

EXHIBIT C

<p>Larimer County District Court Larimer County, Colorado 201 La Porte Ave, Suite 100 Fort Collins, CO 80521</p>	<p>DATE FILED: Oct 03 2020 10:27:08 AM FILE NUMBER: 19-0307-251E CASE NUMBER: 2019CV30123</p>
<p>NO LAPORTE GRAVEL CORP,</p> <p>ROBERT HAVIS,</p> <p>and</p> <p>PETER WAACK,</p> <p>Plaintiffs</p> <p>v.</p> <p>BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY (including all of the individual Commissioners in their official capacities: Chair Tom Donnelly, Steve Johnson, John Kefalas)</p> <p>and</p> <p>LOVELAND READY-MIX CONCRETE, INC.</p> <p>Defendants.</p>	<p style="text-align: center;">▲ ▲</p> <p style="text-align: center;">COURT USE ONLY</p>
<p>John M. Barth Attorney at Law P.O. Box 409 Hygiene, CO 80533 (303) 774-8868 (fax and phone) barthlawoffice@gmail.com Attorney Registration #: CO 22957</p>	<p>Case Number: 2019CV30123</p> <p>Division 3B</p>

**FIRST AMENDED COMPLAINT FOR RELIEF UNDER C.R.C.P.
106(a)(4) AND FOR DECLARATORY RELIEF**

Plaintiffs No Laporte Gravel Corp, Robert Havis, and Peter Waack (collectively, “Plaintiffs”), through counsel John M. Barth, submit this First Amended Complaint pursuant to Colorado Rule of Civil Procedure (“C.R.C.P.”) Section 57 and Section 106(a)(4) against the Defendant the Board of County Commissioners of Larimer County (including all of the individual Commissioners in their official capacities, Chair Tom Donnelly, Steve Johnson, and John Kefalas)(“the Board” or “BOCC”) and Loveland Ready-Mix Concrete, Inc. (“LRM”) challenging the Board’s January 15, 2019 issuance of the written “Special Review Findings and Resolution (“F&R”) Approving the Petition of Loveland Redi-Mix Concrete, Inc.’s.”

NATURE OF THE CASE

1. This is an action under C.R.C.P. 57 seeking declaratory relief and under C.R.C.P. 106(a)(4) seeking review and reversal of the F&R.
2. Plaintiffs initially seek declaratory relief from the Court with respect to the unlawfulness of the Larimer County’s use by special review process. Plaintiffs bring a facial constitutional challenge to provisions of the Larimer County Land Use Code (“Code”) related to this process because they are unconstitutionally vague and provides the Board limitless discretion to elevate the rights of one landowner to the detriment of all others through spot zoning in contravention of Colorado law. The Code also fails to include sufficient safeguards with respect to the Board’s actual or apparent conflicts of interest. The Code fails to require recusal from quasi-judicial proceedings in instances where a Commissioner has received substantial campaign contributions from a land use applicant while its application is pending before the Board. Plaintiffs also bring an “as

applied” constitutional challenge to the application of provisions of the Code to this land use application.

3. Plaintiffs also seek this Court’s review pursuant to C.R.C.P. 106(a)(4) because the Board abused its discretion in approving LRM’s proposed gravel mine and concrete batch plant currently zoned “Open” and currently used for agricultural and residential purposes. The only competent evidence in the administrative record and presented at the Board hearing confirmed that LRM’s proposed industrial use is incompatible and out of harmony with the numerous single and multi-family residences surrounding the Proposed Site which is located in the heart of LaPorte, Colorado. LRM further failed to meet its burden to demonstrate that the proposed gravel mine and concrete batch plant will not have a substantial adverse impact on property in the vicinity of the proposed site. Further, the Board exceeded its jurisdiction relying on improper criteria for approval and by allowing Commissioner Donnelly to cast the deciding vote on the application despite his actual and apparent conflict of interest with regards to this quasi-judicial land use decision.

JURISDICTION AND VENUE

4. The Proposed Site is located along County Road 54G in the heart of LaPorte, unincorporated Larimer County, Colorado.

5. The Findings and Resolution being contested was issued by the Larimer County Board of County Commissioners on January 15, 2019.

6. The January 15, 2019 F&R constitutes the Board’s final action on Loveland Ready-Mix Concrete, Inc.’s Special Review Application (“Application”) pursuant to C.R.C.P. 106(a)(4).

7. This action was timely filed within twenty-eight days of the issuance of the January 15, 2019 Findings and Resolution.

8. Jurisdiction is proper in this Court pursuant to C.R.C.P. §106 and C.R.C.P. §57. *See Margolis v. Dist. Court*, 638 P.2d 297, 305 (Colo. 1981) (explaining that land use decisions are quasi-judicial in nature and therefore subject to review pursuant to C.R.C.P. 106).

