COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado **Previous Appellate History**: COLORADO COURT OF APPEALS Case No. 2017CA000463 Hon. Judge Terry, Hon. Judge Casebolt, Hon. Judge Carparelli DISTRICT COURT, WELD COUNTY, COLORADO Case No. 2015CV30776 Hon. Judge 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 Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steven Moreno, and Julie Cozad), **MARTIN MARIETTA MATERIALS, INC.**, a North Carolina corporation, **GERRARD INVESTMENTS, LLC**, a Colorado limited liability company, **WELD LV, LLC**, a Nevada limited liability company, and **WELD LV II, LLC**, a Nevada limited liability company. **Attorneys for Plaintiffs/Appellants:** Mark E. Lacis, Reg. # 37421 James R. Silvestro, Reg. # 43982	▲ COURT USE ONLY ▲ Case No. 2018CA1103

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APPELLANTS' OPENING 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 therein. Specifically, the undersigned certifies that:

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

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

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

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

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

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

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STATEMENT OF THE CASE

Nature of the Appeal

What is the appropriate remedy when a quasi-judicial body exceeds its authority and abuses its discretion in approving a controversial land use application? Should the prevailing challenger be made whole? Or should the matter be remanded so that the applicant can have another bite at the apple with no lasting consequences for this Court's holding that the original approval was illegal?

This is an appeal challenging the Weld County District Court's actions on remand after the Appellant Neighbors[1] previously prevailed before this Court. In an Opinion of this Court dated November 22, 2017 (the "Opinion"),[2] a three-judge panel unanimously held that Appellee the Weld County Board of County Commissioners (the "BOCC") abused its discretion in approving the use by special ("USR") permit of Appellees Martin Marietta Materials, Inc. ("Martin Marietta") and Gerrard Investments, LLC ("Gerrard"), which would have granted Martin Marietta special permission to operate a heavy-industrial asphalt and concrete plant and transloading (rail-to-truck) facility at a site that is zoned for agricultural use. (Appdx. I, pp. 297-308.) This Court concluded that the BOCC "abused its

[1] Appellants Motherlove Herbal Company (an organic farm that grows specialty products for pregnant and nursing mothers), Rockin S Ranch LLC (a dairy farm-themed wedding and event venue), John Cummings (a homeowner and farmer), Indianhead West Homeowners Association, Inc. (an HOA comprised of approximately 30 homeowners), David Kisker (a homeowner), Gary Oplinger (a homeowner), Wolfgang Dirks (a homeowner), and James Piraino (a homeowner) are collectively referred to as the "Appellant Neighbors." The Appellant Neighbors own homes and/or operate businesses surrounding the subject property and have jointly brought this action to prevent the injuries in fact that each would suffer if the proposed land use is not denied and if the subject property is not returned to a condition of lawful use consistent with the existing zoning designation under the Weld County Code. (CF, pp. 113-19, 134-38.)

[2] For the convenience of the Court, the Opinion and all of the substantive filings submitted by the parties in the previous appeal to this Court in this matter (Colorado Court of Appeals Case No. 2017CA000463) are submitted with this Opening Brief as Appendix I.

discretion because its finding of compatibility [a necessary element of approval] relied on a conclusion of noise mitigation that is unsupported by the record." (*Id.* at 306.) Accordingly, this Court held that "[t]he judgment [of the District Court affirming the BOCC's approval of Martin Marietta's USR permit] is reversed and the case is remanded to the district court for the entry of judgment in favor of the [Appellant Neighbors]." (*Id.* at 307.) Because this Court found that the USR approval was unlawful, it declined to address the four other issues that the Appellant Neighbors had properly presented in this first appeal. (*Id.*)

Following the issuance of the mandate from this Court, this matter was remanded before the Weld County District Court. The District Court immediately entered judgment in favor of the Appellant Neighbors and ordered the BOCC "to reverse its approval of the special use permit, USR 15-0027, by denying that permit instead." (CF, p. 1014.) Thereafter, the Appellant Neighbors and Martin Marietta filed cross-motions to amend the District Court's final judgment. The Appellant Neighbors asked the District Court to order the BOCC to enforce the existing zoning at the subject property[3] and to require the removal of the industrial

[3] The property at issue in this action is an approximately 132-acre parcel located in unincorporated Weld County and entirely within Weld County's A (Agricultural) Zone (hereinafter, the "Property"). (CF, p. 299.)

improvements that Martin Marietta had knowingly[4] constructed during the pendency of the underlying appeal. (*Id.* at 1015-39.) Martin Marietta asked the Court to vacate the final judgment that ordered denial of the USR permit and instead requested remand to the BOCC for further "action." (*Id.* at 1040-47.)

The District Court granted Martin Marietta's motion and found that it had "erred in directing the [BOCC] to deny the special use permit, rather than remanding the case for the [BOCC] to decide how to address the deficiency identified by the Court of Appeals." (*Id.* at 1155-56.) In doing so, the District Court denied the Appellant Neighbors' request that the BOCC be ordered to enforce the existing zoning at the Property. (*Id.* at 1157-59.) Thus, the District Court's amended final judgment merely reversed the BOCC's approval of the USR permit, but remanded the case for further findings before the BOCC. (*Id.* at 1156.)

The Appellant Neighbors now ask this Court to review the District Court's erroneous interpretation of this Court's Opinion and applicable law, which dictate that the District Court was required to order the denial of Martin Marietta's USR permit. The administrative record before the BOCC is closed and there is no

[4] Prior to making the industrial improvements, Martin Marietta sent a letter to the County expressly acknowledging that if the Appellant Neighbors prevailed in the underlying appeal, Martin Marietta would be required to remove all industrial improvements at its own expense. (CF, p. 1030.)

mechanism by which this matter can be remanded before the BOCC for further findings. Moreover, in light of the undisputed evidence that Martin Marietta is currently using the Property in violation of the Weld County Land Use Code, the District Court further erred in failing to order the remediation of the Property to ensure compliance with the applicable zoning and to make the Appellant Neighbors whole.

Finally, if this Court concludes that the District Court did not err in its interpretation of this Court's Opinion, then justice and judicial economy compel this Court to consider the other case-dispositive issues that the Appellant Neighbors previously raised, but which were not reached in the previous appeal. Each of these issues was timely raised before this Court and, if remand to the BOCC is appropriate, should be fully considered and resolved before the BOCC is permitted to take any further action.

