20:2-3, 225:5-7.)

The absence of any competent evidence that the Proposed Industrial Use is compatible with existing *surrounding* land uses was implicitly confirmed by the BOCC's mischaracterization of the evidence in the Second Resolution. Specifically, in support of the BOCC's claim that the Proposed Industrial Use is compatible with existing surrounding uses, the BOCC concludes: "Adjacent

surrounding land uses include a permitted industrial construction business and storage yard, a permitted commercial wedding business and event venue, agricultural uses, residences, and open areas." (CF, p. 713.) However, this "finding" misstates the uncontroverted evidence in several respects. First, the "permitted industrial[5] construction business and storage yard" is not "adjacent" to the Proposed Site—it is Appellee Gerrard Investments, LLC's ("Gerrard") previous use of 18 acres of the 131-acre Proposed Site. (AR, p. 190.) Consequently, Gerrard's use is neither "adjacent" nor "surrounding," moreover, it is irrelevant: after all, if MMM's Proposed Industrial Use moves forward, Appellee Gerrard's *commercial* use of a portion of the Proposed Site will cease. Furthermore, it is undisputed that there are no existing *industrial* uses near the Proposed Site. (R. Tr., at 78:20-23.)

The remaining "adjacent surrounding land uses" relied upon by the BOCC to support its finding of compatibility are represented by the Appellant Neighbors here. (*See* R. Tr., pp. 42:6-47:4, 54:15-57:23, 58:6-60:12, 89:5-24, 174:7-180:10, 181:14-184:8.) These existing surrounding uses are fundamentally different from

[5] The BOCC's mischaracterization of Appellee Gerard's existing use as "industrial" is also telling in its desperation. Prior to MMM's Application, Appellee Gerard possessed a USR to operate a "construction business, shop, and office"—a presumptive commercial use by right under W.C.C. § 23-3-230.B.11. (AR, p. 190.)

the Proposed Industrial Use with respect to the type and intensity of use, and include a proposed dairy farm/wedding venue (Appellant Rockin S Ranch LLC), an organic farm that grows specialty products for pregnant and nursing mothers (Appellant Motherlove Herbal Company), other family-owned farms (Appellant Cummings), and single-family homes (Appellants Indianhead West Homeowners Association, Inc., Kisker, Oplinger, Dirks, and Piraino). (CF, pp. 155-59.) These neighbors vigorously opposed the Proposed Industrial Use and the record is without any evidence that the Proposed Industrial Use is compatible with these existing surrounding residential and agricultural uses.

The BOCC's reliance on discredited[6] maps showing *future potential* land uses is similarly unavailing with respect to the question of compatibility with *existing* uses. (CF, p. 715.) The BOCC's assertion that "[t]he area is likely to become more commercial and industrial" is entirely irrelevant to compatibility with *existing* uses mandated by W.C.C. § 23-2-230.B.3.

Although not binding in any way on this Court, the District Court's Final Order is illuminating on this point. Specifically, the Final Order does not contain any reference to evidence in the record supporting the contention that the Proposed

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[6] Even if this map had anything to do with existing surrounding uses, its credibility was fatally undermined by public officials who testified at the hearing that the map is incorrect and misleading. (R. Tr., at 78:20-23; 244:19-245:5.)

Industrial Use is consistent with neighboring agricultural and residential uses. The absence of such a pin-cite to the record is telling. Nevertheless, the District Court concludes that the BOCC's approval of the Application was lawful because it is "compatible" with *some* other nearby uses—namely, existing road and rail infrastructure. (CF, pp. 879-80.) But this conclusion ignores the existing *surrounding* agricultural and residential uses, which can subsist harmoniously with such existing infrastructure while still being utterly incompatible with the construction of a new, heavy industrial complex.

The District Court's Final Order then spends several pages discussing the many negative impacts that cannot be mitigated and will result from the Proposed Industrial Use (and strongly implies that the District Court would have denied the Application outright). Nevertheless, the District Court reasons that the BOCC's approval was lawful because the BOCC "weighed those [incompatibility] concerns against the competing policy considerations in favor of industrial development and a landowner's right to convert a property's use." (CF, pp. 879-83.) But, these considerations are entirely inconsistent with W.C.C. § 23-2-230.B.3, which requires a showing by the applicant that the proposed use is consistent with "existing surrounding uses." The Weld County Code does not permit the BOCC to

"weigh" or "balance" competing interests. There must be evidence that the new use is consistent with the existing surrounding uses.

