COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203 DISTRICT COURT, WELD COUNTY, COLORADO Case No. 2015CV30776 Hon. Judge Todd Taylor _____ 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 Julie Cozad, Pro-Tem Steve Moreno, Sean Conway, Michael Freeman, and Barbara Kirkmeyer); **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 _____ **Attorney for Defendant/Appellee Weld County:** Bruce T. Barker, Reg. # 13690 Weld County Attorney 1150 'O' Street, P.O. Box 758, Greeley, CO 80632 Phone: (970) 400-4390; Fax: (970) 352-0242 E-mail: bbarker@co.weld.co.us	▲ COURT USE ONLY ▲ _____ Case No. 2017CA463 (Appeal from Weld County District Court Case No. 2015CV30776)

DEFENDANT/APPELLEE WELD COUNTY'S ANSWER BRIEF

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 in these rules. Specifically, the undersigned certifies that:

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

☑ Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains **9,185** words.

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

☑ **In response to each issue raised**, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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

/s/ Bruce T. Barker
Bruce T. Barker, #13690

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ISSUES PRESENTED

1. Does the Administrative Record Contain Competent Evidence That USR 15-0027 Will Be Compatible with Existing Surrounding Uses?

2. Does the Administrative Record Contain Competent Evidence That the Applicants Have Made a Diligent Effort to Conserve Prime Farm Land in Their Locational Decision for USR 15-0027?

3. Does the Administrative Record Contain Competent Evidence That USR 15-0027 Will Satisfy the Development Standard for Noise in the BOCC's Amended Resolution?

4. Was the Approval of USR 15-0027 by the BOCC "Spot Zoning?"

5. Did the District Court Err in Issuing its "Order on Denying Plaintiffs' Motion for Order to Supplement the Certified Record," dated October 28, 2016?

STATEMENT OF THE CASE

Nature of the Case

This is an appeal pursuant to C.R.C.P. 106(a)(4) and C.A.R. (a)(1) of a decision made on August 12, 2015, by the Board of County Commissioners of Weld County ("the BOCC" or "Weld County") to approve an amendment to a Use-by-Special Review ("USR") permit for Weld LV, LLC (Weld LV"), and Gerrard Investments, LLC, c/o Martin Marietta Materials, Inc. ("MMM"). Collectively, Weld LV, LLC; Gerrard Investments, LLC; and Martin Marietta Materials, Inc., are referred to herein as "the Applicants." The USR is denominated "USR 15-0027." The Plaintiffs/Appellants ("the Opponent Neighbors") argued to the District Court that the BOCC had exceeded its jurisdiction or abused its discretion in approving USR 15-0027. The District Court rejected their arguments and affirmed the BOCC's decision by Order dated January 27, 2017. (CF, pp. 866-889.) In his Order, Judge Todd Taylor ruled the record supports the BOCC's findings that USR 15-0027 will be compatible with existing surrounding land uses. He also held the Administrative Record supports the BOCC's findings that the Applicants made diligent efforts to conserve prime farmland in their decision to locate at the site. Judge Taylor noted how the BOCC had imposed mitigation requirements to ensure compliance with noise standards. Finally, he ruled that the

BOCC's decision to approve USR 15-0027 was not an instance of unlawful "spot zoning."

The Opponent Neighbors also appeal the District Court's Order of October 28, 2016, which denied their motion asking the Court to require that certain privileged communications between defense counsel be added to the Administrative Record. (CF, p. 810.)

The Opponent Neighbors' Opening Brief argues Judge Taylor erred on the issues of compatibility, conservation of prime agricultural farmland, noise, spot-zoning, and "*ex-parte*" communications. (Opponent Neighbors' Opening Brief.) Weld County contends the law and the facts stated in the Administrative Record require the Court of Appeals to uphold the decision of the BOCC to approve USR 15-0027, and to affirm the District Court's Orders of October 28, 2016, and January 27, 2017.

Relevant Facts

USR 15-0027 and the BOCC Hearing.

USR 15-0027 is an amendment to USR-1584. (AR[1], p. 97.) USR-1584 was

[1] All citations to the Administrative Record ("AR") refer to the record before the BOCC. 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

previously approved by the BOCC. It allows an industrial use (operation of a construction business) on 42 acres owned by Gerrard Investments, LLC ("Gerrard") in central Weld County. When the 42 acres are added to an adjacent 90-acre parcel owned by Weld LV, there will total of 131.42 acres for USR 15-0027 (also referred to herein as "the Facility"). The 131.42 acres are one-half (½) mile south of U.S. Highway 34. USR 15-0027 is next to Weld County Road ("WCR") 13 and immediately adjacent to the Union Pacific Railroad ("UPRR") line. (R. Tr.,[2] pp. 4:10-6:7; AR. pp 97-100.) It will combine Gerrard's existing industrial use (construction business) with MMM's operation of an asphalt batch plant, a ready-mix concrete batch plant, materials processing, and an approximately 6,400-foot rail loop spur for transloading of materials. (R. Tr., p. 4:21-24; AR, pp. 174-179.)

USR 15-0027 lies in Weld County's A (Agricultural) Zone District ("the Ag Zone"). (AR, p. 116) The Ag Zone allows "Uses-by-Right" normally thought of

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prefix "USR15-0027 Martin Marietta." References to the Administrative Record in this Answer Brief are in the following form: "AR, Page."

[2] Because this is a C.R.C.P. 106(a)(4) appeal, references to the "transcript" are to the transcript of the BOCC hearing which occurred on August 12, 2015. The transcript pdf's use the prefix, "TRBOCC081215_Martin Marietta." References to the transcript herein are in the following form: "R. Tr., Page:Line."

as agricultural, such as farming, ranching, gardening, and grazing and feeding of livestock. W.C.C. § 23-3-20. It also allows certain industrial USR's, such as mineral resource development facilities, *including materials processing, asphalt and concrete batch plants and rail and truck transloading*[3] *of commodities and materials*. W.C.C. § 23-3-40 A.3, A.4, and A.7.

The criteria the BOCC must find to approve a USR are set forth in W.C.C. § 23-2-230 B[4], which requires the applicant to demonstrate:

1. That the proposal is consistent with in Chapter 22 and any other applicable code provisions or ordinances 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 the future DEVELOPMENT of the surrounding area as permitted by the existing zone and with future DEVELOPMENT as projected by Chapter 22 of this Code and any other applicable code provisions

[3] The term, "TRANSLOADING," is defined in W.C.C. § 23-1-90 as: A process of transferring a Commodity from one (1) mode of Transportation to another whose primary activity includes the following kinds of USES:

a. Rail and truck transloading of commodities and materials, including, without limitation, those for the agricultural and oil and gas industries, and including but not limited to grains, petroleum products, sand, pipe and storage related to the same.

[4] All references to the Weld County Code ("W.C.C.") may be found on Weld County's website at: www.weldgov.com.

or ordinances in effect, or the adopted MASTER PLANS of affected municipalities.

