COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver CO 80203	
Appeal from Weld County District Court The Honorable Todd L. Taylor Case No. 2015CV30776	
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; 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	**▲ COURT USE ONLY ▲** Court of Appeals Case Number: 2017CA463
Attorneys for Defendant-Appellee Martin Marietta Materials, Inc.: Wayne F. Forman, # 14082 Mark J. Mathews, # 23749 Julia E. Rhine, #45630 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.223.1100 E-mail: wforman@bhfs.com; mmathews@bhfs.com	

DEFENDANT-APPELLEE MARTIN MARIETTA MATERIALS INC.'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with all requirements of C.A.R. 28 or 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 **9,409** words.

The 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 appellants' statement concerning the standard of review and preservation for appeal and, if not, why not.

I 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/ Mark J. Mathews

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Defendant-Appellee Martin Marietta Materials, Inc. ("Martin"), through counsel, respectfully submits its Answer Brief.

ISSUES PRESENTED

Martin submits that the issues presented are: 1) whether there is, as the District Court found: a) any competent evidence in the record that Martin's aggregate facility, which includes an asphalt plant, a concrete batch plant, a ready-mix concrete plant, and a transloading facility ("Proposed Use"), will be compatible with existing surrounding land uses; b) any competent evidence that Martin made diligent efforts to conserve prime farmland; c) any competent evidence that the Proposed Use will comply with the applicable noise standard; d) any competent evidence that the Proposed Use is an appropriate use in the Weld County "A (Agricultural) Zone District" ("A Zone"); and 2) whether the District Court appropriately declined to order the record to be supplemented with privileged post-decisional communications among Weld County, Martin and Gerrard Investments, LLC's ("Gerrard").

STATEMENT OF THE CASE

Nature of the Case

Appellants challenge the Board's unanimous decision to approve Martin's and Gerrard's (collectively, the "Applicants") application ("Application") for an

amendment to a site-specific development plan and for a Use by Special Review ("USR") permit to operate the Proposed Use in Weld County.[1] The Weld County Board of County Commissioners ("Board" or "BOCC") arrived at its unanimous decision after holding a nearly 14-hour public hearing and considering voluminous evidence, including evidence from interested neighbors and citizens, and expert testimony on the impacts of the Proposed Use on nearby properties with respect to air emissions, noise, visual impact, health and safety, odor, and compatibility with current and future uses in the area. At the conclusion of the hearing, the Board approved the Application, but only after imposing seven Conditions of Approval ("COAs") and 42 Development Standards. The evidence reviewed by the Board, all of which is part of the administrative record, demonstrates the Proposed Use meets all applicable provisions in the Weld County Code ("W.C.C." or "Code").

Appellants brought suit under C.R.C.P. 106(a)(4), challenging the Board's resolution approving the Proposed Use. After remanding the case for further findings, the District Court affirmed the BOCC's second resolution ("Second Resolution"). The Second Resolution retains all of the first resolution's

[1] All citations to the administrative record ("AR") refer to the record before the BOCC below. All AR pin cites refer to the BATES labels affixed by the BOCC Clerk. In the electronic record, the AR pdfs use the prefix "USR15-0027 Martin Marietta." All references to the transcript or to the "hearing" refer to the hearing before the BOCC held on August 12, 2015. In the electronic record, the transcript pdfs use the prefix "TRBOCC081215_Martin Marietta."

conclusions and mandatory mitigation measures and differs only by including the requested additional findings. Upon review of the Second Resolution and record, the District Court concluded that the BOCC's findings and conclusions were supported by record evidence and reasonable interpretations of the Code.

Appellants ask this Court to reverse the Board and District Court on five separate bases, none of which is valid. Regarding issues one through four, this Court should uphold the Board's approval and affirm the District Court because the record shows the Board's approval is supported by competent evidence and correct applications of the appropriate legal criteria. Regarding Appellants' fifth issue, there is no reason to reverse the BOCC and District Court because the allegedly *ex-parte* communications are privileged under a common interest agreement and, in any event, are post-decisional communications among counsel that could not have influenced the BOCC's decision approving the Proposed Use.

Background

The Proposed Use

The Proposed Use is comprised of an asphalt plant, concrete batch plant, and transloading facility to be located approximately one-half mile south of U.S. Highway 34 in unincorporated Weld County. AR, pp. 0173-195. The Proposed Use will remedy the dwindling supply of aggregate and asphalt in Northern

Colorado. AR, p. 0389. Martin anticipates that all of its and its competitors' sources of aggregate in and near Weld County will be depleted within the next ten years. AR, p. 0396. To provide aggregate and ready-mix to the growing northern Colorado market, companies will have to ship the rock to Weld County from other states, including Wyoming, by truck or train. AR, pp. 0389; 0396. One train load (approximately 117 train cars) of rock product is the equivalent of about 400 truckloads. AR, p. 0389. Martin intends to transport crushed rock from its quarry west of Cheyenne to the site of the Proposed Use via rail. *Id*. Without the Proposed Use, thousands of additional loaded trucks will traverse Weld County, impacting the infrastructure of the County and well-being of its citizens.

In addition to supplying the bulk of aggregate to northern Colorado, Martin currently supplies about 80% of the asphalt demand of Weld County. R. Tr., pp. 18:2-4. However, Martin's existing 35th Avenue asphalt facility in Weld County will close within the next five years, because it will be mined out. AR, p. 389; R. Tr., p. 28:6-14. Only one other asphalt plant exists in Weld. AR, p. 390.

Having a steady supply of aggregate and asphalt is essential for growth within Weld County and surrounding areas. Weld County will grow by about 75 to 100 percent in the next 20 years. R. Tr., p. 27:14-18. Without aggregate, it will be impossible to make the asphalt and concrete necessary for roadway and building

construction to accommodate this growth. AR, p. 0389. As Commissioner Conway stated at the end of the hearing, "We like to drive on our roads, we like to build houses, we like to build our shopping centers . . . and the offset of that is you've got to have aggregate…. We're a growing region, [and] we need this in order to grow like we all want in terms of Weld County . . . ." R. Tr., p. 301:6-14. This was echoed, more formally, in a letter by the Greeley City Council: "The City Council recognizes that locating facilities somewhere in Northern Colorado will be important in supporting future economic growth in the area as local gravel resources become less available, even as new development needs additional concrete and asphalt supplies. Rail and major road corridors will be important in supporting such efforts." AR, p. 0685.