Here, there is none. The only reference in the record to existing industrial uses in the vicinity of the Proposed Site is a passing reference to a light industrial park nearly a mile away. (R. Tr., 78:20-23.) MMM's Proposed Industrial Use—complete with one hundred-foot smokestacks, at least nineteen new buildings, and a freight train rail loop that will stretch for more than a mile around the Proposed Site—is wholly incompatible with the existing character of the surrounding neighborhood. There is no evidence to support the BOCC's finding that the Proposed Industrial Use is compatible with existing land uses, and consequently, the BOCC abused its discretion by adopting the Second Resolution.

II. There Is No Competent Evidence That MMM Made a Diligent Effort To Conserve Prime Farmland When Selecting the Proposed Site.

A. Standard of Review

This Court reviews the District Court *de novo* to determine whether the BOCC abused its discretion. *See* § I.A, *supra*. The BOCC abused its discretion if there is no credible evidence in the record to demonstrate that MMM "made a diligent effort to conserve prime farmland" in its "locational decision" in selecting the Proposed Site as required by W.C.C. § 23-2-230.B.5. *Id.*

B. Preservation of the Issue

The Appellant Neighbors argued before the District Court that the record is devoid of evidence that MMM undertook any effort to conserve Prime farmland in selecting the Proposed Site. (CF, pp. 480-81, 629, 795-96, 854-55.)

C. Discussion

Under the Weld County Code, a USR applicant bears the burden of proof to "demonstrate that a diligent effort has been made to conserve PRIME FARMLAND in the locational decision for the proposed use." W.C.C. § 23-2-230.B.6. Here, it is undisputed that the Proposed Site contains Prime farmland (AR, pp. 90, 100, 159, 423-39), and there is no credible evidence in the record that MMM made *any* effort to conserve Prime farmland when it selected the Proposed Site for the Proposed Industrial Use. MMM's "Site Selection Report" confirms that it made no such effort to conserve Prime farmland. (AR, pp. 395-99.) In fact, it appears that MMM was not even aware that the Proposed Site contained Prime farmland when it made its "locational decision for the proposed use" and submitted its Application to the BOCC.[7] (AR, p. 181 (incorrectly

[7] Despite MMM's initial misapprehension, MMM's land use consultant subsequently admitted that the Proposed Site does contain Prime farmland and that W.C.C. § 23-2-230.B.6 must be satisfied. (AR, p. 90.)

claiming that the Proposed Site "would not be considered prime agricultural production land"). This is fatal under the County Code and requires reversal.

After remand, the Second Resolution claims that MMM satisfied this requirement "through the configuration of its site" by "clustering the industrial activities on the site as far west as possible." (CF, p. 718.) This assertion fails for two reasons. First, there is no evidence that MMM made any effort to "configure" the Proposed Use at the Proposed Site to conserve Prime farmland. MMM made no such argument before the BOCC and instead argued that the configuration of the proposed development was intended to protect neighboring residences—there was no mention of Prime farmland. (R. Tr., 37:13-20.)

Second, the plain meaning of W.C.C. § 23-2-230.B.6 requires that an applicant provide competent evidence demonstrating that "a diligent effort" was made to conserve Prime farmland in the "locational decision for the proposed use." (Emphasis added.) This requirement has nothing to do with the configuration of a proposed development *after* a "locational decision" has already been made. Rather, an applicant must use diligent efforts to conserve Prime farmland before it selects a location for proposed use. Moreover, a separate section of the Weld County Code requires proposed developments be "clustered" within a given site to conserve Prime farmland. *See* W.C.C. § 23-2-240.A.11. Thus, the BOCC's

attempt to interpret W.C.C. § 23-2-230.B.6 to require the exact same showing would render this separately enumerated Design Standard meaningless. *Colo. Med. Bd. v. Office of Admin. Courts*, 2014 CO 51, ¶ 19 (legislative text must be interpreted to give independent, non-duplicative meaning to each provision).