5. That the application complies with Article V of this Chapter if the proposal is located within any Overlay District Area identified by maps officially adopted by the County.

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.

The BOCC's hearing regarding USR 15-0027 on August 12, 2015, went from 9:30 a.m., until 11:07 p.m. (R. Tr., p. 2:10 and p. 306:19.) The BOCC heard testimony from County staff, witnesses called for and on behalf of the Applicants, and witnesses both for and against the proposal (all testimony is included in the Transcript). The BOCC reviewed documents, slides shown on screen, videos, and portions of W.C.C. Chapters 22 and 23, all of which was included in the Certified Record prepared for the District Court and the Administrative Record before the Court of Appeals. At the end of the hearing, the BOCC found the Applicants had demonstrated all seven (7) of the criteria set forth above. The BOCC approved USR 15-0027 on a unanimous vote. (R. Tr., pp. 294:11-306:8.)

The Importance of Rail and Road Infrastructure.

The site for USR 15-0027 was chosen because it is uniquely suited for the proposed use. Materials for processing will arrive by rail. Asphalt and concrete will be transported from the site to various locations in northern Colorado by truck. The combination of rail, County road system, and a major State highway enable such transportation to occur. Additionally, the flat nature of the property allows the rail loop to be built below grade so berms for noise control and screening purposes may be erected. The site is located within short distance to the markets where the products will be sold. (R. Tr., pp. 18:8-15; AR, pp. 83-84, 174-176, 182, 389-391, and 2579-2582.)

MMM's search for sites included 13 potential locations. All of them were along the UPRR line. (R. Tr., pp. 189:7-192:6; AR, pp. 389-391, and 395-399.)

The Weld County Comprehensive Plan promotes the siting of industrial uses in the Ag Zone where road and rail infrastructure is available to support it:

> A.Policy 2.2. **Allow commercial and industrial uses**, which are directly related to or dependent upon agriculture, **to locate within agricultural areas** when the impact to surrounding properties is minimal or mitigated and **where adequate services and infrastructure are currently available or reasonably obtainable.** These commercial and industrial uses should be encouraged to locate in areas that minimize the removal of agricultural land from production. (Emphasis added.) W.C.C. § 22-2-20 B.2.

> I.Goal 1. **Promote the location of industrial uses** within municipalities, County Urban Growth Boundary areas, Intergovernmental Agreement urban growth areas, growth management areas as defined in municipalities' comprehensive plans, the Regional Urbanization Areas, Urban Development Nodes, **along railroad infrastructure** or where adequate services are currently available or reasonably obtainable. (Emphasis added.) W.C.C. § 22-2-80 A.
>
> I.Goal 7. **Recognize the importance of railroad infrastructure to some industrial uses.** (Emphasis added.) W.C.C. § 22-2-80 G.

The Comprehensive Plan also requires applicants for industrial USR's to demonstrate that the roads serving the use are adequate in width, classification and structural capacity. Applicant are required to pay to improve roads if necessary.

> I.Policy 3.2 The land use applicant should **demonstrate that the roadway facilities associated with the proposed industrial development are adequate in width, classification and structural capacity to serve the development proposal.** (Emphasis added.) W.C.C. § 22-2-80 C.2.
>
> I.Policy 4.1. New development should **pay for the additional costs associated with those services directly impacted by the new industrial development.** (Emphasis added.) W.C.C. § 22-2-80 D.1.

MMM projects its initial traffic volumes as 560 round trips per day (1,120 trips per day) when the Facility opens in 2017. That number is projected to increase to 1,130 round trips per day (2,260 trips per day) by 2035. (R. Tr., p. 12:5-7.) As an arterial, WCR 13 is designed to handle about 17,000 trips per day. (R. Tr., p. 23:6-11.) U.S. Highway 34 currently carries about 42,000 trips per day, and is projected to increase to 68,000 trips per day in 2035. Martin Marietta's traffic

contribution to the area is projected to be two to three percent (2-3%) to as high as 8.4% of total traffic volume on U.S. Highway 34. (R. Tr., pp. 23:11-17, and 243:12-18; AR, pp. 256-304.)

WCR 13 and U.S. Highway 34 will have adequate width, classification and structural capacity to serve the vehicles accessing USR 15-0027. (AR, pp. 184, and 256-304.) The BOCC's Amended Resolution requires MMM to construct improvements to WCR 13 and U.S. Highway 34 to further ensure roadway serviceability to the site. This includes the installation of acceleration and deceleration lanes, and a traffic signal at the intersection of those two roadways. (CF, pp. 722-723.)

Changing Nature of the Surrounding Area.

Maps submitted into the Administrative Record at hearing show the area surrounding USR 15-0027 is changing from agriculture to a combination of agriculture, residential, commercial and industrial. (AR, pp. 2579-2582) The Town of Windsor and the City of Greeley have recognized this change by entering into an amended Intergovernmental Agreement ("IGA"). (AR, pp. 117-134.) It establishes a "Primary Employment Corridor" and "Secondary Corridor Area" south of U.S. Highway 34, extending east from WCR 13. Under the terms of the amended IGA, the USR 15-0027 site is within the area Greeley has authority to

annex. (AR, p. 133.) Both the Primary Employment Corridor and the Secondary Corridor Area contemplate properties being taken out of agriculture. The Town of Johnstown has approved the "Encore" development located to the west of WCR 13. It includes the conversion of 212 acres of agricultural lands to commercial and mixed use, and 220 acres from agriculture to mixed density residential. (R. Tr., pp. 72:2, and 73:13-74:4.) Also in Johnstown and located to the west of the USR 15-0027 site are a FedEx distribution facility and Feldspar Manufacturing. Both are considered "light-industrial." (R. Tr., pp. 78:18-79:8.) Finally, west of USR 15-0027, on land within Johnstown's Growth Management Area, lies an existing rail unloading facility that is used to unload sand used in oil and gas fracking operations. (AR, p. 183.)[5]

[5] At hearing, the Town of Johnstown submitted into the Administrative Record a resolution opposing USR 15-0027. (AR, pp. 740-741.) The BOCC considered Johnstown's concerns, but did not agree. (CF, ¶ 2.D at p. 717.) The BOCC's consideration was proper in accordance with Weld County Comprehensive Plan A.Policy 7.3, which says: "A municipality's adopted comprehensive plan should be considered, but should not determine the appropriateness of such conversion [from agriculture to industrial]." W.C.C. § 22-2-20 G.3.

Conditions of Approval and Development Standards to Ensure Compatibility.