Because asphalt and aggregate are essential for roadway and building construction, they must also be available for farms to flourish. As the Board determined in the Second Resolution: "The proposed use will maintain and promote agriculture. It will supply aggregate to construct and maintain farm-to-market roads. Aggregate, asphalt and concrete from the proposed use will also be used for the construction of dikes, spillways, ditch liners, feed areas, processing plants, irrigation structures, loafing sheds, dairy parlors and runoff on farms, and to build and maintain roads to get agriculture products to market." R. CF, p. 714.

The Proposed Use's Location and Martin's Locational Decision

Martin sought a location adjacent to a major rail line to allow delivery of aggregate by rail and minimize the impact on local roads. AR, pp. 0397-98. Martin also sought a location very near major roadways so that finished products could be easily delivered to local nearby markets without impacting local roads. AR, pp. 0389; 0397-98.

Martin spent three years evaluating more than 13 sites for the Proposed Use before determining that the Proposed Use site (the "Site") was the most favorable location. AR, pp. 0397-98; 2577. The Site is uniquely suited for the Proposed Use due to its size, location of railroad and road infrastructure, proximity to market, and avoidance of residential subdivision areas. R. Tr., p. 30:2-15; AR, pp. 0143; 0146; 0182; 0398-99.

The Proposed Use will be located on portions of two parcels consisting of 131 acres located one-half (1/2) mile south of U.S. Highway 34, just off County Road 13 and immediately adjacent to the Union Pacific Railroad line. R. CF, p. 27. One of the Site's two parcels is owned by Gerrard and constitutes approximately a third of the Site. AR, p. 2559. It is currently used for commercial and manufacturing uses under a pre-existing Use by Special Review permit. R. Tr., p. 18:17-20; AR, pp. 0176; 0180. The other parcel, owned by Weld LV II,

LLC ("Weld LV"), is kept in pasture grass and is not a significant generator of food for people or animals. AR, pp. 0159; 0181. The Proposed Use will occur primarily on the Gerrard parcel and on the western portion of the Weld LV parcel. R. Tr., pp. 20:8-21:13; 188:18-21; AR, pp. 2563-564. At least 30 acres of the Weld LV parcel will remain open space and remain planted in native grasses. R. CF, p. 718; AR, pp. 2383; 2385. The portion of the Weld LV parcel supporting the Proposed Use will be reclaimed for agricultural purposes once the Proposed Use is discontinued, as required by Martin's lease with Gerrard. R. Tr., pp. 188:17-21; 229:2-10.

Appellants mischaracterize Martin's site selection process as being "based solely on private economic considerations." Op. Br. at 9. But the Site Selection Report included criteria unrelated to Martin's financial interest, including whether the sites would entail "low impact to county roads," and whether the sites "avoid[ed] haul routes that run in front of subdivision entrances." AR, p. 398. Significantly, the Site received the highest score for traffic being able to avoid subdivision entrances, because the "short haul route to State Highway 34 does not run in front of a subdivision main entrance." *Id.* Moreover, as demonstrated by evidence in the record, the other sites considered by Martin in the site selection process would have encroached more significantly on nearby residential areas and

resulted in more truck traffic congestion near homes. R. Tr., pp. 30:10-23; 189:18-191:20; AR, pp. 143; 0398. And although the Site is within an A Zone, there are more industrial and commercial areas near the Site than residential areas. R. Tr., p. 31:18-19; AR, pp. 2579-2582. Indeed, there is a convergence in this area of industrial and commercial uses due, in part, to the proximity of US 34 and CR 13 and the two railroads. R. Tr., p. 31:8-23, AR, pp. 2578-2582. *Id*.

Required Mitigation Measures

The Board imposed seven COAs and 42 Development Standards requiring mitigation measures on nearly every aspect of the Proposed Use. R. CF, pp. 722-732. The Board explicitly cited mitigation measures related to road improvements and traffic, noise, landscaping, dust, aesthetics and hours of operation, in support of its compatibility finding, R. CF, pp. 714, 716, and in its oral findings at the hearing. R. Tr., pp. 300:15-301:4; 302:15-19; 304:6-11.

Martin's Application

On April 28, 2015, Martin submitted the Application to the County Planning Department. AR, p. 0173. The Planning Department found that the Proposed Use was not compatible with existing land uses in the area. AR, p. 0100. The County Planning Commission held a public meeting on July 21, 2015, to consider the Application. AR, p. 0081. After the meeting, the Planning Commission voted 4-3

to recommend denial of the Application. AR, p. 075. At the time of the meeting, the Planning Department received 763 letters and many phone calls concerning the Application. The majority of the letters—534 of them—supported approving the Proposed Use. AR, p. 071. In the resolution recommending denial, the Planning Commission stated that "should the [BOCC] approve the proposal, the Planning Commission recommends the following conditions," and then listed several pages of requirements. AR, pp. 0073-74. Each of these conditions were either satisfied by Martin or included as a COA to the BOCC's approval of the Proposed Use. *Compare* R. CF, pp. 42-44 (Planning Commission recommendations) *with* R. CF, pp. 908-913 (resolution requiring implementation of Planning Commission recommendations); 727-732 (Second Resolution requiring same).

On August 12, 2015, the BOCC held a nearly 14-hour hearing, which included substantial public comment. AR, pp.13-44. Martin presented numerous expert reports and testimony, including a Sound Analysis Report, an Assessment of Air Emissions, a report discussing the Proposed Use's impacts on the health and safety of nearby residents, and a Traffic Impact Study. AR, p. 17; AR, pp. 350-363. Among other testimony, Martin explained how the mixture of rail and roadway infrastructure near the Proposed Use has created "a pattern of commercial and industrial uses" surrounding the Proposed Use. R. Tr., p. 31:6-23. At the

conclusion of the hearing, the five Commissioners made findings on the record, R. Tr., pp. 294:11-305:2, and unanimously approved the Proposed Use. AR, p. 43. A resolution dated August 17, 2015 confirmed the approval. AR, pp. 1-12; 44.

Procedural History

Appellants' First Amended Complaint, filed on September 25, 2015, asked the District Court to find that the BOCC abused its discretion in approving the Application under C.R.C.P. 106(a)(4). R. CF, p. 150. After briefing and oral argument, the District Court on August 19, 2016, remanded the case to the BOCC for additional findings of fact under C.R.C.P. 106(a)(4)(IX), though noting that "[i]t is not necessary that the BOCC make explicit and technical findings; it may, instead, make only findings of ultimate facts." R. CF, p. 706 (citing *Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 534 P.2d 1212, 1216 (1975)).

On October 5, 2016, the BOCC approved and submitted the Second Resolution to the District Court, including nine pages of findings explaining the ways in which each of the USR criteria were satisfied. R. CF, pp. 708-32. The BOCC's findings of fact included in the Second Resolution are supported by the administrative record as it existed at the time of the BOCC's initial approval on August 17, 2015.