Underlying Factual Background

Rather than repeat all of the material facts underlying this second appeal, the Appellant Neighbors expressly incorporate the factual background set forth in the Opening Brief that they filed in the first appeal to this Court (including all supporting citations to the administrative record). (*See* Appdx. I, pp. 89-102.)

This Court previously summarized the relevant background as follows:

> Defendant corporations applied for a use by special review to construct and operate an asphalt and concrete production, processing, and railroad transloading facility (the proposed use) on a 132-acre agriculturally zoned parcel (the proposed site). The facility would involve the construction of multiple new buildings, including an asphalt plant, a ready-mix concrete plant, a 14,000 square-foot office building, and additional supporting elements such as an electrical substation, multiple storage tanks, and a railroad loop that can accommodate up to 121 train cars for the transloading of materials.
>
> Plaintiffs are a diverse group made up of homeowners in a neighboring residential development, an organic farm, and a proposed agriculturally themed event space.
>
> Following a lengthy hearing, the board issued a resolution approving the use by special review. Plaintiffs then sought review in the district court under C.R.C.P. 106(a)(4), arguing that the board violated the Weld County Code (W.C.C.) and abused its discretion in approving the proposed use. After finding that the board's initial resolution did not include sufficient findings of fact or explanations as to how the use by special review would meet the relevant portions of the code, the district court remanded the case to the board to make further factual findings necessary for judicial review.
>
> On remand, the board issued a second, more detailed resolution approving the proposed use, and the case was returned to the district court. That court affirmed the board's decision in a lengthy and detailed order.

(CF, pp. 299-300.)

The Appellant Neighbors timely appealed the BOCC's approval of the USR to this Court for *de novo* review of the BOCC's decision under C.R.C.P. 106. The Appellant Neighbors raised five separate issues in the previous appeal:

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

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

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

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

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

(Appdx. I, pp. 6-7.) In presenting these issues to the Court, the Appellant Neighbors explained that each issue provided an independent and dispositive basis for ordering the denial of Martin Marietta's USR application. (*Id.* at 88.)

This Court issued its Opinion in the previous appeal on November 22, 2017. In the Opinion, this Court only reached one of the five issues raised by the Neighborhood Appellants. (*Id.* at 307.) Specifically, the Court found that the

administrative record did not contain any evidence that Martin Marietta's proposed use could comply with the applicable residential noise standard at the property boundary adjacent to neighboring residential properties. (*Id.* at 306.) The Court concluded "that the [BOCC] abused its discretion because its finding of compatibility relied on a conclusion of noise mitigation that is unsupported by the record." (*Id.*) The Court reversed the District Court's holding affirming the BOCC's approval and specifically instructed that the BOCC's decision be "overturned" and that judgment should enter in favor of the Appellant Neighbors. (*Id.* at 307.) Because the Court found that the noise issue was dispositive of this case, the Court declined to address the other four issues that the Appellant Neighbors raised in this earlier appeal. (*Id.*)

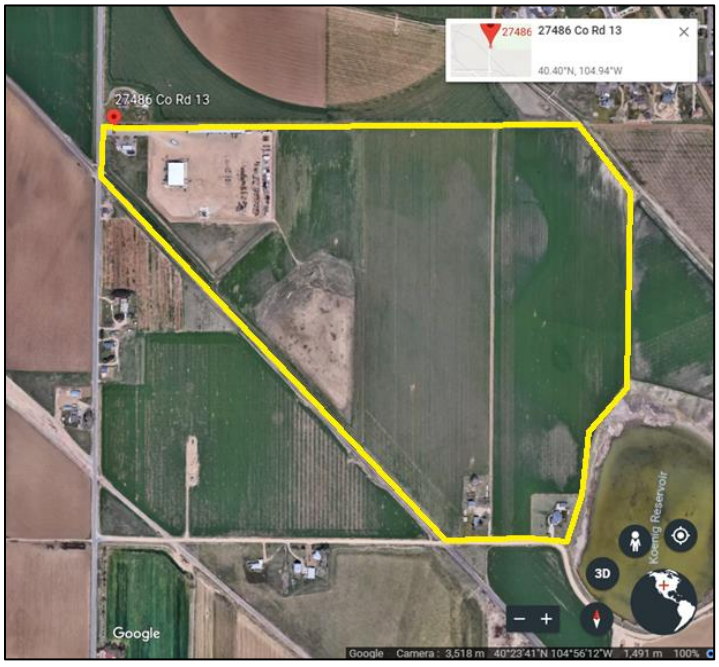
Intervening Developments

After the BOCC initially approved Martin Marietta's USR permit, the Appellant Neighbors timely initiated this action on September 9, 2015. (CF, p. 106.) While this action was pending, all of the parties to this suit were on actual notice that the approval of the BOCC's approval of the USR permit might be reversed.

Martin Marietta expressly acknowledged and accepted the risk of acting in reliance on the approved USR permit while this action was pending. In a letter

dated December 21, 2015, and addressed to the County Attorney for Weld County, counsel for MMM wrote: "[MMM] acknowledges that, in the event the litigation **results in an invalidation of the approval of its Use by Special Review ("USR") permit for the Project**, that it may have to cease activity, or **remove improvements that have been installed pursuant to approved permits**." (CF, p. 1030 (emphasis added).)

At the time that the USR permit was approved, the western side of the Property was used as a construction storage yard (under a separate, preexisting USR held by Gerrard), but the eastern portion of the Property was an unimproved, ungraded alfalfa field as shown in this satellite image of the preexisting condition of the Property:



(CF, pp. 1021-22.[5]) Following this Court's Opinion and remand before the District Court, Martin Marietta confirmed that while the first appeal was pending, it nevertheless had constructed a concrete plant, a rail loop, and an aggregate conveyor system on the Property. (*Id.* at 1078-79 (explaining that Martin Marietta had constructed all of the industrial "USR Facilities" at the Property "with the exception of the asphalt plant")). Moreover, Martin Marietta did not dispute the Appellant Neighbors' contention that as of April 2018, the Property (which prior to the USR was predominantly an undisturbed alfalfa field) had been completely transformed into an industrial site:

[5] Martin Marietta did not dispute any of the material allegations set forth in the Appellant Neighbors' May 2, 2018 "Motion for Amended Final Judgment Pursuant to C.R.C.P. 59(a)(4)." (*Compare* CF, pp. 1016-39 *with id.* at 1077-88.)

(*Id.* at 1022.) Following this Court's Opinion, representatives for both the BOCC and Martin Marietta acknowledged that Martin Marietta could not operate any of the industrial improvements at the Property. (*Id.* at 1023.) Nevertheless, Martin Marietta publicly stated that the heavy industrial facility would be "operational at some point" and counsel for the BOCC declined to respond to the Appellant Neighbors' request that the County act to immediately require the remediation of the Property to agricultural use. (*Id.* at 1023-24.)