The Amended Resolution imposes upon MMM a total of seven (7) conditions of approval ("COA") and forty-two (42) development standards ("DS"). (CF, pp. 722-732.) They include, but are not limited to, the following:

1. The road improvements detailed above. (COA's 1.A and E at CF, pp. 722-723.)
2. Limitation on the hours of operation for asphalt, concrete, and aggregate and recycling. (DS's 6.A-C at CF, pp. 727-728.)
3. Establishment of a Community Work Group of neighbors and MMM representatives to address concerns and to manage a $100,000 landscaping fund. MMM is required to maintain its landscaping/screening, which includes berms and grass around the railroad loop. (DS's 9, 34 and 35 at CF, pp. 728 and 731; AR, p. 177.)
4. Control of odors detected offsite to a seven-to-one (7:1) dilution. A certified "nasal ranger" is to be at the site at all times the asphalt plant is operating. (DS's 30 and 36 at CF, pp. 730-731.)
5. Control of fugitive dust and fugitive particulate emissions. (DS 18 at CF, p. 729.)

6. Noise is to be kept at the residential noise standard of 55 dB(A) daytime and 50 dB(A) nighttime measured at the property lines of adjacent residential lots. (DS 24 at CF, p. 730.)

7. Sources of light on USR 15-0027 must not shine directly onto adjacent properties to create a nuisance. (DS 32 at CF, p. 730.)

8. All structures must be painted in an earth tone color; decorative fencing in key areas must be installed. (COA's 1.H.5 and 1.H.11 at CF, p. 724.)

9. The Facility is required to comply with the Air Pollution Emission Notice (A.P.E.N.) permit requirements of the Colorado Department of Public Health and Environment ("CDPHE"). (DS 28 at CF, p. 730.)

As stated in the Amended Resolution, the BOCC found the seven (7) conditions of approval and forty-two (42) development standards will mitigate the impacts of USR 15-0027 and will ensure compatibility with surrounding land uses. (CF, ¶ 2.A on p. 714 and ¶ 2.C on p. 716.)

Procedural History

The Opponent Neighbors filed a timely C.R.C.P. 106(A)(4) appeal of the BOCC's August 12, 2015, approval of USR 15-0027. They have standing to do so, as detailed in their Opening Brief.

On August 9, 2016, the District Court remanded the matter to the BOCC for the inclusion of additional findings of fact into its Resolution of approval. (CF, pp. 705-707.) The BOCC did so and submitted its Amended Resolution to the District Court on October 5, 2016. (CF, pp. 708-732.)

By letter dated August 31, 2016, the Opponent Neighbors' attorneys submitted a Colorado Open Records Act ("CORA") request to the Weld County Attorney. (CF, pp. 741-742.) The request was for "all internal and external communications that: (1) relate to the Application or the Proposed Site; (2) were sent or received on or after August 1, 2016; and involve any Weld County employees and/or elected officials and/or anyone affiliated with or acting on behalf of Martin Marietta materials, Inc., Gerrard Investments, LLC, and Tetra Tech, Inc." The County Attorney responded by email on September 29, 2016, with a "Privilege Log" which included reference to emails exchanged between defense counsel (the County Attorney and attorneys for the Applicants) on August 9 and 15, 2016, that discussed the court case. (CF, pp. 738-739.) The "Privilege Log" listed the documents identified by the County Attorney which complied with the CORA request but were not provided because of the privilege exception stated in C.R.S. § 24-72-204(3)(a)(IV). The Opponent Neighbors filed a Motion for Order to Supplement the Certified Record, asking the District Court "to supplement the certified record

to include any and all communications between the BOCC (and/or its agents) and any of the Applicant Defendants (including any and all communications with any of these entities' principals, employees, agents, or representatives) . . ." (CF, pp. 743-752.) The District Court denied the Motion. In his order dated October 28, 2016, Judge Taylor ruled that the identified communications were privileged under a Common Interest Agreement for joint defense (CF, p. 758-769), and that the Opponent Neighbors had offered only speculation that the privileged communications affected the drafting of the Amended Resolution. Judge Taylor emphasized that the BOCC's findings of fact in its Amended Resolution are either "supported by the record, or they are not, regardless of the nature and effect of the communications." (CF, p. 810.)

After the filing of the Amended Resolution by the BOCC, the District Court allowed the Opponent Neighbors to submit a Supplemental Brief on October 28, 2016. (CF, pp. 733-736, and 790-809.) The BOCC, MMM and Gerrard filed Supplemental Answer Briefs on November 11, 2016. (CF, pp. 811-849.) The Opponent Neighbors submitted a Supplemental Reply Brief on November 17, 2016. (CF, pp. 850-864.)

The District Court's order affirming the BOCC's decision to approve USR 15-0027, was issued on January 27, 2017. (CF, pp. 866-889.) The Opponent Neighbors filed this appeal in a timely manner. (CF, pp. 890-899.)

SUMMARY OF THE ARGUMENTS

To grant a Use by Special Review permit, the BOCC must find the applicant has demonstrated compliance with W.C.C. § 23-2-230 B.3. It requires the proposed use to be compatible with existing surrounding land uses. The BOCC found that by requiring various methods and elements of impact mitigation in seven (7) conditions of approval and 42 development standards set forth in the BOCC's Amended Resolution, USR 15-0027 will be compatible with the existing surrounding land uses. There is competent evidence in the Administrative Record of such compatibility. As a result, the BOCC did not abuse its discretion or act in excess of its jurisdiction in approving USR 15-0027.

The BOCC interprets W.C.C. § § 23-2-230 B.6 to require an applicant to demonstrate that at the location it has chosen for a proposed USR, prime farmland will be conserved. USR 15-0027 will cluster industrial activities on the side of the property where 42 acres were previously taken out of agriculture through the previously approved USR-1584. Thirty (30) acres of the site will be kept in grass and will be conserved for future agricultural production. Thus, there is competent

evidence in the Administrative Record that the Applicants have made a diligent effort to conserve prime farm land in their locational decision for USR 15-0027. The BOCC did not abuse its discretion or act in excess of its jurisdiction in approving USR 15-0027.

There is competent evidence in the Administrative Record that USR 15-0027 will satisfy the noise standard set forth in DS 24 of the Board's Amended Resolution. By writing this development standard into the Amended Resolution, and hearing evidence that it could be complied with, the BOCC did not abuse its discretion or act in excess of its jurisdiction in approving USR 15-0027.

USR 15-0027 was not a rezoning. Rather, it was the granting of a special use permit in the Ag Zone of Weld County as allowed by W.C.C. § 23-3-40 A.3, A.4, and A.7. Consequently, the case was not "spot zoning," as alleged by the Opponent Neighbors.

The Opponent Neighbors argue that privileged communications among defense counsel on August 9 and 15, 2016, "tainted the impartiality of the quasi-judicial proceeding before the BOCC on remand," and thereby "fatally undermined the fundamental fairness" of the Amended Resolution. However, the Opponent Neighbors produced no evidence of substantial prejudice to them caused by these communications. More importantly, the District Court allowed the Opponent

Neighbors to file a Supplemental Brief on October 28, 2016, and a Supplemental Reply Brief on November 17, 2016. Those Briefs gave the Opponent Neighbors the opportunity to make additional arguments about the supplemental findings made in the BOCC's Amended Resolution, dated October 5, 2016. The District Court thereby ensured that fundamental fairness had occurred, and did not err in issuing its "Order on Denying Plaintiffs' Motion for Order to Supplement the Certified Record," on October 28, 2016.