9. Venue is proper before this Court pursuant to C.R.C.P. § 98(a) because this is an action affecting real property in Larimer County, Colorado.

10. The C.R.C.P. 106 claim in this First Amended Complaint is ripe because the Plaintiffs participated in all aspects of the permitting process, including submission of written comments as well as presentation of oral testimony during the various hearings. All issues presented in the C.R.C.P. 106(a)(4) claim in this First Amended Complaint were raised during the permitting process and thus are ripe for review by this Court.

11. Plaintiffs have standing to bring these claims because Plaintiffs and/or its members live in close proximity to the Proposed Site and will be adversely impacted by noise, air pollution, traffic, risks of water pollution, groundwater mounding, property damage, loss of business income, diminution of property value or loss of appreciation, the unconstitutionality of the Code, as well as violations of their due process rights. These injuries are causally connected to the Board's issuance of the F&R. The injuries complained of by Plaintiffs can be remedied by an order from this Court reversing, vacating, and/or remanding the Board's decision.

THE PARTIES

12. Defendant the Larimer County Board of County Commissioners is the

governing body of a political subdivision of the State of Colorado with a principal address at 200 West Oak, Suite 2200, Fort Collins, Colorado. Pursuant to the Code, the Board is responsible for reviewing and rendering a quasi-judicial determination on applications for Use by Special Review (“USR”). The Commissioners Tom Donnelly, Steve Johnson, John Kefalas are also named as defendants in their official capacity as members of the Board.

13. Defendant Loveland Ready-Mix Concrete, Inc. is a Colorado corporation, as well as the applicant and permittee of the F&R issued by the Board on January 15, 2019.

14. Based on information and belief, LRM possesses a property interest in the seven parcels comprising 123 acres at the Proposed Site.

15. Page 1 of the F&R indicates that it was issued to an entity named “Loveland Redi-Mix Concrete, Inc.” This is not the same corporate entity that applied for the Special Review Permit, which was Loveland Ready-Mix Concrete, Inc. Based on information and belief, there is no Colorado corporate entity that exists with the name “Loveland Redi-Mix Concrete, Inc.”

16. Plaintiff No Laporte Gravel Corp (“NLGC”) is a Colorado Non Profit membership corporation based in LaPorte, Colorado. NLGC’s purpose is to protect LaPorte and its residents from adverse impacts from gravel mining operations, concrete batch plant operations, and related industrial activities in the La Porte planning area. NLGC’s members own homes, buildings, and properties in close proximity to the Proposed Site and are adversely impacted by issuance of the F&R. In some instances, these properties are immediately adjacent to and/or within approximately 300-500 feet

from the proposed Project. Some of the NLGC members have asthma and other medical conditions that could be exacerbated by dust, industrial, and heavy vehicle emissions from the Project. The proposed Project will adversely impact the members of NLGC by imposing unwanted noise, traffic, dust, reduced property values and/or diminished home appreciation, loss of business income, and aesthetic harm on the owners and occupants of the properties.

17. Plaintiff Robert Havis is an individual, homeowner, and resident of LaPorte and is personally adversely impacted by the issuance of the F&R by the Board. Mr. Havis regularly passes by the Proposed Site on a daily basis. Mr. Havis will be adversely impacted by noise, traffic, dust, reduced property values and/or diminished home appreciation, and aesthetic harm. Mr. Havis is a Board member of NLGC.

18. Plaintiff Peter Waack is an individual, homeowner, and resident of LaPorte and is personally adversely impacted by the issuance of the F&R by the Board. Mr. Waack can see the Proposed Site from his property and regularly passes by the Proposed Site on a daily basis. Mr. Waack will be adversely impacted by noise, traffic, dust, reduced property values and/or diminished home appreciation, and aesthetic harm. Mr. Waack also has a water well on his property that could be adversely impacted by the gravel mining. Mr. Waack is also a Board member of NLGC.

STATEMENT OF LAW AND STANDARD OF REVIEW

19. The land use law applicable to lands located in unincorporated Larimer County is set forth in the Larimer County Land Use Code.

20. The Code provides that lands with “Open” zoning designations are principally used for agricultural and residential uses. Code § 4.1.5.

21. In limited, special circumstances, the Code provides that land within “Open” zoning may be used for more intense land uses, including mining. *Id* at (45). Mining is expressly described as an “Industrial use. *Id*.

22. In order to engage in mining within “Open” zoning, a landowner must receive approval from the County for a “use by special review.” *Id*; *see also* Code §4.1.5. (denoted with an “S”).

23. Ultimate authority to approve or deny a USR is vested in the Board subject to special review criteria. Code § 4.5.3.

24. A USR applicant bears the burden of proof to provide the Board with competent evidence that a proposed USR will:

a. “[B]e compatible with existing and allowed uses in the surrounding area and be in harmony with the neighborhood”, Code § 4.5.3(a); and

b. “[Not] result in substantial adverse impact on property in the vicinity of the subject property.” Code § 4.5.3.(D).