The incorrect reasoning in the District Court's non-binding Final Order is again instructive on this point. Because there is no evidence in the record that MMM made any effort to conserve Prime farmland in selecting the Proposed Site, the District Court ignored the plain meaning of W.C.C. § 23-2-230.B.6, which requires a showing of diligent efforts in the "locational decision" for the proposed use. (CF, p. 880.) By glossing over this issue, the District Court apparently found that this material element was inapplicable based on a contested assertion that the Proposed Site was previously taken out of agricultural production. (*Id.*) But this reasoning ignores that Prime farmland is a defined term and the designation is put in place by the U.S. Department of Agriculture. Consequently, the applicability of W.C.C. § 23-2-230.B.6 does not turn on recent use at the Proposed Site. The Proposed Site has been designated as Prime farmland and MMM was required to demonstrate compliance with W.C.C. § 23-2-230.B.6.

Ultimately, the District Court concluded that the BOCC "balanced the goal of preserving prime farmland with the other development goals." (AR, p. 880.)

But the Weld County Code does not provide for such an amorphous "balanced" approach—instead, a USR application must be denied when there is no competent evidence that an applicant made "diligent efforts" to conserve Prime farmland its "locational decision" for a proposed use.

Here, it is undisputed that MMM never considered existence of Prime farmland when it selected the Proposed Site. The BOCC is not permitted to counter "balance" this objective, but inconvenient fact. There is no evidence that MMM made "diligent efforts" to conserve Prime farmland, and the BOCC's decision must be reversed.

III. There Is No Competent Evidence That the Proposed Industrial Use Can Comply with the Applicable Noise Standard.

A. Standard of Review

This Court reviews the District Court *de novo* to determine whether the BOCC abused its discretion. *See* § I.A, *supra*. The BOCC abused its discretion if there is no credible evidence in the record to demonstrate that MMM met its burden to establish that the Proposed Industrial Use will meet all of the Weld County Operation Standards, including compliance with the applicable noise standard as set forth in W.C.C. § 23-2-250.A. *Id.*

B. Preservation of the Issue

The Appellant Neighbors argued before the District Court that the only credible evidence in the record (introduced by MMM) confirms that the Proposed Industrial Use will violate the applicable noise standard. (CF, pp. 485-86, 632-33, 801-02, 859-60.)

C. Discussion

W.C.C. § 23-2-230.B provides that a USR applicant must demonstrate compliance with all operations standards, including compliance with the applicable noise standard. W.C.C. § 23-2-250.A. In the Second Resolution, the BOCC correctly identifies the applicable noise standard to the Proposed Industrial Use as approved: 55 dB(A) during the day and 50 dB(A) at night at all boundaries of the Proposed Site that are adjacent to residential uses. (AR, p. 716.) The Second Resolution includes a conclusory assertion that the Proposed Use "has been mitigated" and that the noise standard will be met at all boundary lines without citation to the record. (*Id.*)