ARGUMENTS

I. The Administrative Record Contains Competent Evidence That USR 15-0027 Will Be Compatible with the Existing Surrounding Uses.

A. Standard of Review.

Judicial review in a Rule 106(a)(4) proceeding is limited to whether the governmental entity's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the record before that entity. C.R.C.P. 106(a)(4)(I); *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 9, 297 P.3d 1052, 1055. An appellate court sits in the same position as the district court when reviewing an agency's decision under C.R.C.P. 106(a)(4); appellate review of the district court's decision is de novo. *Alward v. Golder*, 148 P.3d 424, 428 (Colo.App.2006). The question is whether the governmental entity exceeded its jurisdiction or abused its discretion, which occurs if the body misapplied the law or

no competent evidence supports its decision. *Alpenhof*, ¶ 9, 297 P.3d at 1055. "No competent evidence" means that the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Canyon Area Residents for the Environment v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 907 (Colo.App.2006) (quoting *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo.1996)). The role of the court is not to sit as a zoning board of appeals. *Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 188 Colo. 321, 534 P.2d 1212, 1216 (1975). The court cannot substitute its judgement for that of the governing entity. *Id.* (citing *Bd. of Cnty. Comm'rs v. Simmons*, 177 Colo. 347, 494 P.2d 85, 87 (1972) (courts should not interfere with decisions of zoning authorities unless the record shows a clear abuse of discretion).

If there is competent evidence in the Administrative Record of compatibility between the Facility and existing surrounding land uses in compliance with W.C.C. § 23-2-230 B.3, then the BOCC has not abused its discretion or acted in excess of its jurisdiction in approving USR 15-0027.

B. Preservation of the Issue.

The Opponent Neighbors have properly preserved the issue of whether the Administrative Record contains competent evidence that USR 15-0027 will be compatible with existing surrounding uses.

C. Argument.

Impact Mitigation and Compatibility.

In their Opening Brief, the Opponent Neighbors contend that USR 15-0027's proposed industrial uses of materials processing, asphalt and concrete batch plants, and transloading are incompatible with the existing surrounding agricultural, residential, commercial and light industrial uses. The sum of their argument is that heavy industry *must be incompatible* with these existing uses. They also argue that the neighbors oppose it, and *therefore it is incompatible*. The Opponent Neighbors' Opening Brief, pp. 22-23.

W.C.C. § 23-2-230 B.3, requires a USR applicant to demonstrate, "That the USES which would be permitted *will be compatible* with the existing surrounding land USES." (Emphasis added.) How can the Applicants in this case demonstrate USR 15-0027 will be compatible with these existing surrounding uses?

The answer lies in the Weld County Comprehensive Plan, which is intended to serve "as the foundation of all land use and development regulations in the County." W.C.C. § 22-1-10 A. It forms "the basis for the rules and regulations that govern planning, zoning subdivisions and land use." W.C.C. § 22-1-10 A.

A way to demonstrate compatibility is to show that the impact to surrounding properties will be mitigated:

A.Policy 2.2. Allow commercial and industrial uses, which are directly related to or dependent upon agriculture, to locate within agricultural areas **when the impact to surrounding properties is minimal or mitigated** and where adequate services and infrastructure are currently available or reasonably obtainable. These commercial and industrial uses should be encouraged to locate in areas that minimize the removal of agricultural land from production. (Emphasis added.) W.C.C. § 22-2-20 B.2.

A.Policy 7.1. County land use regulations should support commercial and industrial uses that are directly related to, or dependent upon, agriculture, to locate within the agricultural areas, **when the impact to surrounding properties is minimal, or can be mitigated,** and where adequate services are currently available or reasonably obtainable. (Emphasis added.) W.C.C. § 22-2-20 G.1.

A.Policy 7.2. Conversion of agricultural land to nonurban residential, commercial and industrial uses should be accommodated **when the subject site is in an area that can support such development, and should attempt to be compatible with the region.** (Emphasis added.) W.C.C. § 22-2-20 G.2.

Such mitigation may be imposed by the BOCC through imposition of conditions of approval and development standards:

Where reasonable methods or techniques are available to mitigate any negative impacts which could be generated by the proposed USE upon the surrounding area, the Board of County Commissioners may condition the decision to approve the Special Review Permit upon implementation of such methods or techniques and may require sufficient performance guarantees to be posted with the COUNTY to guarantee such implementation. (Emphasis added.) W.C.C. § 23-2-230 C.

Buffering or SCREENING of the proposed USE from ADJACENT properties may be required in order to make the determination that the proposed USE is compatible with the surrounding uses. Buffering or SCREENING may be accomplished through a combination of berming, landscaping and fencing. (Emphasis added.) W.C.C. § 23-2-240 A.10.

As mentioned above, the Amended Resolution imposes upon MMM seven (7) COA's and forty-two (42) DS's to ensure compatibility and to mitigate the impacts to surrounding properties. (CF, pp. 722-732.) These methods and elements of mitigation were offered by the Applicants in various documents submitted into the Administrative Record and through testimony at the August 12, 2015, hearing, and *constitute competent evidence that USR 15-0027 will be compatible with existing surrounding land uses*.

The genesis of the methods and elements of mitigation was the community outreach conducted by MMM before, during and after the application submittal for USR 15-0027. Community meetings were held on January 27, June 9, June 24, and July 9, 2015. (R. Tr., pp. 31:23-33:3; AR, pp. 185-187). Information regarding the January 27, 2015, and June 9, 2015, meetings is summarized in the Administrative Record. (AR, pp. 392-394, and 609-680.) A response to 20 questions raised by persons who attended the June 9, 2015, meeting was produced by MMM. The response details many of the mitigation measure proposed by the Applicants for USR 15-0027. (AR, pp. 2383-2398.) A map showing various local concerns is in the Administrative Record. (AR, p.198.) The concerns are summarized at AR, p. 2584. (R. Tr., p. 33:9-16.) Each of these concerns was addressed in the USR application and its associated letter. (AR, pp. 173-195.)

MMM engaged various experts to address these concerns. (R. Tr., p. 33:16-34:8; AR, p. 2585.)

Evidence in the Administrative Record of Impact Mitigation and Compatibility.

Evidence in the Administrative Record of the methods and elements of impact mitigation includes the following:

The Applicants have agreed to mitigate the increases in traffic volumes on WCR's 13 and 54, and U.S. Highway 34, by installing a traffic light at the 13 and 34 intersection and by installing acceleration, deceleration and/or turn lanes on those roadways. (R. Tr., pp. 24:19-27:1.) These improvements are detailed in a Memorandum authored by Janet Lundquist, Traffic Engineer, Weld County Public Works, dated July 6, 2015. (AR, pp. 700-701.) The improvements are required by the Amended Resolution. (COA's 1.A and 1.E at CF, pp. 722-723.)