While this case was on remand for additional findings, counsel for Appellants submitted an open records request, asking the County Attorney to disclose communications relating to the Application or Proposed Site that were sent after August 1, 2016. R. CF, p. 741. Counsel for the BOCC declined to disclose two requested communications because they were privileged under a common interest agreement. R. CF, pp. 738-39. Appellants moved to force disclosure of the privileged communications, R. CF, p. 743, which the Appellees opposed, R. CF, pp 753; 755; 770, and the District Court, by its October 28, 2016 order (Interim Order"), denied. R. CF, p. 810. The District Court held that the communications were privileged under the common interest agreement, and that Appellants had "offered only speculation" that the privileged communications affected the drafting of the Second Resolution. R. CF, p. 810. As the District Court explained:

> Furthermore, either the [BOCC]'s findings of fact are supported by the record, or they are not, regardless of the nature and effect of the communications. It is clear beyond any doubt that the Board's conclusions were unaffected by the communications.

Id.

On January 27, 2017, the District Court affirmed the BOCC's approval of the Application ("Final Order"), finding that the Board's decision was supported by competent evidence. R. CF, p. 889.

District Court Orders Presented for Review

Two District Court orders are appealed: the Final Order affirming the Board's unanimous Second Resolution and the Interim Order protecting the terms of the Appellants' common interest agreement and the County Attorney's privileged communications with his client.

ARGUMENT SUMMARY

ARGUMENT

I. Competent Evidence in the Record Supports the BOCC's Finding that the Proposed Use Will Be Compatible with Existing Surrounding Land Uses.

A. Standard of Review

In C.R.C.P. 106(a)(4) appeals, the appellate court stands in the shoes of the district court, reviewing the decision of the governmental body to determine whether the decision was an abuse of discretion. *IBC Denver II, LLC v. Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008). A governmental body abuses its discretion only if it has either misapplied the law or no competent record evidence supports its decision. *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2013). Even if reasonable persons could differ on the merits of a decision, so

long as there is any competent evidence in the record supporting a decision and the law is correct, the decision must be affirmed. *Ford Leasing Development Co. v. Bd. of Cnty. Comm'rs*, 528 P.2d 237, 240-241 (Colo. 1974)(upholding approval of planned development where the question of whether it was "compatible with the surrounding development was fairly debatable"); *see also Sundance*, 534 P.2d 1212, 1216 (Colo. 1975) ("this kind of decision [rezoning] is not a popularity contest. The Board is charged with the final decision making.")

The Court should not reweigh the evidence in the record or substitute its judgment for that of the governmental body if there is any competent evidence in the record to support the decision. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo App. 2008); *see also Arndt v. City of Boulder*, 895 P.2d 1092, 1095-1096 (Colo. App. 1994)(observing that evidence can be inferred and that the agency's decision cannot be set aside "merely because the evidence was conflicting or susceptible of more than one inference"). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *IBC Denver II, LLC*,183 P.3d at 717. This Court "should not interfere with the decision of zoning authorities absent a clear abuse of discretion." *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996).

B. Issue Preservation

This issue is preserved.

C. Discussion

The BOCC found that the Proposed Use would be compatible with existing surrounding land uses. R. CF, pp. 714-16. In arguing that the record is devoid of any competent evidence supporting the BOCC's finding, Appellants ignore thousands of pages of record evidence and the extensive mitigation and operating limitations imposed by the BOCC on the Proposed Use. Far from reflecting arbitrary decision making, the Board's determination is supported by competent evidence.

Appellants first argue that the land uses adjacent to the Proposed Use "are fundamentally different" and that this Court should rule that the Proposed Use is therefore incompatible with these uses. Op. Br. at 22-3. This argument is untenable for multiple reasons. First, it flatly contradicts the standard of review under C.R.C.P. 106(a)(4) that requires this Court to affirm a local government's land use decision if there is *any* competent record evidence supporting the decision. *E.g., Whitelaw v. Denver City Council,* 2017 COA 47, ¶8. As discussed below, the record is replete with evidence supporting the Board's finding that the Proposed Use will be compatible with surrounding uses.

Second, the fact that one use may be more intense than another does not mean that they are incompatible. *See Sundance*, 534 P.2d at 1215 (holding rezoning to allow more intense development than surrounding area was nonetheless compatible with surrounding land uses). Indeed, there was extensive testimony and evidence during the hearing, including remarks by the Commissioners, about areas in Weld County where industrial and residential uses coexist in close proximity, including testimony by those living near industrial facilities, such as Martin's 35th Avenue asphalt plant, who have not been adversely impacted by the operations. R. Tr., pp. 30:18-31:6; 98:14-20; 106:9-12; 129:13-16; 131:10-15; 145:16-24; 242:1-4; 297:14-23; 299:12-300:10; 302:4-14; AR, pp. 2579 (aerial photo of 35th Avenue facility and nearby residences); 2582 (map showing mix of industrial, commercial and residential land uses and zoning).

Third, Appellant's view of surrounding land uses is too narrow. There is record evidence, and the BOCC recognized, that the Site is adjacent not only to Appellants' uses, but also to open areas, the existing Gerrard construction business and storage yard,[2] the Union Pacific and Great Western railroad lines, County

[2] Appellants quibble that the Gerrard construction yard is not an adjoining use but rather will be occupied by the Proposed Use. Op. Br. at 22. That distinction is immaterial, as the existence of a commercial/industrial construction business and heavy equipment storage yard is relevant in identifying the mixed character of the

Road 13, and an arterial roadway, and proximate to State Highway 34 and I-25. AR, pp. 2559; 2576; 2579. These industrial uses and major transportation corridors in the immediate area support the BOCC's compatibility finding.

Appellants' claim that the Site is "surrounded" by agricultural and residential uses on all sides is inaccurate. In fact, there are more industrial and commercial areas near the Site than residential areas. R. Tr., p. 31:18-19; AR, pp. 2579-2582. Martin presented a series of maps showing designated land uses in the vicinity of the Site. R. Tr., p. 31:8-23, AR, pp. 2578-2582. As these maps demonstrate, there is a convergence in this area of industrial and commercial uses due, in part, to the proximity of US 34 and CR 13 and the two railroads. *Id*. The BOCC considered surrounding land uses as including the three-mile referral area around the Site. R. CF, p.715.[3] In discussing compatibility, several Commissioners commented on the number of commercial and industrial land uses in the area. R. Tr., pp. 296:18-297:8; 298:14-19.

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area and the ability of the Proposed Use to be compatible with the surrounding uses.

