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January 25, 2019

**SENT VIA CERTIFIED MAIL AND EMAIL**

Bethany Pascoe  
Zoning Compliance Officer  
Weld County Planning and Building Department  
1555 N 17th Ave.  
Greeley, Colorado 80631  
[bpascoe@co.weld.co.us](mailto:bpascoe@co.weld.co.us)

***Re: Report of Zoning Violation – Rock & Rail, LLC Industrial Site***

Dear Ms. Pascoe:

This law firm represents individuals and businesses that own and use property in the vicinity of 27486 County Road 13 in unincorporated Weld County (the “Property”). The purpose of this letter is to report an ongoing zoning violation at the Property by its current occupant/tenant, Rock & Rail LLC (“Rock & Rail”). As detailed below, our clients have been injured and continue to suffer injury as a result of Rock & Rail’s continued unlawful use of the Property in violation of the Weld County Code. Weld County’s website lists you as the point of contact for reporting such zoning violations.

The Property is zoned within Weld County’s A (Agricultural) Zone District. Despite this zoning, the Property presently includes industrial improvements, including but not limited to a heavy-freight railroad spur and loop, an aggregate conveyor and processing system, and a batch concrete plant (the “Industrial Improvements”). As you may know, these Industrial Improvements were constructed by Rock & Rail’s parent company and predecessor in interest, Martin Marietta Materials, Inc. (“Martin Marietta”), pursuant to what has since become an invalidated and—according to Martin Marietta—abandoned use by special review (“USR”) permit. By virtue of applying for the USR permit, Rock & Rail’s parent company previously conceded that these Industrial Improvements could not be constructed and operated in conformance with the agricultural zoning at the Property. Nevertheless, despite the subsequent invalidation of the USR, Rock & Rail has continued to maintain and operate the Industrial Improvements in violation of the agricultural zone designation.

While we understand that Rock & Rail has represented to the County that its continued use of the Industrial Improvements is covered by federal law that preempts the County’s land use authority, we are not aware of any similar determination from the County or a court of competent jurisdiction. Unless and until such a judicial determination has been made, it falls to the County

in the first instance to determine whether the continued existence and operation of the Industrial Improvements at the Property is consistent with the County's land use regulations and related authority.

In particular, the County must consider to what extent any alleged federal preemption might possibly attach to Rock & Rail's non-transloading efforts, which are wholly divorced from railroad operations and instead relate to the manufacture of an entirely new, perishable product (concrete) from various raw materials, including but not limited to cement, sand, water, and aggregate, after an intensive industrial process. *Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380, 1999 WL 715272, at \*7 (1999) (“[I]t should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to [the STB's] jurisdiction or subject to federal preemption.”); *see also Town of Milford, MA-Petition for Declaratory Order*, STB Finance Docket No. 34444, 2004 WL 1802301, at \*2 (Aug. 11, 2004). Moreover, the County should investigate whether Rock & Rail's possession/use of the Property is merely a front for Martin Marietta's pre-planned industrial activities, which have nothing more than a superficial connection to “federal railroad policy.” *See Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1336 (11th Cir. 2001).

Our clients (and your constituents) have been directly harmed by Rock & Rail's unlawful industrial operations at the Property. On numerous occasions, including within the past two weeks, Rock & Rail's manufacturing operations at the Property have generated noise of up to 75 dB at adjacent residential properties during the pre-dawn hours of the day. The industrial operations have also generated noxious dust clouds and have resulted in numerous traffic jams when trains entering the Property have come to a dead stop while crossing County roads. These traffic issues have raised serious concerns regarding the ability of emergency first responders to travel through the area during an emergency. Rock & Rail's unlawful industrial operations have directly impaired the quiet enjoyment of our clients in their use of their properties and have unquestionably reduced property values in the immediate vicinity of the Property.

Under the Weld County Code, whenever an employee of the Weld County Department of Planning Services (such as yourself) has personal knowledge of a zoning code violation, the employee must provide the violator with written notice to correct the violation within no more than 30 days. W.C.C. §§ 23-10-20.C, 23-10-40.C. The Weld County Code provides that you “shall” do this and does not allow for any discretion in taking this initial enforcement action.


Under the Weld County Code, a violator that refuses to comply with applicable zoning faces criminal penalties of up to \$100 and up to 10 days in County jail for *each day* that a property remains in violation of the Weld County Code. W.C.C. § 23-10-20.A. Moreover, your Department is empowered to seek equitable relief in Court to require the removal of non-conforming structures and to assess civil penalties of up to \$1,000 plus an additional \$100 for each day that a property remains out of compliance. W.C.C. §§ 23-10-30, 23-10-40.A.

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Please confirm within 14 days of your receipt of this letter that your office will pursue this important enforcement matter. If your office concludes that Rock & Rail's continued industrial operations at the Property are not in violation of the Weld County Code, we respectfully request that your office provide a reasoned determination supporting this conclusion with respect to each of the industrial improvements and activities currently occurring at the Property. Given the high-profile nature of Rock & Rail's unlawful industrial use, the County must take affirmative steps to fully explain any decision not to enforce the Weld County Code. If the County refuses to take this basic step, it will open itself to charges of bias and unreasonable arbitrariness in the subjective enforcement of its land use regulations.

If you have any questions or wish to discuss anything raised in this letter, please do not hesitate to contact me.

Sincerely,



Mark E. Laxis, Esq.

cc: Bruce Barker, Weld County Attorney ([bbarker@co.weld.co.us](mailto:bbarker@co.weld.co.us))  
James Silvestro