The Applicants initially desired to operate 24 hours a day, seven (7) days a week. (AR, p. 191.) However, in response to the community concerns, they scaled the proposed hours back significantly. (AR, pp. 387-388.) The hours of operation were discussed extensively at the hearing, resulting in the restrictions contained in the Amended Resolution. (R. Tr., pp. 256:22-259:11, and 281:5-285:2; DS's 6.A-C at CF, pp. 727-728.)

The Community Work Group was offered by MMM to "make sure [it's] Facility operates consistent with all development standards and conditions of approval as well as provides a way for [MMM] and the neighbors to regularly communicate regarding any issues of concern." The Group will consist of neighbors and MMM representatives. (R. Tr., pp. 208:4-209:3; AR, p. 240.) It will also manage a $100,000 landscaping fund to pay for landscaping on adjacent properties to enhance screening. (R. Tr., pp. 39:21-40:2; 207:3-19.)

Three (3) different odor control measures will be incorporated into the Facility. (AR, p. 2588.) These measures will include vertical liquid asphalt/cement tanks, which will minimize the surface area of the liquids to emit less odor. An emission capture and carbon filters will also minimize odors. (R. Tr., pp. 35:20-36:4.) The goal is to remove odors, not mask them. (R. Tr., pp. 230:11-231:19.) Odor standards will be enforced by the Weld County Department of Public Health and Environment ("WCDPHE"). (R. Tr., pp. 15:15-21; 241:9-17.) The Amended Resolution requires that odors detected off-site are not to exceed a seven-to-one (7:1) dilution, and that certified "nasal ranger" be at the site at all times the asphalt plant is operating. (DS's 30 and 36 at CF, pp. 730-731.)

The Dust Abatement Plan for the Facility, dated June 24, 2015, includes a number of dust mitigation techniques which will be incorporated into the Facility.

(AR, p. 242.) Inactive exposed areas will be vegetated. A partially enclosed hopper and water sprays will be used to control dust from unloading of train cars. Water trucks will spray exposed areas and main roads will be paved. The Facility will be designed to minimize dust enclosure, including baghouse enclosures and water sprays. A street sweeper will be utilized on paved surfaces. (R. Tr., p. 35:15-20; AR, pp. 242 and 2587.)

DS 24 of the Amended Resolution requires maximum permissible noise levels meeting the residential standard of 55 dB(A) daytime and 50 dB(A) nighttime measured at the property lines of adjacent residential lots, and the industrial standard of 80 dB(A) daytime and 75 dB(A) nighttime at all other locations on the site. (DS 24 at CF, p. 730; AR, pp. 704-705.) Mitigation measures will include redesigning the rail loop with a 700 foot setback from the northeastern property line, clustering of industrial activity on the west half of the property, and installing several vegetated berms. (R. Tr., pp. 36:18-38:11; AR, pp. 311 and 2590.) The below grade hopper for unloading trains, enclosing the concrete plant in a building, and a circular truck route will also mitigate noise impacts. (R. Tr., p. 38:3-8; AR, pp. 2591-2592.) With these mitigation measures in place, the decibel rating at adjacent residences will be no more than 50/55 dB(A). (R. Tr., pp. 204:10-205:7.) A noise monitoring program will be followed by MMM. (AR, p. 312.) Staff from the

WCDPHE will enforce the noise requirements. (R. Tr., p. 15:15-21.)

A noise analysis by Paul Burge, INCE Bd. Cert., of AECOM, dated March 26, 2015, was submitted into the Administrative Record. (AR, pp. 305-311.) He provided an addendum to his analysis dated August 10, 2015. (AR, pp. 2731-2734.) As modeled, noise levels will be within required limits. (AR, pp. 2370-2371, and 2589.)

Two (2) types of lighting will be used on the Facility. The first type is operational lighting, and MMM has agreed to reduce its pole heights from 35 to 25 feet. The 25-foot height is typical of "dark sky ordinances" found elsewhere. (R. Tr., pp. 232:18-233:2.) All lighting is "directional full cutoff," meaning it shines only down on the ground. (R. Tr., p. 233:2-5.) Security lighting is on motion sensors. (R. Tr., p. 233:13-15.) MMM has also agreed to shield all sources of light so that light rays will not shine directly onto adjacent properties to cause a nuisance or interfere with adjacent land uses. (AR, p. 179.)

MMM has agreed to install decorative fencing at certain locations (R. Tr., p. 230:1-6.), and to modify its paint schemes. (R. Tr., 225:19-226:21.) The visual mitigation will also be enhanced by the installation of the vegetative berms. (AR,

p. 177; AR, p. 2593-2598.)[6]

Finally, MMM is required by the Amended Resolution to comply with the Air Pollution Emission Notice (A.P.E.N.) permit requirements of the Colorado Department of Public Health and Environment. (R. Tr., pp. 34:11-35:6; AR, p. 2586; DS 28 at CF, p. 730.) David R. Stewart, President and CEO of Stewart Environmental Consultants, Inc., provided an Air Emissions Assessment. (AR, pp. 349-363.) He also submitted follow-up letters. (AR, pp. 165, and 2393-2405.) Dr. Stewart concluded that particulate matter concentrations at the property boundary and nearest residence will be at or below National Ambient Air Quality Standards ("NAAQS") levels. The CDPHE will not issue an air quality permit until MMM demonstrates compliance with NAAQS. (AR, p. 2402.) Mr. Stewart studied hazardous air pollutants ("HAP") emissions modeling for the Facility that included benzene, ethylbenzene, formaldehyde, hexane, toluene, and xylenes. He concluded that:

> "The HAP values are well below both the EPA Safe Concentration Threshold and Reference Exposure Levels (RELS) for the State of California's Office of Environmental Health Hazard Assessment (OEHHA). California has instituted the most stringent emission policies in the country, and the Highway 34 Facility complies with those levels. **Our conclusion is**

[6] In separate letters submitted to the BOCC, the City of Greeley and the Town of Windsor both asked for the same visual mitigation measures: The installation of earthen berms and the shielding of light sources. (AR, pp. 716-717, and 759-760.) The berms and lighting by MMM will satisfy these requests.

> **that this Facility will not negatively impact the surrounding environment or affect human health as it will meet all environmental standards.**" (Emphasis added.) (AR, p. 361.)

In his July 20, 2015, letter, Mr. Stewart revised his estimates regarding formaldehyde, but concluded that, "actual formaldehyde emissions are expected to be within the carcinogenic screening level. In addition, the Highway 34 Facility will be adding activated carbon to the control measures, which was not included in the original calculation." (AR, p. 2403.) Concern was expressed during the hearing about metals emitted from the Facility that would have an adverse effect on an adjacent organic farm. (R. Tr., p. 178:5-19.) Mr. Stewart addressed the issue, concluding, "that if I took all the metal that came out of [the] Facility and placed them on top of the [organic] farm, it would represent less than one percent of the metals that already exist" on the farm. (R. Tr., pp. 201:12-203:23 and 204:3-5.)