[3] Though "surrounding" is not a defined term in the Code, the Board's interpretation as including not just adjacent land uses, but also those within the three-mile referral area, is reasonable and should be affirmed. *Alpenhof*, P.3d at 1055 (court will defer to reasonable interpretation of municipal code).

Appellants claim Martin's land use maps are not competent evidence because they show only future, not existing, land uses and they were "discredited" at the hearing. Neither challenge has any merit. First, the land use maps show existing land uses and zoning designations, R. Tr., p. 31:13-23, both of which are encompassed within the definition of "USES" under the Code.[4] They constitute competent evidence of the land uses surrounding the Site. Second, the maps were hardly discredited. John Franklin, Johnstown planner, said only that the map included zoning designations, not actual development, R. Tr., p. 78:20-23, which as explained, are relevant to the BOCC's determination. And County Planner Diane Aungst raised several benign issues: the map accurately identified a parcel to the north of the Site as proposed industrial that hadn't yet been rezoned, though an application was pending; a parcel to the north of US34 shown as industrial was in fact limited industrial; and an area to the southeast shown as commercial was a dairy farm. R. Tr., pp. 244:19-245:5. The Board heard these comments along with

[4] W.C.C.§23-2-230.B.3 requires a showing that the Proposed Use be "compatible with existing surrounding land USES." W.C.C.§23-1-90 defines "USES" as "Any purpose for which a STRUCTURE or tract of land may be designed, arranged, intended, maintained or occupied…." Existing zoning designations evidence the purpose for which a tract of land is intended and fall within the scope of review under W.C.C.§23-2-230.B.3. They are also relevant under the USR criteria in W.C.C.§23-2-230.B.4, which requires a showing of compatibility with future development.

the testimony of other witnesses and, in assessing credibility and weighing evidence, was entitled to rely upon the maps as reflecting surrounding land uses.[5]

Appellants also ignore the studies presented at the hearing and the mitigation measures required by the Board's approval. There was extensive testimony on the design features and operational requirements addressing the potential impacts of the Proposed Use on nearby residents. *E.g.*, R. Tr., pp. 33:6-40:24; 192:14-198:3 (water quality), 198:18-199:14; 201:12-204:8 (air emissions), 199:15-200:14 (health effects), 204:10-205:22 (noise). Martin addressed these potential impacts by changing the Site layout to minimize offsite impacts, AR, pp. 240-241, and through imposition of a dust abatement plan, AR, p. 242, landscape plan, AR, p. 197, emergency action plan, AR, p. 199, waste handling plan, AR, pp. 207-208, and spill prevention, control and countermeasure plan, AR, pp. 210-230. Martin also addressed potential impacts through a myriad of expert reports, including a traffic study AR, pp. 256-287, noise analysis, AR, pp. 305-310; 2731-2734, wildlife review, AR, pp. 364-376, impact assessment on bees and farms, AR, p.

[5] Moreover, the Board was entitled to rely upon their own knowledge and experience when, as here, they include them in the public record. *See Geer v. Stathopulos*, 309 P.2d 606, 611 (Colo. 1957)(agency may take administrative notice of facts if included in judicially reviewable findings); *Londer v. Friednash*, 560 P.2d 102, 104 (Colo. App. 1976)(hearing officer statements based on personal knowledge were proper as they were included within findings).

343, air emissions assessments, AR, pp. 346-348; 0349-361, water resource assessment, AR, pp. 344-345, and a value diminution report, AR, pp. 492-535.

The BOCC recognized the need to ensure that the Proposed Use would be compatible with surrounding uses. R, Tr., p. 295:1-4 (Comm'r Kirkmeyer: the decision boils down to "compatibility with the existing and future surrounding land uses, consistency with the area whether it's existing and future land uses. And then our ability to mitigate should [we] feel that there are negative impacts so that we can ensure protection of the health, welfare and safety of the surrounding area…."). The Board explicitly cited mitigation measures related to road improvements and traffic, noise, landscaping, dust, aesthetics and hours of operation, in support of its compatibility finding, R. CF, pp. 714; 716, and in its oral findings at the hearing. R. Tr., pp. 300:15-301:4; 302:15-19; 304:6-11.

Based on this evidence, the Board imposed seven COAs and 42 Development Standards requiring mitigation measures on nearly every aspect of the Application. R. CF, pp. 722-732. These mitigation requirements and methods include, but are not limited to:

- establishment of a 30-acre buffer zone from closest houses in subdivision to main area of activity and a 12-acre buffer from the subdivision to railroad loop. AR, p. 2385;

- constructing the concrete and asphalt plants approximately 1,500 feet and 2,000 feet away, respectively, from the nearest subdivision houses. AR, p. 495; R. Tr., p. 39:7-11;

- construction of vegetated berms to help screen the facilities from the neighbors. AR, pp. 177; 197; R. Tr., p. 5:21-23;

- establishment of a $100,000 fund for landscaping on the lots of adjacent landowners with views of the facility. R, CF, pp. 197; 2383; R. CF, p. 731; R. Tr., pp. 39:19-24; 40:1-2;

- installation of three odor emissions control systems at the asphalt plant, R. CF, p. 732, which will be the only asphalt plant in Colorado that uses all three of these technologies. R. Tr., p. 36:3-4; AR, p. 2588;

- use of an emission capture system with carbon filters. AR, pp. 181; 2383;

- on-site odor monitoring to ensure no violations. R. CF, p. 732; R. Tr., p. 231:11-19;

- dust mitigation, including using paved roads, a partially-enclosed hopper to unload train cars bringing product to the site, and a street sweeper and water truck to control dust associated with handling material once it is unloaded from the train. AR, p. 196;

- a noise monitoring program to ensure that applicable noise standards are met. AR, p. 240;

- noise mitigation techniques including the use of berms, white noise back-up alarms, a below-grade hopper, and acoustical enclosures. *Id*.; and

- limits on hours of operation. R. CF, pp. 727-28.

As the District Court noted, the record in this case contains competing evidence and testimony. In such controversial cases, the Court's role is not to

reweigh the evidence, but to determine if the Board's decision is supported by competent evidence. *See Sundance*, 534 P.2d at 1216; *Whitelaw*, 2017 COA 47 at ¶60. In light of the extensive testimony, expert reports, and mitigation measures imposed, the Board's decision was undoubtedly supported by competent evidence.

II. There is Competent Evidence that Martin made a Diligent Effort to Conserve Prime Farmland in its Locational Decision.

A. Standard of Review

See § I.A, *supra*.

B. Issue Preservation

This issue is preserved.