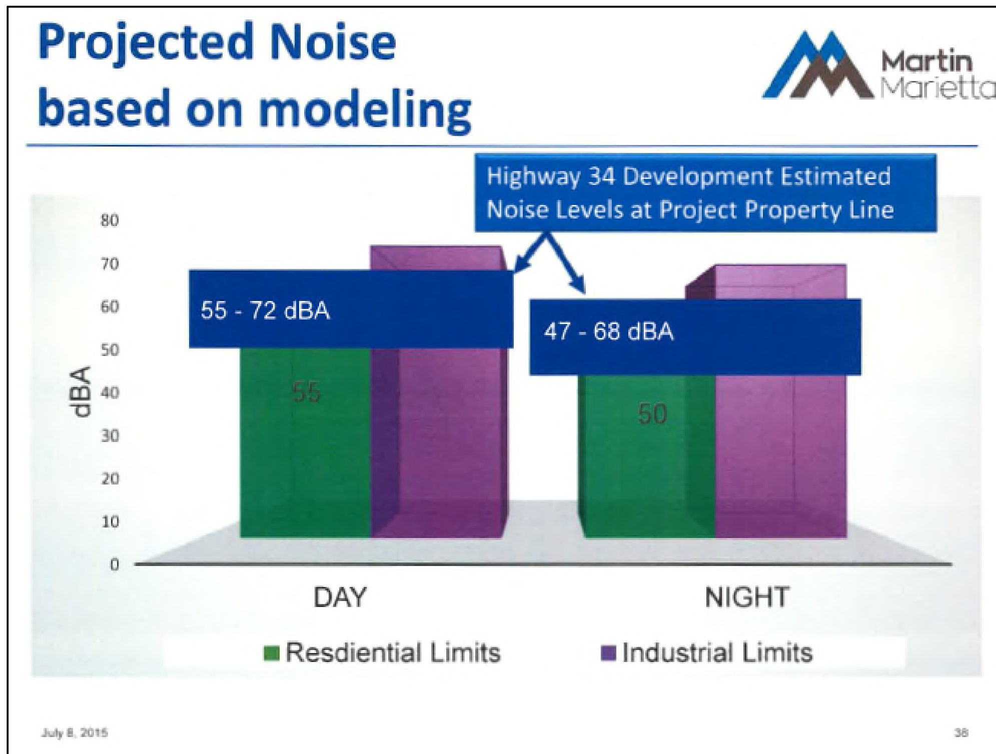
This conclusion, however, is directly contradicted by uncontroverted evidence in the record. Specifically, the noise report submitted by MMM confirms that even if all proposed noise mitigation is employed, the Proposed Industrial Use will still violate the applicable noise standard at neighboring residential properties:

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

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

(AR, p. 310 (highlighting added) (as explained in this report, PL1A – PL5 correspond to the adjacent property boundaries for seven residential lots surrounding the Proposed Site).)[8] Accordingly, even if MMM deploys all possible noise mitigation (as assumed in its noise study), the applicable residential noise standard will still be violated at five of seven adjacent residential property lines—day and night. (AR, pp. 305-11.) MMM's presentation materials at the Hearing further confirm that noise levels at adjacent residential boundaries will exceed the applicable residential noise standards:

[8] This graph is potentially confusing in that it claims that all of the property line receptors will "meet [the] maximum allowable 'Industrial' property line limit." While the study claims that the Proposed Industrial Use will comply with the industrial standard (not include the noise from trains), as approved by the BOCC, the Proposed Industrial Use must meet the residential noise standard at all adjacent residential property lines. This chart confirms that this standard will not be met.



(AR, p. 2589.)

The District Court declined to specifically address this issue and instead concluded—without citation—that the mitigation proposed by MMM "would ensure compliance with noise standards." (CF, p. 880.) This conclusion, however, ignores the fact that MMM's noise study assumed that all mitigation efforts would be employed before concluding that the Proposed Industrial Use would *still* violate the applicable residential noise standard at surrounding residential property lines. (AR, pp. 305-11.)

Like the District Court, neither the BOCC nor MMM can cite to anything in the record that demonstrates that the Proposed Industrial Use will comply with the

applicable noise standard. Consequently, there is no evidence in the record to show that MMM met its burden under W.C.C. § 23-2-250. The BOCC's decision must be reversed.

IV. The Proposed Industrial Use Is Not "Directly Related to" Agriculture and the Approval of the Application Constitutes *De Facto* Spot Rezoning from Agricultural to Industrial Use.

A. Standard of Review

This Court sits in the same position as the District Court under C.R.C.P. 106(a)(4) and therefore reviews the District Court's Final Order *de novo*. *See* § I.A, *supra*. Under C.R.C.P. 106(a)(4), this Court must determine whether the BOCC's adoption of the Second Resolution exceeded the BOCC's lawful authority. *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 9. A government action taken in violation of applicable law constitutes a *per se* abuse of discretion. *People v. Waddle*, 97 P.3d 932, 936 (Colo. 2004).

B. Preservation of the Issue

The Appellant Neighbors challenged the BOCC's approval of the Application before the District Court as unlawful *de facto* spot zoning that has no relationship to agriculture. (CF, pp. 621, 625-26, 797-98, 856.) In affirming the BOCC's adoption of the Second Resolution, the District Court addressed the Appellant Neighbors' *de facto* spot zoning argument and found that it could ignore

the requirement that a USR within an Agricultural Zone must be related to agriculture. (CF, pp. 874, 878-79.)