Dr. Scott Phillips, a Denver physician, addressed air-borne health concerns of the Facility. (AR, pp. 346-348.) Dr. Phillips did not see anything coming from the Facility that would give him concern "for causing any cute or chronic health effects." (R. Tr., p. 200:12-14.)

The Administrative Record contains competent evidence that USR 15-0027 will be compatible with existing surrounding land uses, *because of the methods and*

elements of mitigation contained in the COA's and DS's of the Amended Resolution. The Weld County Comprehensive Plan and W.C.C. §§ 23-2-230 C. and 23-2-240 A.10. allow the BOCC to make such a finding of compatibility.

II. The Administrative Record Contains Competent Evidence That the Applicants Have Made a Diligent Effort to Conserve Prime Farmland in Their Locational Decision for USR 15-0027.

A. Standard of Review.

The appeals court sits in the same position as the district court when reviewing an agency's decision under C.R.C.P. 106(a)(4). Appellate review of the district court's decision is de novo, and is limited to a determination of whether the governmental entity's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the administrative record. *See* § I.A., *supra*.

When courts interpret local government code language, they are to give deference to the interpretation provided by the officer or agency charged with the administration of the code unless that interpretation is inconsistent with the legislative intent manifested in the text. *Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1141 (Colo. App. 2010). Courts must give effect to the ordinary meaning of the language and read the provisions as a whole, construing each consistently and in harmony with the overall design of the code, if possible. *Id.* Additionally, interpretations that produce illogical or absurd results must be avoided. *Id.*; s*ee also*

Waste Mgmt. of Colo., Inc. v. City of Commerce City, 250 P.3d 722, 725 (Colo. App. 2010).

If there is competent evidence in the Administrative Record that the Applicants made a diligent effort to conserve prime farmland in their locational decision for the Facility in compliance with W.C.C. § § 23-2-230 B.6, then the BOCC has not abused its discretion or acted in excess of its jurisdiction in approving USR 15-0027.

B. Preservation of the Issue.

The Opponent Neighbors have properly preserved the issue of whether the Administrative Record contains competent evidence that the Applicants have made a diligent effort to conserve prime farm land in their locational decision for USR 15-0027.

C. Argument.

W.C.C. § § 23-2-230 B.6 requires the BOCC to find:

> 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.

As stated above, the siting of USR 15-0027 was highly dependent upon the availability of rail and road infrastructure. Also important was not having MMM truck traffic going through towns and urban development. Finally, close proximity

to markets was a big factor in the locational decision. (R. Tr., pp. 18:11-15; AR, pp. 83, 174-176, 182, 389-391, and 2579-2582.)

The BOCC found the Applicants complied with the "diligent effort to conserve prime farmland" requirement by their decision to cluster the bulk of the industrial activities on the western 42 acres already taken out of agriculture through USR-1584. (CF, ¶ 2.F on p. 718; R. Tr., p. 18:15-19.) That leaves 30 acres as open irrigated grassland when USR 15-0027 is operating. (Evidence of clustering and the conservation of prime farmland on the Martin Marietta site is found by viewing and comparing the diagrams and depictions at AR, pp. 2559-2564.) The 30 acres will serve as a buffer to adjacent properties and may be returned to agricultural production when the Facility ceases operation. (R. Tr., p. 188:17-21.)

The clustering of the activities in this manner complies with W.C.C. § 23-2-240 A.11, which requires:

> Uses by Special Review in the A (Agricultural) Zone District shall be located on the least prime soils on the property in question unless the applicant can demonstrate why such a location would be impractical or infeasible.

The BOCC's interpretation of W.C.C. § § 23-2-230 B.6 makes sense. It says the USR applicant must demonstrate that the chosen site will allow for the conservation of prime farmland. This may be demonstrated by showing the

industrial activities will be clustered on that portion of the property with least prime soils, and that the other parts of the property with prime farmland will be conserved for future agricultural production.

The BOCC's interpretation recognizes the most important decision point for an industrial use will be location to existing infrastructure and markets. The interpretation creates consistency between W.C.C. § § 23-2-230 B.6 and W.C.C. § 23-2-240 A.11. It is also consistent with Weld County Comprehensive Plan's A.Policy 2.2. and A.Policy 7.2., which encourage the County's land use regulations to allow industrial uses to locate within agricultural areas (where prime farmland exists). W.C.C. § 22-2-20 B.2 and W.C.C. § 22-2-20 G.2. Lastly, the BOCC's interpretation is in harmony with W.C.C. § 23-3-10, which says that the Ag Zone is intended "to provide areas for the conduct of Uses-by-Special Review which have been determined to be more intense or to have a potentially greater impact than USES Allowed-by-Right." That cannot happen if industrial USR applicants are second-guessed by neighbors who claim the applicants' efforts to conserve prime farmland *just aren't diligent enough*.

There is competent evidence in the Administrative Record that the Applicants have made a diligent effort to conserve prime farm land in their locational decision

for USR 15-0027. The BOCC has not abused its discretion or acted in excess of its jurisdiction in approving USR 15-0027.

III. The Administrative Record Contains Competent Evidence That USR 15-0027 Will Satisfy the Development Standard for Noise in the BOCC's Amended Resolution.

A. Standard of Review.

The appeals court sits in the same position as the district court when reviewing an agency's decision under C.R.C.P. 106(a)(4). Appellate review of the district court's decision is de novo, and is limited to a determination of whether the governmental entity's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the administrative record. *See* § I.A., *supra*.

If there is competent evidence in the Administrative Record that the Facility will satisfy the noise standard set forth in DS 24 of the Board's Amended Resolution, then the BOCC has not abused its discretion or acted in excess of its jurisdiction in approving USR 15-0027.

B. Preservation of the Issue.

The Opponent Neighbors have properly preserved the issue of whether the Administrative Record contains competent evidence that USR 15-0027 will satisfy the development standard for noise in the BOCC's Amended Resolution.

C. Argument.

W.C.C. § 23-2-250 A. requires that USR 15-0027 "comply with the noise standards enumerated in Section 25-12-101, C.R.S." DS 24 of the Amended Resolution requires maximum permissible noise levels meeting the residential standard of 55 dB(A) daytime and 50 dB(A) nighttime measured *at the property lines of adjacent residential lots*, and the industrial standard of 80 dB(A) daytime and 75 dB(A) nighttime at all other locations on the site. (Emphasis added.) (DS 24 at CF, p. 730.)