C. Discussion

W.C.C. § 23-2-230B.6. provides that an applicant must exercise diligent effort to "conserve PRIME FARMLAND in the locational decision for the proposed use." Appellants assert "there is no evidence" that Martin satisfied this USR criterion either in its site selection or in the configuration of the Proposed Use on the chosen Site. Op. Br. at 26-27. Both arguments are meritless.

Martin did exercise diligence in the site location process. Martin spent three years evaluating more than thirteen sites for the Proposed Use. AR, pp. 0397-98; 2577. The Site was selected because it was uniquely suited for the Proposed Use due to its size, location of railroad and road infrastructure, location to market, and

avoidance of residential subdivision areas. R. Tr., p. 30:2-15; AR, pp. 0143; 0146; 0182; 0398-99. The other sites considered by Martin in the site selection process would have encroached more significantly on nearby residential areas and resulted in more truck traffic congestion near homes. R. Tr., pp. 30:10-23; 189:18-191:20; AR, pp. 143; 0398.

While the Site Selection Report did not explicitly include preservation of prime farmland as a factor, it did not do so because all of the sites encroached upon prime farmland. R. Tr., p. 221:4-7 ("… if you look for a 100-acre site that's ready to develop anywhere in Weld County, it's going to either be prime farm land or adjacent to prime farm land. That was already a factor in any site that could have been surveyed and that's why it wasn't listed as a separate criterion of site selection analysis that was presented earlier.").[6] Appellants claim that several other locations mentioned during public comment would not have encroached on prime

[6] Appellants also err in stating that Martin was not aware that the Proposed Use location contained prime farmland when it made its site selection. Op. Br. at 26. Presentations before both the County Planning Commission and the Board made it clear that the Proposed Use would be located on an area designated as prime farmland, even though it was not producing crops. R.Tr., p. 6:15-17; AR, p. 90. Appellants' only "evidence" for this claim is a statement by Martin that the land being removed from agricultural use under the Proposed Use "has been kept in pasture grass and is not a significant generator of food product for people or animals," and therefore should not be considered "prime agricultural production land." AR, p. 181. Nowhere in this statement or anywhere else in the record does Martin dispute that the Proposed Use is located on prime farmland.

farmland. Op. Br. at 9. But most of these alternative locations did not meet Martin's mandatory criteria of being over 100 acres, located between Kelim and Miliken, and adjacent to the Union Pacific Railroad. AR, pp. 397-99. And Martin did consider several of the sites identified by the public, including a site in the "North Greeley Rail Sub-corridor" that was rejected because it would require traffic traveling directly through Windsor, R. Tr., p. 55:6-8, and a site in Milliken where its industrial zoning would not allow the Proposed Use. R. Tr., p. 189:19-21.[7]

Additionally, the Board reasonably interpreted W.C.C.§23-2-230B.6. as requiring diligent effort pertaining to the location of operations on the selected site. R. CF, p. 718 ("The applicant has made an effort to conserve prime farmland through the configuration of the site. . . . By clustering the industrial activities on the site as far west as possible, and preserving a substantial portion of the site, the applicant has shown diligent efforts to preserve as much prime farmland as possible."). Appellants argue that the Board misinterpreted this Code provision because another Code provision, § 32-2-230B.6, already requires diligent efforts to

[7] Martin testified before the Board to additional factors that disqualified the sites mentioned by the public from being selected, including having a significant elevation drop and being located in close proximity to residential subdivisions or significant distance from Martin's market that could compromise the product life of transported asphalt and ready mix. R. Tr., p. 189:19-190:21.

cluster a proposed use on the selected property. Op. Br. at 27-28. But this provision only sets forth a design standard that proposed uses should be located "on the least prime soil on the property in question" if practicable and feasible. It does not address diligence in preserving prime farmland when locating a proposed use.

Martin met the requirements of W.C.C.§23-2-230B.6. because, on this Site uniquely situated for the Proposed Use, R. Tr., pp. 18:13-15; 106:7-9; AR, p. 716, it exercised diligent effort to preserve prime farmland through its configuration of the Proposed Use. One of the Site's two parcels is owned by Gerrard and constitutes approximately a third of the Site. AR, p. 2559. It was removed from agricultural production in 2015 and is currently used for commercial and manufacturing uses. R. Tr., p. 18:17-20; AR, pp. 0176; 0180. The Weld LV parcel has been kept in pasture grass and is not a significant generator of food for people or animals. AR, pp. 0159; 0181. The Proposed Use will occur primarily on the Gerrard parcel and on the western portion of the Weld LV parcel. R. Tr., pp. 20:8-21:13; 188:18-21; A.R. pp. 2563-564. At least 30 acres, or over half of the Weld LV parcel, will remain open space and remain planted in native grasses. R. CF, p. 718; AR, pp. 2383; 2385. Additionally, the entire Weld LV parcel will be reclaimed for agricultural purposes once the Proposed Use is discontinued, as

required by Martin's lease with Gerrard. R. Tr., pp. 88:17-21; 228:14-17; 229:2-10. As the Board determined in the Second Resolution, Martin satisfied W.C.C.§23-2-230B.6. by clustering the industrial activities on the western portion of the Weld LV parcel and on the Gerrard parcel, and preserving a substantial portion of the Weld LV parcel as agricultural open space. R. CF, p. 718.

Finally, as the Board also determined, the Code does not mandate that prime farmland can never be developed. R. CF, p. 718 ("The Board does not interpret the requirement that an applicant make a diligent effort to conserve prime farmland as a mandate that prime farmland may never be converted to any other use. The Board must balance the goal of preserving prime farmland with its other goals for the development of Weld County."). Indeed, prime farmland was removed to develop Indianhead Estates, R. CF, p. 718; AR, pp. 84; 90; 1434-35; 2217, and Gerrard's commercial and manufacturing facility. AR, pp. 84; 1434-35; 2217; 2559. *See* R. CF, p. 718 ("The 1979 Soil Conservation Service Important Farmlands of Weld County map, which designates the proposed site as prime farmland, also designates the area where the Indianhead Estates Subdivision is now located as prime farmland."). Even the Johnstown Encore mixed use development project is on prime farmland. R. Tr., p. 73:15-18.

The Board's interpretation that prime farmland may be developed is supported by the Code. Any other interpretation would render meaningless Code provisions providing that "mineral resource development facilities including . . . asphalt and concrete batch plants" are eligible for USR permits in the A Zone. *See* § 23-3-10 (the A 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.") and §23-3-40.A.4 ("Uses eligible to receive a USR permit in the A Zone include: "[m]ineral resource development facilities including: . . . 4. asphalt and concrete batch plants…[and] 7. TRANSLOADING.").