Subsequent Procedural History

This Court denied Martin Marietta's petition for rehearing and/or re-argument on March 15, 2018, and thereby affirmed the Opinion as the final order of this Court in the earlier appeal. (Appdx. I, pp. 372-74.) Thereafter, this Court entered its mandate on April 30, 2018, and returned jurisdiction of this matter to the District Court. (*Id.* at 378.)

The very next day—before the parties could file anything with the District Court—the District Court acted *sua sponte* to enter final judgment in this matter in favor of the Appellant Neighbors by ordering that the BOCC "reverse its approval of the [USR permit] by denying that permit instead." (CF, p. 1014.)

At the time that the District Court entered this initial final order, it had not been presented with any of the subsequent developments related to Martin

Marietta's construction of the industrial improvements and the BOCC's refusal to confirm that it would require remediation of the Property to agricultural use. Accordingly, one day after the District Court entered its initial final judgment (and just two days after the mandate issued), the Appellant Neighbors filed a motion to amend the final judgment pursuant to C.R.C.P. 59(a)(4) to specifically include a mandatory injunction in light of these intervening, undisputed developments. (*Id.* at 1015-39.) The Appellant Neighbors referenced the December 21, 2015 letter whereby Martin Marietta expressly acknowledged that it was assuming the risk that if the Appellant Neighbors' appeal was successful that it could be required to remove all improvements constructed pursuant to the unlawful USR. (*Id.* at 1020-21, 1030.)

Thereafter, Martin Marietta filed its own C.R.C.P. 59(a)(4) motion and asked the District Court to amend its final judgment so that the BOCC's approval would be "reversed" instead of requiring that the USR application be "denied." (*Id.* at 1040-49.)

On June 4, 2018, the District Court denied the Appellant Neighbors' motion and granted Martin Marietta's motion, thereby amending its final judgment to provide that the BOCC's approval of the USR permit was merely "reversed" and

that consideration of the USR application would be "remanded to the [BOCC] for further proceedings consistent with the [Opinion]." (*Id.* at 1155-59.)

Orders Presented for Review

The Appellant Neighbors appeal two orders of the District Court. First, the Appellant Neighbors ask this Court to review the District Court's final judgment on remand—the June 4, 2018 "Order Granting Defendant Martin Marietta Materials, Inc.'s Motion to Amend Judgment" which found that the District Court had no power to order denial of the USR application and instead remanded consideration of the USR application for further factual findings before the BOCC. (CF, pp. 1155-56.) Second, the Appellant Neighbors ask this Court to review the District Court's June 4, 2018 "Order Denying Plaintiffs' Motion for Amended Judgment" which found that the District Court had no authority to consider the Appellant Neighbors' request for a mandatory injunction in light of Martin Marietta's construction of improvements during the pendency of the first appeal that are now unlawful. (*Id.*, pp. 1157-58.)

Alternatively, if this Court concludes that the District Court appropriately remanded Martin Marietta's USR application to the BOCC for further factual findings, then the Appellant Neighbors ask this Court, in the interest of judicial economy, to revisit its Opinion and review the other dispositive issues that the

Appellant Neighbors properly raised, but which this Court declined to consider. (*See* Appdx. I, p. 307.)

STATEMENT OF JURISDICTION[6]

It is well-settled that this Court can and should review a challenge to a District Court's final judgment for consistency with an earlier opinion of this Court. *Thompson v. United Secs. Alliance, Inc.*, 2016 COA 128, ¶ 13 ("Trial courts have no discretion to disregard binding appellate rulings."); *see also City Council of City of Cherry Hills Vill. v. S. Suburban Park & Recreation Dist.*, 219 P.3d 421, 423 (Colo. App. 2009) (explaining that this Court can and should "review de novo whether a trial court has complied with a prior appellate ruling.").

Under this line of cases, the Appellant Neighbors timely challenge the District Court's final judgment as inconsistent with the Opinion of this Court. *See* C.R.C.P. 54(a); C.A.R. 3. Similarly, in light of this final judgment, the Appellant Neighbors also timely ask this Court to review the District Court's order refusing to consider the Appellant Neighbors' request for a mandatory injunction. Finally, if this Court concludes that the District Court acted appropriately in reversing its initial final order and merely remanding the USR application to the BOCC for a

[6] In an Order dated July 20, 2018, the Court directed the parties to brief the jurisdictional issues raised by Martin Marietta in their principal briefs.

reopened evidentiary hearing, then the Appellant Neighbors ask this Court to exercise its discretionary authority to address the merits of the otherwise case-determinative issues that this Court previously declined to address. *Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1118 (Colo. 1990) (recognizing that appellate courts have discretion to address issues that are likely to arise on remand).

In its motion to dismiss this appeal, Martin Marietta argues that this Court was without jurisdiction to hear this appeal by blurring a procedural argument with the substance of this appeal. First, Martin Marietta argues that this Court has no authority to review the actions of the District Court in a C.R.C.P. 106(a)(4) appeal, but ignores the longstanding principle that this Court can review district court orders for compliance with appellate decisions. *Thompson*, 2016 COA 128, ¶ 13. As explained below, the flawed reasoning of the District Court in its amended final judgment violates this Court's Opinion and is therefore directly appealable to this Court irrespective of the fact that this matter arises under C.R.C.P. 106.

Second, Martin Marietta assumes that the District Court's remand order is correct and then, from that starting point, argues that this action cannot be appealed because it has now been remanded before the BOCC. *Sidman v. Sidman*, 2016 COA 44, ¶ 10 (refusing to grant motion to dismiss appeal based on trial court's

actions because "an appellate court is not bound by substantive decisions made in a lower court"). Specifically, Martin Marietta claims that a review of the District Court's final judgment is not yet ripe because the District Court merely remanded this matter to the BOCC for action "consistent with the opinion of the Court of Appeals." This argument ignores the fact that the District Court expressly recognized that the BOCC will attempt to reopen the administrative record to allow Martin Marietta to correct the issue that this Court identified in the administrative record. As explained in more detail below, the flaw in the District Court's reasoning stems from the fact that there is no provision under the Weld County Code for reopening an administrative record. Rather, the only lawful result is to order that the BOCC deny the USR permit and thereby prevent Martin Marietta from reapplying for the same USR for a period of five years after the denial. *See* Weld County Code (hereinafter, "W.C.C.") § 2-3-10(A).[7]

Finally, Martin Marietta argues that the Appellant Neighbors seek an advisory opinion because the BOCC has not yet acted on remand. Again, this argument looks past the Appellant Neighbors' challenge to the substance of the District Court's amended final judgment. It would be an absurd result if, as Martin Marietta contends, the Appellant Neighbors were first required to wait for the

[7] All provisions of the Weld County Code are publicly available at: https://library.municode.com/co/weld_county/codes/charter_and_county_code.