The Opponent Neighbors argue in their Opening Brief at pp. 29-33 that USR 15-0027 cannot meet the Residential standard. As support for this argument, they include Table 6A from Paul Burge's noise analysis, dated March 26, 2015, on p. 31 of their Brief. (AR, p. 309.) But the inclusion of Table 6A is misleading. The proper table to consider is Table 6B. (AR, p. 309.) It shows the "Predicted Project Noise Levels *at Receiver Locations*." (Emphasis added.) The receiver locations are explained on Tables 3 and 4 (AR, p. 307) and shown on a map (AR, p. 311). The receiver locations are at the adjacent surrounding residences. Table 6B reveals that at the nearby residences, the Residential standard of 55 dB(A) daytime will be met when the planned mitigation measures are implemented. The nighttime standard of 50 dB(A) will also be met, except at locations R4A, R4B, and R5 for "occasional

nighttime operations," which would put those readings one (1) to five (5) decibels higher than allowed. (AR, p. 309.) If such nighttime operations exceed the nighttime standard of 50 dB(A) at the receiver locations, DS 24 would require either that such operations cease or be mitigated to bring the noise within the standard.

Opponent Neighbors' inclusion of MMM's chart from AR, p. 2589 in their Opening Brief at p. 32 is also misleading. It does not, as they impliedly assert, show only predicted noise at the adjacent surrounding residences. Rather, it is a general depiction of predicted noise levels at *all* places around the USR 15-0027 property, both residential and non-residential, involving a range of noise levels from the low of residential to the high of industrial. It should be remembered that in addition to setting the Residential standard for noise at residential locations, DS 24 *allows the industrial noise standards at all non-residential locations*. (DS 24 at CF, p. 730.) Therefore, their statements regarding the chart at AR, p. 2589 are correct.

The Administrative Record contains competent evidence that USR 15-0027 will satisfy DS 24 for noise set forth in the BOCC's Amended Resolution.

IV. The Approval of USR 15-0027 by the BOCC Was Not "Spot Zoning."

A. Standard of Review.

The seminal case on "spot zoning" in Colorado is *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961). It involved the rezoning of a property from

"Residence 3" to "Business 1" with the goal of allowing the construction of a filling station. The *Clark* Court held, "In determining whether spot zoning is involved, the test is whether the change in question was made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations." *Id.*, 362 P.2d at 531.

The approval of a conditional use or special review permit *was not* at issue in the *Clark* case.

B. Preservation of the Issue.

The Opponent Neighbors have properly preserved the issue of whether the approval of USR 15-0027 by the BOCC was "spot zoning."

C. Argument.

"Direct Relationship To or Dependent Upon Agriculture."

In their Opening Brief, the Opponent Neighbors argue that this industrial use has no "direct relationship to and is not dependent upon agriculture," and therefore it cannot be located in the Ag Zone. They argue the BOCC was required to make that exact finding and failed to do so. The Opponent Neighbors contend that without this exact finding, the approval of USR 15-0027 amounted to illegal "spot zoning." Opponent Neighbors' Opening Brief, pp. 33-40.

The phrase "directly related to or dependent upon agriculture" *is not* one of the seven (7) criteria listed in W.C.C. § 23-2-230 B. Rather, it is part of the legislative directives to the BOCC contained in the Weld County Comprehensive Plan. Specifically, together A.Goal 2., A.Policy 2.2., Recommended Strategy A.2.2.a., A.Goal 7., A.Policy 7.1., and Recommended Strategy A.7.1.a., require the BOCC to enact land use regulations that allow certain industrial uses in the Ag Zone "that are directly related to, or dependent upon, agriculture." W.C.C. § 22-2-20 B, W.C.C. § 22-2-20 B.2, W.C.C. § 22-2-20 B.2.a, W.C.C. § 22-2-20 G, W.C.C. § 22-2-20 G.1, and W.C.C. § 22-2-20 G.1.a. The BOCC has done so by adopting W.C.C. § 23-3-20 (allowing Uses-by-Right) and W.C.C. § 23-3-40 (allowing certain Uses-by-Special Review). When the BOCC legislatively enacted W.C.C. § 23-3-40 A.3, A.4, and A.7, it determined that mineral resource development USR's, *including materials processing, asphalt and concrete batch plants and rail and truck transloading of commodities and materials*, are "directly related to, or dependent upon, agriculture."

W.C.C. § 23-2-230 B.1 requires the applicant to demonstrate:

> 1. That the proposal is consistent with in Chapter 22 and any other applicable code provisions or ordinances in effect.

For the BOCC to conclude that the Applicants met this burden for USR 15-0027, it needed to find that the Facility fit into the Ag Zone as a "materials

processing, asphalt and concrete batch plant and transloading of commodities and materials." W.C.C. § 23-3-40 A.3, A.4, and A.7. The BOCC made this finding in its Amended Resolution. (CF, ¶2.B at p. 715.)

The BOCC was not required at the hearing on August 12, 2015, to make a separate finding that the Facility was "directly related to or dependent upon agriculture," as contended by the Opponent Neighbors.

"Spot Zoning."

The concept of "spot zoning" relates to *rezoning, not the approval of a USR*. "Spot zoning" in Colorado is where there is a change of zone for an area that is contrary to a comprehensive zoning plan. *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 (1961). *Clark* addressed a specific *rezoning* of property. It did not involve the granting of a *conditional use* or *special exception*. The District Court properly recognized this distinction between rezoning and the granting of a USR permit, citing Footnote 1 of 3 Rathkopf's *The Law of Zoning and Planning* § 41:2 (4th ed.), which states:

> The grant of a variance or special exception that has the same effect as a small parcel rezoning cannot be attacked as spot zoning. 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. *(Citations omitted.)*

Cases in other states have held that approval of a conditional use or special exception is not "spot zoning." *See Kiss v. Board of Appeals of Longmeadow*, 371 Mass. 147, 355 N.E. 2d 461, 467 (1976) (the granting of a special permit does not constitute spot zoning); *Rocchi v. Zoning Bd. of Appeals*, 157 Conn. 106, 248 A.2d 922, 925 (1968) ("plaintiff's claims that the granting of the special exception constituted spot zoning is not well founded . . . A special exception does not involve a change of zone but rather a permitted use when certain conditions specified by the ordinance are met."); *Weeks v. City of Bonner Springs*, 213 Kan. 622, 518 P.2d 427, 435 (1974) (the granting of a special permit is not invalid spot zoning); and *Foster v. City of Pass Christian*, 117 So. 3d 658, 660 (2013) (approval of a special-use exception was not spot zoning, because it did not involve rezoning or the reclassification of a zoning ordinance). *See also* Salkin, *2 Am. Law. Zoning* § 14.1 (5th ed.), which explains how the approval of a special use permit cannot "serve as the basis for a spot zoning claim."