C. Discussion

The Proposed Industrial Use will convert the Proposed Site from its existing agricultural designation to a largescale, heavy industrial use. Under the Weld County Code, any use within the Agricultural Zone must be "directly related to or dependent upon agriculture." W.C.C. § 22-2-20.B. Despite this requirement, the BOCC ignored the underlying Agricultural Zone and approved the Proposed Industrial Use without any showing that MMM's asphalt and concrete plant will be "related to" agriculture. W.C.C. §§ 23-2-230.B.2, 23-3-10. The end result is that the BOCC has effectively rezoned the Proposed Site from Agricultural to Industrial for the narrow benefit of MMM and to the widespread detriment of all surrounding land users. The BOCC created an island of industrial property amidst a sea of longstanding residential and agricultural uses. The BOCC's approval of the Application is "[a]n attempt to wrench a single small lot from its environment and give it a new rating that disturbs the tenor of the neighborhood." *Linden Methodist Episcopal Church v. Linden*, 173 A. 593, 595 (N.J. 1934).

Colorado law expressly forbids the reclassification of an isolated parcel of land for the narrow benefit of a single land user (and to the detriment of all

surrounding neighbors and the uniformity of the comprehensive zoning scheme). Consequently, the BOCC exceeded its lawful authority by approving the *de facto* spot rezoning of the Proposed Site.

Colorado's prohibition against spot zoning is rooted in the fundamental tenet that "unless a zoning line is drawn somewhere there can be no zoning at all." *Clark v. Boulder*, 362 P.2d 160, 162 (Colo. 1961). In order to protect neighboring users and ensure the predictability of a holistic scheme of land use planning, an allegation of spot zoning examines "whether the change in question was made with the purpose of furthering a comprehensive zoning plan or [was] designed merely to relieve a particular property from the restrictions of the zoning regulations." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961). Colorado law prohibits unlawful spot zoning that "creates a small island of property with restrictions on its use different from those imposed on surrounding property." *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 63 (quoting *Little v. Winborn*, 518 N.W.2d 384, 387 (Iowa 1994)).

Colorado's prohibition on spot zoning was first recognized in *Clark v. Boulder*, 362 P.2d 160. There, the Colorado Supreme Court rejected an attempt to rezone property from residential to commercial to permit the operation of a gas station adjacent to another business park, which also contained a gas station. *Id.* at

161, 163. In reversing the reclassification from residential to commercial, the *Clark* Court refused to consider the fact that "the property may not be used as profitably for residential purposes as for commercial use" and instead focused on the neighbors' "right to rely on existing zoning regulations where there has been no material change in the character of the neighborhood which may require re-zoning in the public interest." *Id.* at 162. The *Clark* Court further confirmed that such a change in the permissible land use would only be legitimate:

> [I]f the character and use of a district or the surrounding territory have become so changed since the original [zoning designation] was enacted that the public health, morals, safety and welfare would be promoted if a change were made in the boundaries or in the regulations prescribed for certain districts; but mere economic gain to the owner of a comparatively small area is not a sufficient cause to involve an exercise of this amending power for the benefit of such owner.

Id. (quoting *Leahy v. Inspector of Bldgs.*, 31 N.E.2d 436, 439 (Mass. 1941)). Consistent with this reasoning, the *Clark* Court reversed the reclassification from residential to commercial use on the grounds that "there is no indication that the [decision] was intended to further the comprehensive general plan" and instead "has all the earmarks of a special act enabling the [applicant] to build" an incompatible land use. *Id.* at 161.

The present dispute involves the reclassification of the Proposed Site from the Agricultural Zone to a heavy industrial facility with no connection to agriculture in violation of the Weld County Code and with "all the earmarks" of a special handout to MMM. Although the Weld County Code permits a USR for the operation of certain mineral resource facilities on land within the Agricultural Zone, it nevertheless still requires that all such uses with the Agricultural Zone be "directly related to or dependent upon agriculture." W.C.C. § 22-2-20.B.