BOCC to act again before they could ask this Court to review the District Court's improper refusal to enter an order denying the USR permit and for mandatory injunction to remove the unlawful industrial improvements—not least of all because that would presumably require the Appellant Neighbors to initiate an entirely new action under C.R.C.P. 106.

The District Court has entered final judgment and, in doing so, violated this Court's Opinion. Separate and apart from its consideration of the merits of this appeal, there can be no question that this Court has jurisdiction to review the actions of the District Court (following the entry of final judgment) for consistency with its own appellate ruling.

SUMMARY OF THE ARGUMENT

Following remand from this Court, the District Court erred in reversing its interpretation of this Court's Opinion by entering a final judgment that merely vacated the BOCC's approval of the USR permit while allowing the administrative record before the BOCC to be reopened for further evidentiary findings. The difference between a final judgment ordering the denial of the USR permit and a final judgment merely vacating and remanding the permit is of critical importance in light of the provision of the Weld County Code that provides that a denied land use application cannot be reconsidered by the BOCC for at least five years after the

denial. Because the Weld County Code does not provide any mechanism by which an evidentiary record underlying a USR permit application may be reopened, this Court's holding that the BOCC abused its discretion requires denial of the USR application and prohibits the BOCC's reconsideration of Martin Marietta's proposed industrial land use for five years after the denial. By incorrectly reversing its own judgment and finding that it had no authority to order denial of the USR application, the District Court failed to enter final judgment in favor of the Appellant Neighbors as required by this Court's Order.

The District Court further erred by refusing to consider the merits of the Appellant Neighbors' request for a mandatory injunction to remove all of Martin Marietta's industrial improvements to the Property and to enforce the agricultural zoning of the Property consistent with this Court's Opinion. Colorado courts have expressly recognized that they possess authority to impose equitable remedies within the context of a C.R.C.P. 106 land use appeal. The District Court further erred by ignoring that all material facts supporting such relief were stipulated to or otherwise could have been easily demonstrated in an evidentiary hearing. Finally, the District Court's concerns with the timing of the Appellant Neighbors' request for a mandatory injunction wholly ignores the facts giving rise to the request for a mandatory injunction. The District Court had authority to enter a mandatory

injunction, and by refusing to even consider this remedy, the District Court failed to make the Appellant Neighbors whole and thereby violated this Court's Opinion directing judgment in their favor.

Lastly, if this Court finds that the District Court's final judgment was in fact consistent with its Opinion, then the Appellant Neighbors respectfully ask this Court to consider the other issues that the Appellant Neighbors properly preserved and raised in the previous appeal.

ARGUMENT

I. The District Court Erred in Remanding the USR Application Back to the BOCC for Further Proceedings Rather Than Denying It Consistent with this Court's Opinion.

A. Standard of Review

This first issue asks the Court to review the final judgment of the District Court for consistency with the previous Opinion of this Court. It is well-settled that this Court reviews "de novo whether a trial court has complied with a prior appellate ruling." *City Council of City of Cherry Hills Vill.*, 219 P.3d at 423 (Colo. App. 2009).

B. Preservation of the Issue

On remand before the District Court, the Appellant Neighbors opposed Martin Marietta's request for the District Court to amend its initial final judgment on remand. (CF, p. 1098-1114.)

C. Discussion

Before reversing itself, the District Court first interpreted this Court's Opinion as directing the District Court to order the BOCC "to reverse its approval of the [USR permit] by denying that permit instead." (*Id.* at 1014.) Following Martin Marietta's motion to amend this final judgment, the District Court concluded that it "erred in directing the [BOCC] to deny the special use permit, rather than remanding the case for the [BOCC] to decide how to address the deficiency identified by the Court of Appeals." (*Id.* at 1155-56.)

In stark contrast to this Court's Opinion mandating that the BOCC decision approving the USR permit be "overturned" (Appdx. I, p. 307), the District Court concluded that it did not have the authority to require that the USR permit be denied. (CF, pp. 1155-56.) Specifically, the District Court relied upon *Wolf Creek Ski Corp. v. Board of County Commissioners of Mineral County*, 170 P.3d 821, 831 (Colo. App. 2007) to conclude that it was without authority to do anything other than remand the USR application to the BOCC and allow for the reopening

of the administrative record. What the District Court failed to recognize, however, is that the Weld County Code requires denial of an application that does not meet the requirements of the Code.

As noted above, the difference between the District Court's initial judgment denying the USR permit and its amended judgment merely vacating the approval and remanding the issue to the BOCC for further findings is critical in light of Weld County's five-year bar on reconsidering land use applications that have been denied. *See* W.C.C. § 2-3-10(A) ("[N]either an applicant nor his or her successors in interest in property for which a land use application was denied within the preceding five (5) years may submit a land use application or request a rehearing on a previously submitted application for any portion of the property contained in the original action . . . ."). In asking the District Court to amend its original final judgment, Martin Marietta itself recognized that an order denying the USR permit would "jeopardize Martin Marietta's enormous investment in the USR facilities." (CF, p. 1045.)

The District Court was correct in noting that *Wolf Creek* includes the statement that "[o]nce a court finds that an administrative body has abused its discretion, how to address that deficiency on remand is within the discretion of the administrative body." (CF, p. 1155 (quoting 170 P.3d at 831).) However, what the

District Court failed to recognize is that under the Weld County Code, the BOCC does not actually possess any discretion to "address" a deficiency in the USR application. Thus, the situation before the Court of Appeals in *Wolf Creek* (where the Court of Appeals provided express instructions that the matter be remanded to the underlying administrative body) is distinguishable.[8]

If, following a hearing before the BOCC, an applicant cannot meet its burden of proof to demonstrate that the proposed USR will comply with all of the required legal elements, the BOCC has no discretion and must deny the USR application. The options before the BOCC in considering a USR application are binary—if there is sufficient competent evidence, the BOCC must approve; if there is not, the BOCC must deny. W.C.C. § 23-2-210(B)(1) ("The authority for making the decision to approve or deny the request for a Special Review Permit rests with the Board of County Commissioners."). There is nothing in the Weld County Code to suggest that a record may be left open or may be reopened following a USR applicant's failure to meet its burden of proof. *Cf.* W.C.C. § 23-2-290 (providing that a new hearing may be held when a party has moved to revoke an existing, valid USR permit). If a USR application is denied, then the same or

[8] There is also no suggestion in *Wolf Creek* that the Mineral County Code included a provision similar to Weld County's five-year bar on reopening deficient USR applications.

similar land use proposal may not be reopened or otherwise raised before the BOCC for a period of at least five years. W.C.C. § 2-3-10(A). There is no mechanism by which an applicant can seek to reopen a failed application by seeking to introduce additional evidence within this five-year period.