The Right to Farm Policy in the Comprehensive Plan also supports the Board's interpretation that prime farmland can and should be developed in certain circumstances. In fact, under the Comprehensive Plan, the Right to Farm policy provides that County land use regulations should "protect the individual property owner's right to request a land use change," and accommodate conversion of agricultural land to commercial and industrial uses where appropriate. *See* R. CF, p. 713 (citing W.C.C. §22-2-20.G (A.Goal 7).

In light of Martin's extensive site selection process and the uniqueness of the Site to satisfy the criteria necessary for the Proposed Use, the Board reasonably

interpreted its Code in determining that Martin exercised diligence in its "locational decision" by placing its operations on the Site's far west side to ensure a sizable buffer of prime farmland between its operations and homeowners. *See Quaker Ct. Ltd. Liability Co. v. Bd. of Cnty. Comm'rs*, 109 P.3d 1027, 1030 (Colo. App. 2004)(if governmental body's interpretation of code is reasonable, it will be affirmed under C.R.C.P. 106 review). Appellants' efforts to second guess the Board's decision should be rejected.

III. **There is Competent Evidence that the Proposed Use Will Comply with the Applicable Noise Standard**.

A. Standard of Review

See § I.A, *supra.*

B. Issue Preservation

This issue is preserved.

C. Discussion

Appellants argue that the Proposed Use violates the County's residential noise limits of 55 dB(A)/day and 50 dB(A)/night and therefore should not have been approved. Op. Br. at 30. Appellants misunderstand the applicable noise requirements and incorrectly interpret the record evidence.

Development Standard 24 requires that the Proposed Use, when operational, meet standard residential noise levels at adjacent residential property boundaries.

R. CF, pp. 192; 719-20. This residential noise standard is more stringent than County and state law, which require only that the Proposed Use meet industrial noise standards set at 80 dB(A)/day and 75 dB(A)/night. W.C.C.§14-9-40; C.R.S.§25-12-103. By requiring that Martin meet residential as opposed to industrial standards, the Board ensured that noise levels will be protective of neighbors. R. CF, p.719 ("The proposed use must adhere to maximum permissible noise levels of 55dB(A) during the day and 50 dB(A) at night at adjacent residential lots. This is a higher standard (residential) than the one for industrial.")

This Development Standard is a requirement that Martin must meet once the Proposed Use is operational. It is not, as Appellants argue, a standard that must be satisfied based on noise modeling projections before USR approval.[8] Under Development Standard 24, Martin must conduct daytime and nighttime monitoring of its operations according to a County-approved monitoring protocol. AR, p. 312. The results of the monitoring then must be reported to the County no less

[8] While Martin's noise modeling did show occasional exceedances of residential noise standards, this modeling was based on the worst-case assumption that all potential sources of noise on the entire 131-acre site would be operating simultaneously and continuously, which the evidence recognizes is unrealistic. AR, pp. 91; 308; R. Tr., p. 37:1-11. Because all sources of noise pollution will not in fact be operating either simultaneously or continuously, the modeled sound levels are inflated estimates of those that will actually result from the Proposed Use. *Id*. Despite being overstated, the modeled levels for daytime noise met County and state residential levels and only those for nighttime operations had minimal potential for exceeding residential limits at three select receiver locations. AR, p. 309; R. Tr., p. 37:1-11.

frequently than once per year for the full term of the USR. *Id*. Should the monitoring results indicate that the facility exceeds the residential noise action levels, Martin is legally obligated to identify the source of the noise and take corrective actions to reduce the noise or face enforcement action. *Id.* See also R. CF, pp. 719-20.

Appellants also ignore the robust sound mitigation and monitoring measures Martin will undertake, including redesigning the rail loop with a 700-foot setback from the northeastern property line, grouping industrial activity on the west half of the Site, and installing several vegetated berms. R. Tr., pp. 19:11-13; 36:18-38:11; AR, p. 2590. In addition, Martin will enclose the concrete plant and use white noise back-up alarms, a below grade hopper for unloading trains, and a circular track route. R. Tr., p. 38:7-11; AR, pp. 2591-2592. The efficacy of these measures will be directly reflected in the monitored noise levels of the fully-operational Proposed Use, which must meet the residential noise standards of Development Standard 24.

IV. **The Proposed Use is "Related to" Agriculture and Approval of the Application Does Not Constitute Spot Rezoning**.

A. Standard of Review

See § I.A, supra.

B. Issue Preservation

Appellants preserved their claim of spot zoning and that the Proposed Use was not sufficiently related to agriculture.

Appellants have not preserved their argument that this Court should declare Weld County's USR process arbitrary and unlawful. Op. Br. at 38, fn. 9. This argument was never made below, nor was it included in the Notice of Appeal. This Court should therefore ignore footnote nine.

C. Discussion

Appellants allege the Board erred in determining that the Proposed Use is consistent with the intent of the A Zone, because the Proposed Use is not "directly related to or dependent upon" agriculture and the approval of the Proposed Use constitutes "spot zoning" from agriculture to industrial use. Op. Br. at 34. Appellants' argument fails for several reasons.

First, under the Code's USR approval criteria, the Board must determine whether the Proposed Use is consistent with the intent of the district in which it is located. W.C.C.§ 23-2-230.B.2. Under the Code, the A Zone is intended for uses by right that are "related" to agriculture. W.C.C.§ 23-3-10. But the A Zone also 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." W.C.C.§ 23-3-10. Uses eligible to receive a USR

permit include: "[m]ineral resource development facilities including: . . . 4. asphalt and concrete batch plants…[and] 7. TRANSLOADING." Code §23-3-40.A.4. The Proposed Use will comprise asphalt and concrete plants and a transloading facility. The Board, therefore, appropriately determined that the Proposed Use would be consistent with the intent of the A Zone. R. CF, p. 715.

Appellants' interpretation of the Code ignores these key provisions. If, as Appellants assert, asphalt and concrete plants cannot be "directly related" to agriculture, then asphalt and concrete facilities could never be approved in an A Zone under the Code's USR provisions. Yet such uses are specifically listed as eligible for USR approval in the A Zone under W.C.C.§ 23-3-40.A.4. As Judge Taylor reasoned, "If the plaintiffs' position was accepted that asphalt and concrete plants are not directly related to agriculture, then those types of facilities could never qualify for a special use permit and including them in §23-3-40.A would be meaningless. I thus reject the plaintiff's [sic] position and conclude that the Code recognizes asphalt and concrete plants as being sufficiently related to agriculture to justify the approval of a special use permit, assuming all other requirements are met." R. CF, p. 879.