The District Court agreed that the record evidence confirms that the Proposed Industrial Use has "no more than a marginal relationship to agriculture." (CF, p. 879.) Despite this finding, the District Court concluded that the agricultural connection required under W.C.C. § 22-2-20.B could be ignored because the Proposed Industrial Use is one of the enumerated USR's that may be permitted within the Agricultural Zone. (*Id.*) The District Court, however, provides no legal justification for ignoring W.C.C. § 22-2-20.B. Rather than ignoring this operative language within the Weld County Code as "mere surplusage," an interpretation that correctly gives meaning to each provision of the Weld County Code dictates that any mineral resource facility operated as a USR within an Agricultural Zone must nevertheless still be related to or dependent upon agriculture. *See Bennett Bear Creek Farm Water & Sanitation Dist. v. City &*

Cnty. of Denver, 928 P.2d 1254, 1262-64 (Colo. 1996) ("We must give effect to the meaning, as well as every word of a statute if possible.").[9]

Here, however, the Proposed Industrial Use does not have "more than a marginal relationship to agriculture," and correspondingly, the Application constitutes a *de facto* rezoning of the Proposed Site from agricultural to industrial use. This reclassification was not based on any changed conditions with respect to the Proposed Site or the surrounding area—which has uniformly been used for either farming or rural residential purposes for decades. *Cf. Whitelaw*, 2017 COA 47, ¶¶ 64-65 (permitting residential property to be used for more dense residential use because such density was consistent with neighboring uses). The Proposed Site was selected by MMM based solely on MMM's narrow economic interests. (AR, p. 397 (confirming that MMM only considered locations for the Proposed

[9] Even if the District Court is correct that the Weld County Code's inclusion of mineral resource facilities in the list of potentially permissible USR's within the Agricultural Zone permits the BOCC to ignore whether or not a proposed use has any relationship to agriculture, the end result should not be to affirm the BOCC's approval of the Application. Rather, Colorado's prohibition on spot zoning dictates that such an arbitrary USR process—which in the District Court's estimation permits uses that are wholly inconsistent with the underlying zoning—must be deemed unlawful and unenforceable. *See, e.g.*, *Merrimac Planning Bd. v. Moran*, 17 LCR 92, 95 (Mass. Dist. 2009) (rejecting land use scheme that conferred "virtually unlimited authority" to "treat land disparately" to quasi-judicial body); *see also Kane v. City Council*, 537 N.W.2d 718, 723-24 (Iowa 1995) (suggesting that a zoning scheme could be unenforceable if it permits illegal spot zoning through administrative site development process).

Industrial Use where it could economically import aggregate by rail from Wyoming); *see also* R. Tr., p. 29:7-14.)

The District Court eschewed any consideration of the practical impact of the approved Application in favor of a blanket conclusion that spot zoning is inapplicable to "the administrative act of granting a variance or a special exception." (CF, p. 874.) But, no appellate court in Colorado has ever adopted such a sweeping conclusion that a USR process may never be challenged under *Clark*'s prohibition on spot zoning. To the contrary, this Court previously considered whether a "delineation" process that applied facts to law to classify parcels of land and establish permissible uses on a case-by-case basis could amount to unlawful spot zoning. *Carron v. Bd. of Cnty. Comm'rs*, 976 P.2d 359, 362 (Colo. App. 1998). Although the *Carron* Court concluded that there was no showing of preferential treatment sufficient to establish spot zoning in that case, it is instructive that the Court did not hesitate to apply *Clark* to what appears to have been an administrative land use process. *Id.*

Outside of Colorado, at least one court has concluded that an administrative process can be abused to the point that a quasi-judicial reclassification does amount to unlawful *de facto* spot zoning. *See, e.g.*, *Drews v. City of Hattiesburg*, 904 So. 2d 138, 141-42 (Miss. 2005). Blatant attempts to "bypass" the safeguards

of a legislative rezoning process (and the prohibition on spot rezoning) through an administrative process can and should be rejected as unlawful. *Id.* The District Court's refusal to consider the ramifications of the Proposed Industrial Use in light of *Clark* unnecessarily elevates form over function.