The Opponent Neighbors mischaracterize *Carron v. Bd. of Cnty. Comm'rs*, 976 P.2d 359 (Colo. App. 1998). Opponent Neighbors' Opening Brief, p. 39. *Carron* involved the designation of uses allowed on a specific property in a zone called, "Foothills/Valley," in Ouray County, Colorado. The designation was to determine what allowed uses would be "consistent with prior historical use and the

unique character of that area." There was no change of zone. The *Carron* Court *did not* "apply *Clark*, *supra*, to what appears to have been an administrative land use process," as argued by the Opponent Neighbors. To the contrary, the *Carron* Court cited *Clark* merely to explain that the Ouray County designation procedure *was not spot zoning*. If anything, *Carron* confirms that in Colorado, the concept of "spot zoning" does not apply to the determination of the type of uses which may occur on a property within a zone where no rezoning has occurred.

The Opponent Neighbors cite no Colorado cases supporting their contention that a quasi-judicial process to allow a conditional use permit or special exception in a zone, without rezoning, is illegal "spot zoning."

In Weld County, rezoning of properties are case-by-case changes to the County's Official Zoning Map.[7] Conversely, the process of approving a USR is a quasi-judicial proceeding to determine if the proposed land use is one of the uses listed in W.C.C. § 23-3-40, and if it complies with the criteria listed in W.C.C. § 23-2-230 B.

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[7] W.C.C. § 23-2-10. - Amendment procedures.

A. The Board of County Commissioners may amend the Official Zoning Map of Weld County. All requests for such changes of zone must be reviewed by the Planning Commission, whose recommendation shall be sent to and considered by the Board of County Commissioners. Such amendments shall be made in compliance with state statutes and with COUNTY procedures and regulations as established herein.

The approval of USR 15-0027 *was not* a rezoning. It *was not*, as the Opponent Neighbors say on p. 37 of their Opening Brief, "the reclassification of the Proposed Site from the Agricultural Zone to heavy industrial facility." Instead, it was the approval of a special permit for an industrial use that is allowed as a USR in the Ag Zone under W.C.C. § 23-3-40 A.3, A.4, and A.7.

For the above-stated reasons, the approval of USR 15-0027 was not "spot zoning," as argued by the Opponent Neighbors.

V. The District Court Did Not Err in Issuing its "Order on Denying Plaintiffs' Motion for Order to Supplement the Certified Record," dated October 28, 2016.

A. Standard of Review.

Consideration of an application for a special use permit is a quasi-judicial action. *Bd. of Cnty. Comm'rs. v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996). Quasi-judicial decision-makers of a local governmental entity are entitled to a "presumption of integrity, honesty, and impartiality." *Whitelaw v. Denver City Council*, 2017 COA 47, ¶11 (quoting *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983). To rebut this presumption, evidence of substantial prejudice must be presented. *Whitelaw*, 2017 COA 47, ¶11.

B. Preservation of the Issue.

The Opponent Neighbors have properly preserved the issue of whether the District Court erred in issuing its "Order on Denying Plaintiffs' Motion for Order to Supplement the Certified Record," dated October 28, 2016.

C. Argument.

Without support, the Opponent Neighbors contend defense counsel were prohibited from communicating during the time this matter was on remand to the BOCC for further fact finding between August 9, 2016, and October 5, 2016. The Opponent Neighbors believe the privileged emails exchanged among defense counsel, on August 9 and 15, 2016, were "*ex parte*." They argue these "ex parte" communications "tainted the impartiality of the quasi-judicial proceeding before the BOCC on remand," and thereby "fatally undermined the fundamental fairness" of the Amended Resolution. Opponent Neighbors' Opening Brief, p. 42.

The Opponent Neighbors have provided no affidavit or evidence that the specified communications played any part in the writing of the BOCC's Amended Resolution. Such evidence is required if the Opponent Neighbors expect the Court to consider their claims of "tainting BOCC impartiality" or "undermining fundamental fairness." *Public Utilities Commission v. District Court*, 431 P.2d 773, 770 (Colo. 1967). The District Court correctly identified Plaintiffs'/Appellees'

concerns as speculation. (CF, p. 810.) No evidence of substantial prejudice to the Opponent Neighbors has been produced. *Whitelaw*, 2017 COA 47, ¶11.

The BOCC's approval of USR 15-0027 was unanimous. (R. Tr., pp. 294:11-306:8.) The Amended Resolution did not change that vote count. (CF, pp. 708-732.)

An important part the discussion regarding fundamental fairness is Judge Taylor's order granting the parties the opportunity to supplement their briefs after the Amended Resolution was filed on October 5, 2016. The Opponent Neighbors took full advantage of the opportunity by filing a Supplemental Brief on October 28, 2016, and a Supplemental Reply Brief on November 17, 2016. (CF, pp. 790-809 and 850-864.) Those briefs afforded the Opponent Neighbors due process by allowing them the chance to convince Judge Taylor the supplemented findings of fact set forth in the Amended Resolution were not supported by the Administrative Record. He considered those briefs, but did not agree with them. (CF, pp. 866-889.) If he had, would the Opponent Neighbors now be claiming lack of impartiality and the undermining of fundamental fairness by the BOCC? Most likely not.

The Administrative Record contains no evidence of substantial prejudice to the Opponent Neighbors caused by the privileged communications between defense counsel during the remand to the BOCC. There is no evidence of "tainting BOCC

impartiality" or "undermining fundamental fairness." The District Court did not err in issuing its "Order on Denying Plaintiffs' Motion for Order to Supplement the Certified Record," dated October 28, 2016.

CONCLUSION

Defendant/Appellee Weld County requests that the Court of Appeals uphold the decision by the BOCC to approve the application of MMM for USR 15-0027, and affirm the Order of the District Court.

Respectfully submitted this 29th day of June, 2017.

BRUCE T. BARKER
WELD COUNTY ATTORNEY

/s/ Bruce T. Barker
Bruce T. Barker, #13690
Attorney for Defendant/Appellee Weld County
1150 'O' Street
P.O. Box 758, Greeley, CO 80632
Phone: (970) 400-4390
Fax: (970) 352-0242
E-mail: bbarker@co.weld.co.us

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2017, a true and correct copy of this Opening Brief was served via the Colorado Courts e-filing system on the following individuals:

Mark E. Lacis, Esq.
James R. Silvestro, Esq.
mlacis@irelandstapleton.com
jsilvestro@irelandstapleton.com
Attorneys for Plaintiffs/Appellants

Wayne Forman, Esq.
Mark Mathews, Esq.
wforman@bhfs.com
mmathews@bhfs.com
Attorneys for Defendant/Appellee Martin Marietta Materials, Inc.

Patrick Groom, Esq.
pgroom@wobjlaw.com
Attorney for Defendant/Appellee Gerrard Investments, LLC

Christopher Kamper
CKamper@csmkf.com
Attorney for Defendants/Appellees Weld LV, LLC and Weld LV II, LLC

Weld County District Court
via CCEF

SIGNED ORIGINAL ON FILE AT THE OFFICE OF THE WELD COUNTY ATTORNEY

/s/ Diane Beckman
Diane Beckman, Paralegal