Instead of addressing Code provisions listing permitted uses in the A Zone, Appellants focus exclusively on Comprehensive Plan Policy 7.1, which states:

"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 . . ." Op. Br. at 34. Appellants argue that under Policy 7.1, only uses "directly related to" agriculture should be permitted in the A Zone. Op. Br. at 34. But this Policy states that land use regulations should "support" directly related uses. It doesn't suggest that regulations should prohibit or discourage other uses in the A Zone, particularly those allowed in the A Zone by USR, such as concrete and asphalt facilities.

Moreover, Policy 7.1 must be viewed in context. The Comprehensive Plan establishes a number of "Goals" for future development and "Policies" to serve as guidance to achieve these Goals.[9] W.C.C. § 22-1-130. Policy 7.1 is intended to implement A.Goal 7, which provides that "County land use regulations should protect the individual property owner's right to request a land use change." § 22-2-20 A.Goal 7A. Consistent with this Goal, the "Policy" provision directly following Policy 7.1. states that "conversion of agricultural land to nonurban residential, commercial and industrial uses should be accommodated when the subject site is in

9 These Goals and Policies under the Comprehensive Plan are not intended to have the same weight as Code regulations. As the Plan makes clear, if there is a conflict between the Zoning Code and the Comprehensive Plan, provisions in the specific Zoning Code should take precedent. *See* W.C.C.§ 22-1-110.H.

an area that can support such development . . . .” W.C.C.§22-2-20.G.A.Goal 7.A.Policy 7.2. Contrary to Appellants’ claims, this portion of the Comprehensive Plan actively supports the right of property owners to request a land use change, including the conversion of agricultural land to commercial and industrial uses, when the subject site is in an area that can support such development and where impacts to nearby properties is minimal or can be mitigated.[10]

Additionally, there is record evidence supporting the Board’s finding that the Proposed Use is directly related to agriculture. As the Board determined in the Second Resolution: “The proposed use will maintain and promote agriculture. It will supply aggregate to construct and maintain farm-to-market roads. Aggregate, asphalt and concrete from the proposed use will also be used for the construction of dikes, spillways, ditch liners, feed areas, processing plants, irrigation structures, loafing sheds, dairy parlors and runoff on farms, and to build and maintain roads to get agriculture products to market.” R. CF, p. 714. Indeed, Martin currently supplies about 80% of the asphalt demand in Weld County, and the new facility will be the primary source of aggregate in Weld County in the future. R. Tr., pp. 18:2-4, 303:23-304:2; AR, p. 389. To pretend that Martin’s business does not

10 The Board in the Second Resolution cites to ample evidence supporting the conclusion that the Proposed Use is in an area that can support such development, that adequate services are available, and that impacts will be substantially mitigated by the seven COAs and 42 Development Standards. R. CF, pp. 713-16.

benefit Weld County's agricultural industry ignores the economic realities of that industry.

Finally, Appellants' claim that approval of the Proposed Use constituted illegal "spot zoning" is without merit. "Spot zoning" occurs when there is a rezoning order designed to relieve a particular property from applicable zoning restrictions. *Clark v. City of Boulder*, 362 P.2d 160, 161 (1961)("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."). Indeed, each case Appellants cite reflects that "spot zoning" involves a change in zoning for a particular property. *See id.* at 161 (challenging the rezoning of a residential district into a business district); *Whitelaw*, 2017 COA 47 at ¶63 (challenging the rezoning of a single-family parcel to allow three-story apartment buildings); *Little v. Winborn*, 518 N.W.2d 384, 386-387 (Iowa 1994)(challenging the rezoning of one type of agricultural district into another); *Leahy v. Inspector of Bldgs*., 31 N.E.2d 436, 439 (Mass. 1941)(challenging the rezoning of a residential district into a business district).

Here, there has been no zoning change at all. What is being considered is not a change-of-zone, but a USR that the Code explicitly allows in the A Zone. As

the District Court observed, "the grant of a variance or special exception that has the same effect as a small parcel rezoning, like the permit here, cannot be attacked as spot-zoning…. The permit here seeks a special exception to allow an industrial operation on land zoned as agricultural. It does not seek to rezone the land [and] cannot therefore be characterized as illegal spot zoning." R. CF, p. 874.

Appellants urge this Court to create new law by citing to *Carron v. Bd. of Cnty. Comm'rs*, 976 P.2d 359, 362 (Colo. App. 1998), for the proposition that the *Carron* court "did not hesitate to apply *Clark* to what appears to have been an administrative land use process." This is a misinterpretation of *Carron*. That case involved a challenge to a "delineation" process allowing for multiple uses within the same zoning district, which this Court recognized as being "similar to that adopted for special uses." *Id.* at 362. The *Carron* appellants argued that the delineation process amounted to spot zoning, but this Court disagreed by citing to *Clark* to explain that "[p]rohibited spot zoning occurs only when it appears that the rezoning order is designed to relieve a particular property from applicable zoning regulations." *Id.* at 362 (citing *Clark*, 362 P.2d at 161). By contrast, the Court held that, "a zoning code setting out standards for granting or denying special uses

within the same district is permitted." *Id*. at 361-362. The *Carron* decision therefore undermines Appellants' claim.[11]

The Board appropriately determined that the Proposed Use was consistent with the USR criteria for the A Zone. Because this approval did not involve a change-of-zone, it cannot be characterized as "de facto spot zoning."

V. The District Court's Refusal to Order Production of Privileged Communications Reflected the Exercise of Sound Discretion.

A. Standard of Review

Martin disputes Appellants' standard of review for this issue. Factual issues surrounding privilege and discovery are not subject to *de novo* review. Rather, "[w]hen reviewing matters of discovery and privilege, [courts] apply an abuse of discretion standard." *Land Owners United, LLC v. Waters*, 293 P.3d 86, 95 (Colo. App. 2011)(internal citations omitted).

B. Issue Preservation

This issue is preserved.

C. Discussion

[11] Appellants' citation to *Drews v. City of Hattiesburg*, 904 So. 2d 138, 141-42 (Miss. 2005), is no more availing. That case did not involve special uses at all, but rather setback, building height, and number of parking spaces variances. *Id.* at 140. Unlike the Code, which specifically allows the Proposed Use, nothing in the scope and intent of the City's zoning regulations supported the requested variances.

Appellants argue that this Court should reverse the Interim Order denying their request to force the County to divulge privileged emails between counsel for Martin, Gerrard and the County Attorney. These privileged emails were exchanged more than a year after the Board's decision to approve the Proposed Use, but before the Board issued its supplemental findings in response to the District Court's remand. As the District Court ruled, the subject communications need not be disclosed because they are privileged under a valid common interest agreement and did not affect the Board's decision in any way. This is a matter within the District Court's discretion, and the Court should affirm Judge Taylor's Order.