On the facts here, the proposed transformation of the Proposed Site is not from one type of use to a similar, but slightly more intensive, type of use. By approving the Application, the BOCC has granted MMM the authority to plow up 100 acres of alfalfa and convert the Proposed Site from an agricultural designation to a heavy industrial use. The Proposed Industrial Use is completely unrelated to agriculture. Nevertheless, the BOCC approved this change without any showing that the new use is consistent with the surrounding uses and/or the comprehensive zoning scheme. Rather, it was approved solely for the narrow economic interest of MMM.

Irrespective of the process used, the reclassification of the Proposed Site from agricultural uses to the Proposed Industrial Use—completely disconnected from any relationship to agriculture—is unlawful spot zoning in violation of Colorado law. The BOCC exceeded its lawful authority under Colorado law and its approval of the Application must be reversed.

V. The District Court Erred by Refusing To Order Production of *Ex Parte* Communications Between MMM and the BOCC While This Action Was on Remand.

A. Standard of Review

The fundamental fairness of a quasi-judicial proceeding is reviewed *de novo*. *Whitelaw*, 2017 COA 47, ¶ 8.

B. Preservation of the Issue

The Appellant Neighbors asked the District Court to order MMM and/or the BOCC to supplement the record with all *ex parte* communications that occurred during the remand period while the Application was remanded to the BOCC. (CF, pp. 743-52, 781-89.) The District Court denied such request. (CF, p. 810.)

C. Discussion

This Court should reverse the District Court's refusal to order that the record be supplemented with *ex parte* communications between the BOCC and MMM that occurred while the Application was on remand. Attorneys for MMM and the BOCC discussed the content of this case while the action was remanded for further quasi-judicial action before the BOCC. Such a situation is analogous to a litigant engaging in *ex parte* communications with a judge while an action is on remand before a district court. Although they have been requested and withheld, records of such communications have not been produced and thus, were not made a part of

the record on appeal. Because these *ex parte* communications taint the impartiality of the quasi-judicial proceeding before the BOCC on remand, they fatally undermine the fundamental fairness of the Second Resolution.

It is well-established under Colorado law that a governmental body's land use decisions are quasi-judicial in nature. *Margolis v. Dist. Court*, 638 P.2d 297, 304-05 (Colo. 1981). When a government decision is quasi-judicial in nature, "officials should be treated as the equivalent of judges." *Wells v. Del Norte Sch. Dist.*, 753 P.2d 770, 772 (Colo. App. 1987). Accordingly, Canon 2 of the Code of Judicial Conduct, which bars *ex parte* communications between judges and the parties before them regarding the substance of an action,[10] has been applied to overturn quasi-judicial decisions tainted by *ex parte* communications between the decision maker and one of the parties before it. *Id.* This prohibition on *ex parte* communications extends to the agents of the decision-making body when they serve as "intermediar(ies)" to the decision-making body itself. *Colo. Energy Advocacy Office v. Pub. Serv. Co.*, 704 P.2d 298, 302-04 (Colo. 1985).

As confirmed by the District Court's August 9, 2016 remand order, the BOCC's initial resolution did not contain findings of fact that would permit

[10] Rule 2.9 of the Colorado Code of Judicial Conduct provides that a judicial decision maker "shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter."

appellate review. (CF, pp. 705-07.) The District Court consequently remanded the case "to the BOCC to make the requisite findings of fact necessary for judicial review of its decision to approve the application." (CF, p. 707.) As a result, this action was on remand before the BOCC from August 9, 2016 through October 5, 2016, when the BOCC recertified the Second Resolution. (*See* CF, pp. 708-10.) Despite the remand—and more disconcertingly, because of it—attorneys for MMM and the BOCC engaged in *ex parte* communications during the remand period, which should not have occurred and which have not been produced. (CF, pp. 738-79.) These communications included emails with "defense attorneys discussing the [District Court] case" while this action was on remand before the BOCC. (*Id.*)

Despite the BOCC's admission that such *ex parte* communications occurred while this action on remand, the District Court refused to order their disclosure to supplement to the record. The District Court incorrectly found that such communications were privileged under the common interest doctrine. (CF, p. 810.) Without citing to anything in the record for support, the District Court summarily asserted that "[i]t is clear beyond any doubt that the Board's conclusions are unaffected by the communications." (*Id.*) The District Court was wrong on both counts.