Here, the record before the BOCC on Martin Marietta's proposed USR permit has been closed since before the Appellant Neighbors initiated this lawsuit. There is no mechanism under the County Code by which this administrative record may be reopened. Once this Court concluded that the BOCC abused its discretion in approving the USR permit without competent evidence of compatibility, the only available result consistent with this Court's Opinion was for the District Court to enter judgment finding that the USR application must be denied.

The inconsistency between the District Court's amended final judgment and this Court's Opinion is further underscored by this Court's decision within the Opinion to forego consideration of the other four issues that the Appellant Neighbors presented in that first appeal. (*See* Appdx. I, p. 307.) "The meaning of a remand is to be determined from the reviewing court's disposition of the issues before it." *In re Marriage of Ashlock*, 663 P.2d 1060, 1062 (Colo. App. 1983); *see also Thompson*, 2016 COA 128, ¶14 ("When determining the meaning of a remand order, we consider the disposition and context of the entire opinion."). In its

Opinion, this Court ordered that the District Court's initial affirmation of the BOCC's approval of the USR permit was to be reversed and therefore remanded this action to the District Court for judgment to be entered in favor of the Appellant Neighbors. (Appdx. I, p. 307.) This Court exercised judicial restraint in declining to address the Appellant Neighbors' additional issues on appeal because it intended for its holding that the USR permit "must be overturned" to be dispositive of this case. If the Court had merely intended for this matter to be remanded back to the BOCC for further findings, then no judicial economy would have been realized by this Court's election to forego consideration of the other (potentially dispositive) issues that were fully briefed and pending before it—and certain to be raised again following remand.

Ultimately, the question before the District Court was not whether it had the authority to tell the BOCC what to do. Rather, in the face of this Court's determination that Martin Marietta failed to provide any competent evidence to meet its evidentiary burden, the District Court had no discretion but to enter judgment that the USR application be denied. The District Court misinterpreted this Court's Opinion and erred in remanding this matter to the BOCC for a continued evidentiary hearing. The District Court's amended final judgment must

be reversed with instructions to enter final judgment denying Martin Marietta's USR permit.

II. The District Court Erred in Denying the Appellant Neighbors' Request for a Mandatory Injunction in Light of the Undisputed Industrial Improvements Subsequently Constructed by Martin Marietta.

A. Standard of Review

This second issue asks the Court to review whether the District Court correctly reasoned that it had no authority to consider the Appellant Neighbors' request for a mandatory injunction. This Court reviews *de novo* whether a district court has applied the correct legal standard in determining the availability of a particular equitable remedy. *Zeke Coffee, Inc. v. Pappas-Alstad P'ship*, 2015 COA 104, ¶ 11; *see also Perfect Place v. Semler*, 2016 COA 152M, ¶ 47 ("We review the trial court's findings of fact for an abuse of discretion, but we review de novo whether the trial court correctly understood the appropriate test for the equitable remedy." (Internal quotation omitted)).

Moreover, this Court must review *de novo* whether the District Court has acted consistent with its prior appellate ruling. *City Council of City of Cherry Hills Vill.*, 219 P.3d at 423.

B. Preservation of the Issue

From the outset of this action in September 2015, the Appellant Neighbors have challenged the BOCC's approval of Martin Marietta's USR application and have sought to be made whole for the injury-in-fact that was caused by this wrongfully approved, non-conforming, heavy industrial use. (CF, pp. 113-118.) For example, in the Appellant Neighbors' Complaint they alleged on behalf of Appellant Indianhead West Homeowner Association that the approved heavy industrial USR would be "inconsistent with existing and future land uses on and around" the Property and would "irreparably injure its members' rights to the use and quiet enjoyment of their property." (*Id.* at 116.) At the time that the Appellant Neighbors brought this action, Martin Marietta had not yet engaged in any industrial activities at the Property and therefore there was no basis for the Appellant Neighbors to move for a mandatory injunction to remove nonexistent industrial improvements. (*See id.* at 1085 (Martin Marietta claims that it "did not begin to construct any of the USR Facilities until after the [District Court] affirmed the [BOCC's] Amended Resolution approving the permit" in January 2017).) From the very start of this action, however, the Appellant Neighbors' explicit and singular request was to be made whole through the nullification of the BOCC's unlawful approval of Martin Marietta's USR permit. (*Id.* at 138-39.)

Less than two days after this action was remanded to the District Court, the Appellant Neighbors presented the District Court with undisputed evidence regarding Martin Marietta's now unlawful industrial improvements to the Property and requested a mandatory injunction requiring Martin Marietta to remove such improvements (constructed under a USR permit that was void *ab initio*) and for the BOCC to enforce the existing agricultural zoning. (*Id.* at 1015-39.) The Appellant Neighbors raised this issue before the District Court as soon as was practicable and less than two days after this Court issued its mandate and jurisdiction returned to the District Court on April 30, 2018. (*Id.* at 1015-39.)

C. Discussion

C.R.C.P. 65(f) provides that an injunction may be "made mandatory" whenever "merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled . . . ." As set forth in this Court's Opinion, the Appellant Neighbors are entitled to judgment in their favor. The relief that the Appellant Neighbors sought in this action was for the Property to be maintained and used consistent with its agricultural zoning. Consequently, once it was confirmed that Martin Marietta never had legitimate authority to construct industrial improvements at the Property, the Appellant Neighbors immediately petitioned the District Court for a mandatory injunction consistent with Martin

Marietta's explicit acceptance of the risk that the USR might ultimately be found unlawful and that it might be required to remove the improvements. (CF, p. 1030.)