The requested communications were between defense counsel under the protection of Appellees' Common Interest Agreement. R. CF, p. 758. Colorado law recognizes the common interest privilege. *See, e.g., Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co*., 142 F.R.D. 471, 476 (D.Colo.1992). "Communications shared with third persons who have a common legal interest with respect to the subject matter thereof will be deemed neither a breach nor a waiver of the confidentiality surrounding the attorney-client relationship." *Black v. Southwestern Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003) (internal quotation omitted).

Appellees entered into this agreement well before the remand for the purpose of allowing Appellees' counsel to share attorney-client and work product privileged materials without waiving those privileges. The communications were between counsel, not with the BOCC, and Appellees' attorneys had a legitimate expectation that their communications would be confidential. Under the circumstances here, the District Court was well within its discretion in deciding not to violate this privilege and force disclosure of communications.

Moreover, the privileged communications did not affect the Board's decision, a threshold showing for their disclosure. It is well established that review under C.R.C.P. 106(a)(4)(I) is limited to the record before the administrative body. *E.g.*, *Whelden v. Bd. of Cnty. Comm'rs*, 782 P.2d 853, 857 (Colo. App.1989). The record may not be supplemented through discovery unless there is a threshold showing that the administrative body improperly considered evidence not before it or that it engaged in improper conduct that affected the result. *Id.*

In *Peoples Natural Gas Div. of Northern Natural Gas Co. v. Pub. Util. Comm'n*, 626 P.2d 159, 163 (Colo. 1981), cited by Appellants, the court affirmed the PUC's refusal to allow discovery into an alleged *ex-parte* communication: "discovery should be available as a matter of right [into alleged *ex-parte*

communications] only if the party alleging procedural irregularities first shows, by affidavit or other substantial factual evidence, that there is good cause to believe that *ex-parte* communications, personal bias or other impermissible considerations played a part in the tribunal's decision." *Id*. at 163-164. *Accord Lopez-Samoya v. Colorado State Bd. of Medical Examiners*, 868 P.2d 1110, 113 (Colo. App. 1993), *rev'd on other grounds*, 887 P.2d 8 (Colo. 1994)(allegation of bias that relied upon post-decision newspaper articles insufficient to get discovery in post-hearing, pre-appeal administrative proceeding). Appellants did not meet their burden entitling them to discovery of privileged communications between counsel because they did not and cannot show that they altered the BOCC's decision.

The BOCC's initial USR decision, finalized on August 17, 2015 ("Resolution"), approved Martin's USR application and imposed seven COAs and 42 development standards. AR, pp. 3-12. Although the BOCC found that each of the USR criteria had been met, AR, p. 2, the District Court's August 9, 2016 Interim Order remanded for additional findings of fact. R. CF, p. 707. The Second Resolution, AR, pp. 711-732, sets forth exactly the same decision as the Resolution, but adds supporting findings of fact. Accordingly, the requested privileged communications did not alter the Board's decision in any way.

This situation is markedly different from the cases Appellants cite, which concern alleged *ex-parte* communications that occurred *before* the quasi-judicial body's decision, meaning that they could have altered the quasi-judicial body's decision. In *Wells v. Del Norte Sch. Dist. C-7*, 753 P.2d 770, 771 (Colo. App. 1987), the court held that a teacher seeking review of a school board decision to dismiss her for incompetency was entitled to a new hearing because the hearing officer during a break ate lunch with counsel for the school board and a witness during the witness's testimony before the board made its decision. Similarly, in *Colo. Energy Advocacy Office v. Pub. Serv. Co*., 704 P.2d 298, 300 (Colo. 1985), the PUC received *ex-parte* communications while the evidentiary record was still open and before it issued its decision concerning a gas tariff. *Id*. at 301-302. And in *Zuviceh v. Industrial Comm'n*, 544 P.2d 641, 642 (Colo. App. 1975), involving a claim for unemployment benefits, the employer had a telephone conversation with one of the Commission members and the Commission subsequently reopened the record and reversed the hearing officer's award of benefits. The court reversed because it could not tell whether the conversation influenced the Commission to change courses. *Id*. at 642-643.

None of these cases applies. Here, the evidentiary record had been closed since August 17, 2015, when the BOCC issued its decision, more than a year

before the requested emails between counsel were exchanged. And the Second Resolution did not alter any aspect of the BOCC's decision. It is therefore impossible for Appellants to make the required "threshold showing that the administrative body improperly considered evidence not before it or that it engaged in improper conduct that affected the result," *Whelden*, 782 P.2d at 857. Accordingly, the District Court did not abuse its discretion in denying Appellants' motion to require disclosure of privileged communications.

Appellants also argue that disclosure of the communications is warranted because the BOCC, through the County Attorney, could have relied upon the allegedly *ex-parte* communications in arriving at their supplemental findings in the Second Resolution. But even assuming this speculative claim is true, it does not overcome the fact that the communications were privileged and obviously did not affect the Board's decision to approve the Proposed Use. *See Ricci v. Davis*, 627 P.2d 1111, 1121 (Colo. 1981)(although board received extra-record affidavits, its decision was supported by record facts and must be affirmed); *Whitelaw*, 2017 COA 42 at ¶ 13 (court rejects claim that council's rezoning decision fatally tainted by emails from a lobbyist: "the neighbors have not overcome the presumption of integrity, honesty and impartiality and have shown no prejudice from the communications. . . .")

Moreover, because the Board's decision is supported by record evidence, it should be affirmed regardless of whether *ex-parte* communications occurred. *See Ricci,* 627 P.2d at 1121; *City of Wheat Ridge*, 183 P.3d at 720 (though recognizing council discussed impermissible considerations, court found council's decision was supported by findings in the written resolution and ruled that "we will not attempt to read the collective mind of the City Council to determine whether its members were motivated by improper considerations."); *Whitelaw*, 2017 COA 42 at ¶¶ 22 & 59 (where record supported Council's decision, neighbors failed to show reliance on extra-record information and rezoning must be affirmed). As Judge Taylor correctly ruled, "…either the Board of County Commissioner's findings are supported by the record, or they are not, regardless of the nature and effect of the communications." R. CF, p. 810.

CONCLUSION

For the foregoing reasons, Martin respectfully requests that this Court uphold the Second Resolution and affirm the Interim Order.

Dated: June 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, a true and correct copy of **DEFENDNT-APPELLEE MARTIN MARIETTA MATERIALS INC.'S ANSWER BRIEF** was served via the Colorado Courts e-filing system on the following individuals:

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