First, the suggestion that communications are privileged subject to a common interest doctrine is misplaced in light of the divergent interests of MMM and the BOCC at the time these communications occurred. The challenged *ex parte* communications did not occur while the BOCC's action was on appeal before the District Court—they occurred while this action was on remand before the BOCC for further quasi-judicial action. Any legitimate common interest privilege that MMM and the BOCC may have enjoyed in defense of the Appellant Neighbors' C.R.C.P. 106 action before the District Court ceased to exist when the District Court remanded this case to the BOCC. During the remand, MMM reverted to its former position as applicant and the BOCC reverted to a purportedly neutral arbiter of an application in a quasi-judicial proceeding. The common interest doctrine was inapplicable during the remand period because, at that time, the parties could not as a matter of law have had "a common legal interest with respect to the subject matter" of their communications. *Cf. Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003). They were judge and litigant. The parties' pre-decisional[11] *ex parte* communications during the remand period cannot be protected by any cognizable privilege.

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[11] In their opposition before the District Court, MMM misidentifies these communications as "post-decisional." (CF, pp. 771-72.) While it is true that these communications did occur following the BOCC's original decision to approve the

Second, the District Court's unsupported pronouncement that the *ex parte* communications played no role in the Second Resolution is unavailing. (CF, p. 810.) The District Court never reviewed the offending *ex parte* communications and therefore could not possibly make a determination as to whether or not they improperly tainted the underlying quasi-judicial process on remand. Nevertheless, the District Court concluded—sight unseen—that communications between the parties in furtherance of the parties' alleged common interest in pushing through MMM's Proposed Industrial Use and defending against the Appellant Neighbors' legal challenge (*see* CF, pp. 758-69) had no bearing on the BOCC's allegedly impartial adoption of the Second Resolution. As it stands, neither the Appellant Neighbors nor this Court can say with any reasonable certainty whether *ex parte* communications between counsel for MMM and the BOCC in the immediate aftermath of the District Court's remand order and while the BOCC was reevaluating the Application had any bearing on the BOCC's drafting and adoption of the Second Resolution. All that can be said for certain is that the Appellant Neighbors have been prevented from confronting the record that existed before the BOCC during the remand period.

Application, they nevertheless occurred while this action was on remand before the BOCC and before the BOCC made its decision to adopt the Second Resolution that is now on appeal before this Court.

Under Colorado law, "parties to an administrative hearing should have the opportunity to be confronted with all facts that influence the disposition of a case," *L.G. Everist, Inc. v. Water Quality Control Comm'n of Colo. Dept. of Health*, 714 P.2d 1349, 1352 (Colo. App. 1986), and "questionable ex parte exchanges between an advocate and an adjudicatory tribunal may not be arbitrarily screened from appellate scrutiny." *Peoples Natural Gas. Div. of N. Natural Gas Co. v. Pub. Util. Comm'n*, 626 P.2d 159, 163 (Colo. 1981); *see also Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 908-09 (Colo. App. 2006) (quasi-judicial body may not consider new evidence presented after public hearing). If it cannot be determined whether improper *ex parte* communications impacted the quasi-judicial body's decision, the decision may properly be reversed. *Zuviceh v. Indus. Comm'n*, 544 P.2d 641, 642-43 (Colo. App. 1975).

The District Court's refusal to order the disclosure and supplementation of the record with all such *ex parte* communications fatally undermines the impartiality and ultimately, the legitimacy of the BOCC's adoption of the Second Resolution. These undisclosed *ex parte* communications regarding the substance of this matter while this action was on remand before the BOCC were not subject to any recognizable privilege and indelibly taint the quasi-judicial process. Accordingly, the BOCC's decision must be reversed.

CONCLUSION

The Proposed Industrial Use has no relationship to agriculture and constitutes an unlawful spot zoning from agricultural to industrial use. The BOCC's approval of the Application was entirely unsupported by the competent evidence and was undermined by *ex parte* communications. The Appellant Neighbors respectfully request that this Court to reverse the improper and unlawful approval of MMM's Application.

Respectfully Submitted: May 26, 2017

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CERTIFICATE OF SERVICE

I certify that on May 26, 2017, a true and correct copy of this Opening Brief was served via the Colorado Courts e-filing system on the following individuals:

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Weld County District Court
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