Without citing to any controlling authority, the District Court rejected the Appellant Neighbors' request for a mandatory injunction out of hand. Specifically, the District Court erroneously interpreted C.R.C.P. 106 (and ignored plainly applicable case law) to find that it has no authority to enter equitable relief in a C.R.C.P. 106 appeal. The District Court then erred in ignoring the undisputed nature of the material facts underlying the Appellant Neighbors' request for equitable relief. Finally, the District Court found that it was significant that the Appellant Neighbors had not previously requested a mandatory injunction while ignoring the fact that there was no earlier opportunity for the Appellant Neighbors to seek redress in light of subsequent developments that occurred while the first appeal was pending before this Court.

The Appellant Neighbors will address each of these flaws in the District Court's reasoning in turn.

a. *Colorado Courts Possess the Authority to Grant Equitable Remedies as Part of C.R.C.P. 106 Appeals.*

The District Court initially erred in concluding that it had no authority to provide equitable relief in this C.R.C.P. 106 appeal. Initially, it is well-established under Colorado law that equitable considerations must be accounted for in the

judicial review of land use issues. *Hargreaves v. Skrbina*, 662 P.2d 1078, 1080 (Colo. 1983); *see also* 4 *Rathkopf's The Law of Zoning and Planning* § 65:13 (4th ed.) ("When a continuing use violates a valid zoning restriction, it may be enjoined unconditionally."). In particular, with regards to land use appeals under C.R.C.P. 106, Colorado courts have long recognized that equitable relief, including mandatory injunctive relief, may be an appropriate way of making a party whole. *See DeVilbiss v. Zoning Bd. of Adjustment of Garfield Cnty.*, 690 P.2d 260, 262 (Colo. App. 1984) ("The issuance of the permits and the construction of the loadout facility subsequent to the time the complaint was filed entitles plaintiff, if successful, to a mandatory injunction ordering restoration of the status quo or modification of the facility to conform with zoning limitations.");[9] *see also Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1995) (considering a request for

[9] The Court of Appeals' holding in *DeVilbiss* was reversed by the Colorado Supreme Court on further appeal, but the Supreme Court opinion similarly assumed that mandatory injunctive relief was an available remedy within the context of a C.R.C.P. 106 appeal. *Zoning Bd. of Adjustment of Garfield Cnty. v. DeVilbiss*, 729 P.2d 353, 360 (Colo. 1986). Notably, the present case is plainly distinguishable from the Supreme Court holding in *DeVilbiss* because Martin Marietta knowingly agreed that it was assuming the risk in proceeding with its industrial improvements while this action was on appeal and explicitly recognized that it could be forced to remove the improvements if the Appellant Neighbors were successful in challenging the USR permit. *See also Save Cheyenne v. Colo. Springs*, 2018 COA 18, ¶ 10 (distinguishing *DeVilbiss* and questioning its precedential value in light of the Supreme Court's explicit limitation of its holding to "the particular facts of that case").

injunctive relief within the context of a hybrid action under C.R.C.P. 106 and C.R.C.P. 57).

Beyond the recognized equitable authority that courts possess in C.R.C.P. 106 actions, it is also "fundamental that trial courts are vested with certain inherent powers necessary for courts to act efficiently. These inherent powers include all powers reasonably necessary to allow the court to efficiently perform its judicial functions and to make its lawful actions effective." *Laleh v. Johnson*, 2016 COA 4, ¶ 14 (citing *Pena v. Dist. Court*, 681 P.2d 953, 956 (Colo. 1984)). In this case, the need for this inherent authority is underscored by the unreasonable position advanced by the BOCC in its briefing on this issue before the District Court. Specifically, the BOCC apparently claims that it has limitless discretion to enforce its land use code and that this Court is powerless to police even flagrant zoning violations (to the obvious detriment of injured neighbors). (CF, pp. 1095-96 ("The County retains its rights to exercise its authority to remedy this authority, as well as the authority to exercise discretion in how to enforce zoning violations.")).

Colorado courts have the authority to provide for equitable relief under C.R.C.P. 106 and should enter mandatory injunctive relief consistent with C.R.C.P.

65(f) whenever "merely restraining the doing of an [unlawful land use] will not effectuate the relief to which the moving party is entitled."

b. *Martin Marietta Does Not Dispute Any of the Material Facts Underlying the Appellant Neighbors' Request for Mandatory Injunction.*

The District Court further erred in finding that there was no factual basis for the Appellant Neighbors' request for mandatory injunctive relief because it ignored that the briefing of the parties confirmed that Martin Marietta had stipulated that it constructed various industrial "USR Facilities" under its now-illegitimate USR permit. (CF, pp. 1078-79.) The District Court also refused to confront the fact that Martin Marietta assumed the risk in constructing these improvements and explicitly told the County that it recognized that if the Appellant Neighbors prevailed in this appeal that the industrial improvement would have to be removed. (*Id.* at 1030.)

In light of these undisputed facts, the District Court failed to cite to any authority to support its suggestion that it could not provide mandatory injunctive relief without first holding an evidentiary hearing. (*See id.* at 1158.) If, however, the District Court had found that any material fact underlying such relief was in dispute, then the appropriate action should have been to hold an evidentiary hearing. Instead, the District Court summarily denied the Appellant Neighbors' requested relief without consideration of the disputed and undisputed facts.

c. *The Appellant Neighbors Sought a Mandatory Injunction as Soon as Was Practicable Following Intervening Events That Occurred While the First Appeal Was Pending.*

Lastly, the District Court's order denying the Appellant Neighbors' request to amend the judgment to include a mandatory injunction suggests that it was material that the Appellant Neighbors did not request such relief until one day after final judgment entered in this matter. Such reasoning, however, ignores when the actions giving rise to the Appellant Neighbors' request for mandatory injunction occurred. Specifically, at the time that the Appellant Neighbors filed suit, Martin Marietta's USR permit had just been approved and Martin Marietta had not yet erected any industrial improvements at the Property. Nevertheless, in bringing suit, the Appellant Neighbors specifically sought redress for the injuries in fact that they expected to suffer if Martin Marietta was permitted to proceed in converting the agricultural Property into a heavy industrial asphalt and concrete facility. *See In re Marriage of Lohman*, 2015 COA 134, ¶ 22 (a request to amend judgment may seek previously requested relief). Those imminently threatened injuries ripened and came to fruition while this matter was previously on appeal before this Court.

In moving forward with its unilateral decision to construct its industrial improvements, Martin Marietta recognized that if its USR permit were found to be

unlawful, it would have to remove the industrial improvements. That is precisely what happened when this Court issued its Opinion and returned the mandate in this action to the District Court. Two days after jurisdiction returned to the District Court, the Appellant Neighbors immediately petitioned the District Court for a mandatory injunction consistent with the Court's Opinion and in light of the intervening acts of Martin Marietta while this matter was on appeal.

While this action has been pending, all parties have been fully advised that the Appellant Neighbors were seeking judicial relief to prevent the Property from being converted to a heavy industrial facility. Martin Marietta has always known—and indeed it affirmatively accepted the risk—that it one day might be forced to remove what are presently unlawful improvements upon the Property. "Even where an injunction has not been issued, if the suit is one for an injunction, the defendant, if he does the thing sought to be enjoined does so at his peril." *Grattan v. Wilson*, 259 P. 6, 8 (Colo. 1927); *see also Werner v. Norden*, 287 P. 644, 646 (Colo. 1930) ("And where a defendant does an act thus sought to be restrained, he proceeds at his peril, and the court in which the action is pending may compel the restoration of the former status or grant to the plaintiff such relief as may be proper.").

Martin Marietta knowingly accepted the risk that it might one day be required to remove its industrial improvements if this Court found that the USR permit was invalid. This Court has now done so, and neither the District Court nor the Appellees can articulate any legitimate basis by which the Appellant Neighbors should not be made whole through a mandatory injunction ensuring that the Property be returned to the status quo ante consistent with the agricultural zoning that remains in effect.

III. In the Alternative, Justice and Judicial Economy Compel This Court to Resolve the Other Dispositive Issues That the Appellant Neighbors Timely Presented Before This Court.

A. Standard of Review

It is committed to the discretion of this Court whether to review issues in the interest of judicial economy. *See People v. Mountjoy*, 2016 COA 86, ¶ 39 ("Whether to exercise discretion and take up [an appellate issue] requires us to consider judicial economy.").

To the extent that the Court's earlier Opinion was not intended to be dispositive of this dispute, the Appellant Neighbors ask this Court to reconsider its decision to refrain from addressing these timely raised and otherwise dispositive issues in the interest of justice, judicial economy, and finality. *See* C.A.R. 40(a)

(providing that in a request for rehearing the Court may "issue any other order it deems appropriate").

B. Preservation of the Issue

The Appellant Neighbors properly raised the remaining dispositive challenges to the BOCC's approval of Martin Marietta's USR permit as part of the Appellant Neighbors' first appeal to this Court. (Appdx. I, pp. 6-7.) In its earlier Opinion, this Court declined to address these other issues because the Court concluded that its holding (that the BOCC abused its discretion in approving the USR permit without competent evidence of compatibility) fully disposed of this case. (*Id.* at 307.) As explained in the Appellant Neighbors' Opening Brief in this earlier appeal, each of these issues was raised and preserved before the District Court. (*Id.* at 105, 111, 118-19, 126.) Consequently, these dispositive issues remain ripe for review and resolution by this Court.

C. Discussion

In entering its Opinion, this Court declined to address the four other issues that the Appellant Neighbors had timely and properly appealed before this Court in their previous appeal. Specifically, this Court explained:

> Because the [BOCC's] decision must be overturned, we decline to address [the Appellant Neighbors'] other contentions that the BOCC improperly considered non-adjacent land uses in its compatibility analysis, that

> there was not competent evidence demonstrating a diligent effort to conserve prime farmland, and that the [BOCC] engaged in illegal "spot zoning." We also decline to address [the Appellant Neighbors'] contention that the [BOCC] and defendant corporations' attorneys engaged in improper ex parte communications.

(Appdx. I, p. 307.)

As explained above, the Appellant Neighbors believe that implicit within this Court's judicial restraint was this Court's intention that its holding that the BOCC's approval of Martin Marietta's USR permit "must be overturned" would finally and completely resolve this case. If, however, as the District Court found and the appellees now contend, the Opinion was merely intended to remand this matter to the BOCC so that Martin Marietta could attempt to correct its earlier evidentiary deficiency, both judicial economy and basic fairness dictate that this Court should resolve these dispositive issues before ordering that this action be remanded to reopen the administrative hearing before the BOCC. Accordingly, if the Court believes that the District Court and the appellees have correctly interpreted its Opinion, then the Appellant Neighbors would now ask this Court to revisit its decision to forego addressing these other case dispositive issues. Unlike the noise issue that the appellees now contend can be "fixed" by somehow reopening the administrative record before the BOCC, at least three of the four

other issues[10] that this Court previously declined to address would be completely determinative of this case.

First, in raising the issue of *de facto* spot zoning, the Appellant Neighbors asked this Court to review the BOCC's approval of the USR permit—which effectively reclassified agricultural land to create an island of heavy industrial use

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[10] As timely presented to this Court in the earlier appeal, the other four issues raised by the Appellant Neighbors were:

> 1. Whether the Board of County Commissioners Engaged in Unlawful *De Facto* Spot Zoning When It Approved a Use By Special Review Application that Will Convert a Site Zoned for Agricultural Uses Into a Heavy Industrial Site?
>
> 2. Whether the Board of County Commissioners Erred in Approving a Use By Special Review Application that Was Not Supported By Competent Evidence that the Proposed Use is Consistent with Existing Surrounding Uses, as Required By the County Code?
>
> 3. Whether the Board of County Commissioners Erred in Approving a Use By Special Review Application that Was Not Supported By Competent Evidence that the Applicant Made Diligent Efforts to Preserve Prime Farmland, as Required By the County Code?
>
> ***
>
> 5. Whether the District Court Erred in Refusing to Order the Record to Be Supplemented With All *Ex Parte* Communications Between the Board of County Commissioners and the Applicants While the Order Approving a Special Use Application Was On Remand Before the Board of County Commissioners?

(Appdx. I, pp. 6-7.)

to the narrow benefit of a single landowner and the obvious detriment of all surrounding land owners—in light of Colorado's prohibition on spot zoning as articulated in *Clark v. Boulder*, 362 P.2d 160 (Colo. 1962). (*See generally* Appdx. I, pp. 118-125.) The true nature of Martin Marietta's proposed use as a *de facto* reclassification of the underlying zoning was further confirmed by the fact there is no competent evidence in the record that the proposed industrial use is "directly related to agriculture" as otherwise required under the Weld County Code. (*Id.* at 119.) If this Court were to consider this issue and conclude that Martin Marietta's proposal to convert an agricultural parcel that is surrounded by agricultural and residential uses into a heavy industrial asphalt and concrete production plant constitutes unlawful spot zoning, then the USR must be denied and there is no need for further proceedings before the BOCC.

Second, the Appellant Neighbors timely asked this Court to review whether there is any competent evidence in the record that the proposed industrial use is consistent with the existing surrounding agricultural and residential uses. (*See generally id.* at 104-10.) The administrative record confirms that all surrounding uses are agricultural or residential and that the BOCC abused its discretion by citing to potential future developments and a single light industrial park nearly a mile from the Property as evidence of compatibility with existing surrounding

uses. (*Id.* at 108-10.) Because the existing surrounding uses are a matter of objective fact, there is no other competent evidence that Martin Marietta might seek to supplement the plainly deficient administrative record on remand. Accordingly, the Appellant Neighbors' issue regarding the BOCC's abuse of discretion with regards to the material element of compatibility with existing surrounding uses is similarly dispositive of this case.

Third, the Appellant Neighbors asked this Court to review the BOCC's approval of the USR permit in light of the undisputed fact that Martin Marietta could not establish that it used diligent efforts to conserve Prime Farmland[11] in selecting the Property. (*See generally id.* at 110-14.) The undisputed evidence confirms that Martin Marietta selected the Property for its proposed industrial use without any regard for its status as Prime Farmland. (*Id.* at 111-12.) Accordingly, this issue presented the Court with a question of law—does the USR approval criteria under the Weld County Code require an applicant to consider whether its proposed use would require the destruction of Prime Farmland or can this element be satisfied by simply "clustering" the proposed use so as to limit the destruction Prime Farmland (and thereby render this requirement duplicative of a different

[11] "Prime Farmland" is a defined term in the Weld County Code that refers to agricultural lands that have valuable physical characteristics associated with the potential for use as productive farmland. W.C.C. § 23-1-90.

section of the Code which requires "clustering" to conserve Prime Farmland)? (*Id.* at 112-14.) Because it is undisputed that Martin Marietta made no effort to conserve Prime Farmland in selecting the Property, if this Court agrees with the Appellant Neighbors' interpretation of the County Code, this issue would provide another independent basis to finally dispense with this case.

The final issue that the Appellant Neighbors raised before this Court in the previous appeal also requires resolution by this Court before this matter can be remanded to the BOCC. The Appellant Neighbors' final issue in the earlier appeal asked this Court to review the fundamental fairness of the proceeding before the BOCC in light of the fact that counsel for the BOCC and Martin Marietta engaged in *ex parte* communications purportedly pursuant to a joint defense agreement between the BOCC and Martin Marietta while this action was on remand for further quasi-judicial action before the BOCC. (*See generally id.* at 126-31.) The Appellant Neighbors timely raised the issue before the District Court, but the District Court summarily concluded "beyond a reasonable doubt" (without examining the contents of the disputed emails) that the *ex parte* communications had no impact on the BOCC's approval of the USR permit. (*Id.* at 130.) Colorado law provides that if the impact of *ex parte* communications on a quasi-judicial body cannot be determined that the appropriate remedy is the reversal of the

body's disputed action. *See Zuviceh v. Indus. Comm'n*, 544 P.2d 641, 642-43 (Colo. App. 1975); *see also Wells v. Del Norte Sch. Dist. C-7*, 753 P.2d 770, 772 (Colo. App. 1987) ("Although the record does not show the content of the discussion, the hearing officer's *ex parte* lunch conversations with counsel and witnesses for the board undermine the appearance of impartiality in connection with his determination of the facts and was sufficient to overcome the presumption of regularity attendant to an administrative proceeding.").

If this Court were to conclude that the joint defense agreement and the *ex parte* contacts between counsel for the BOCC and Martin Marietta were improper, then this Court might—at the most extreme—conclude that there are no circumstances under which the Appellant Neighbors could obtain a fair hearing before the BOCC on the USR permit and therefore order the denial of the USR application. At a minimum, any further administrative proceedings in this action should only proceed after the Appellees have been instructed to disclose all improper *ex parte* communications as part of the public administrative record. In either scenario, if this Court finds in favor of the Appellant Neighbors on this final issue, the footing of this case will be materially different moving forward.

If the Appellees are correct that this Court's Opinion implies that this matter should be remanded to the BOCC for further administrative proceedings, then

(contrary to the judicial restraint exhibited in the Opinion) the interests of judicial economy are best served by this Court's immediate consideration and resolution of all of the issues that the Appellant Neighbors previously presented on appeal. Otherwise, these potentially dispositive issues will remain unresolved and will require yet another appeal in the future—after Martin Marietta has been given a second chance at an administrative hearing before the BOCC (its partner in an ongoing joint defense agreement). Such an inefficient and unjust result is completely inconsistent with the principle of judicial economy and would likely add years of additional work and expense for the parties to simply appear before this Court on these same issues.

An appellate court should exercise its discretion to resolve issues in the interest of judicial economy whenever such issues are likely to arise on remand. *Westfield Develop. Co.*, 786 P.2d at 1118; *see also Jackson v. Unocal Corp.*, 231 P.3d 12, 25-26 (Colo. App. 2009); *Catlin v. Tormey Bewley Corp.*, 219 P.3d 407, 415 (Colo. App. 2009). If—contrary to the primary contention advanced by the Appellant Neighbors in this Opening Brief[12]—this Court's Opinion was merely

[12] Again, the Appellant Neighbors' primary contention is that this Court did not accidentally leave these dispositive issues to be re-argued in a future appeal. Rather, this Court intended its Opinion to be the final word in this matter and therefore concluded that there was no need to resolve these other outstanding appellate issues.

intended to remand the USR permit for further consideration before the BOCC, then the interests of justice and judicial economy compel this Court to immediately consider and resolve the other issues that the Appellant Neighbors had previously raised and presented on appeal.

CONCLUSION

The District Court ignored the plain meaning of this Court's earlier Opinion and provided Martin Marietta with relief that is not otherwise allowed. This Court's Opinion mandated that judgment enter for the Appellant Neighbors and that the underlying USR application be denied. In order to make the Appellant Neighbors whole, the District Court must be further directed to order the BOCC to enforce the Weld County Code and to require Martin Marietta to remove all non-conforming industrial improvements, just as Martin Marietta previously acknowledged it would do if judgment entered in favor of the Appellant Neighbors.

Alternatively, judicial economy compels this Court to resolve the remaining appellate issues that the Court previously declined to address and which might separately resolve this case or otherwise arise again following remand.

Respectfully Submitted: September 13, 2018

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CERTIFICATE OF SERVICE

I certify that on September 13, 2018, a true and correct copy of this **APPELLANTS' OPENING BRIEF** was served via the Colorado Courts e-filing system on the following individuals:

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