25. The Code defines “compatible” as “[h]aving harmony in design and appearance, use and/or function with natural systems and/or existing land uses in an area.” Code § 0.1.1.

26. The Code does not define “harmony with the neighborhood” or “substantial adverse impact.”

27. The Code requires that a Commissioner, in his or her “sole discretion”, recuse himself or herself from any quasi-judicial decision if he or she “believe[s] they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision.” Code § 2-67(10). The Code also states that Commissioners,

must avoid any conflict of interest and that all official actions “must represent unconflicted loyalty to the interest of the citizens of the entire county.” Code § 2-71.

28. The Code does not specifically address, or otherwise specifically prohibit, a Commissioner from participating and voting in a quasi-judicial hearing on a land use application in instances where the applicant made substantial campaign donations to the Commissioner while the land use application was pending.

29. In this court, government actions are reviewed pursuant to C.R.C.P. § 106(a)(4) for an abuse of discretion. See generally, *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986 (Colo. 2012); *Hewitt v. State of Civil Serv. Comm.*, 167 P.2d 961, 963 (Colo. 1946); *Gallegos v. Garcia*, 155 P.3d 405 (Colo. App. 2006); *Venard v. Dept. of Corr.*, 72 P.3d 446 (Colo. App. 2003).

30. A government action taken in violation of applicable law constitutes a *per se* abuse of discretion. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004).

31. A government abuses its discretion when its decision is not reasonably supported by competent evidence within the administrative record. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo. 2008).

32. A quasi-judicial decision must provide for due process and adhere to fundamental principles of fairness. *Churchill*, 285 P.3d 986; *see also Canyon Area Residents v. Bd. of Cnty Comm'rs*, 172 P.3d 905, 908 (Colo. App. 2006).

STATEMENT OF FACTS

The gravel mine

33. LRM seeks to conduct gravel mining on seven parcels comprising 123 acres zoned “Open” in downtown LaPorte, Colorado.

34. The F&R incorrectly and arbitrarily states that the existing zoning for the seven parcels at the Proposed Site is “C-Commercial & O-Open” instead of just “Open.”

35. The seven parcels at the Proposed Site are currently used for grazing cattle and horses and for hay production. There is no evidence that the Proposed Site has ever been used for anything other than residential and agricultural uses.

36. Twenty-six parcels abut the Proposed Site. Five abutting properties to the north and northwest are used for agricultural purposes; seventeen properties are single family residential, one is multifamily residential, and three are commercial.

37. None of the abutting properties are zoned industrial.

38. None of the abutting properties are currently used for gravel mining or concrete batch plants.

39. The F&R allows gravel mining at the Proposed Site from 7:30 am – 5:00 pm Monday through Friday for a 12-year period.

The concrete batch plant

40. LRM’s Special Review Application states, “[t]he project includes a concrete batch plant as central to proposed operations”.

41. LRM’s Application sought, and received, approval to operate the concrete batch plant 6-days per week, 12 hours per day (Monday through Friday) and 24-hours a day under some circumstances. In contrast, LRM stated in the public hearing that the gravel mine would only operate 2-3 days per week, approximately 9 hours per day.

42. The F&R approves 366 average daily trips per/day the majority of which would be concrete trucks being filled at the concrete batch plant, delivering the concrete to construction sites, and then returning to be re-filled for another delivery.

43. LRM's Sketch Plan states, "[a]fter mining cease on the property, LRM proposes to continue concrete batch plant operations with aggregates delivered from off-site, to-be-determined sources."

44. LRM's March 2018 Second Submittal states, "[t]he project's *mine life* is estimated at 10 years, depending on economic conditions" (emphasis added) but is silent on the life of the concrete batch plant.

45. LRM's proposal to continue use of the concrete batch plant beyond the life of the gravel mine was not formally withdrawn in writing in LRM's March 2018 Second Submittal Application.

46. The F&R states that "[a]ll **mining** shall be completed no later than 12 years from the first material hauled from the site" (emphasis added). However, there is no language in the F&R requiring cessation of concrete batch plant activities upon completion of gravel mining.

47. LRM's Application states that the batch plant would import "dry cement, delivered from off-site suppliers" in order to produce concrete. The Application also states that LRM would import the following offsite materials for concrete production: "concrete admixtures, fly ash, [and] calcium chloride."

48. LRM is unable to produce concrete solely with materials mined on-site because cement is required to produce concrete and cannot be mined or produced on-site.

49. The F&R approves construction and operation of a concrete batch plant as an accessory use to the gravel mining operation at the Proposed Site. The proposed concrete batch plant is the central use of the property, not an accessory use, and is allowed to continue operating after end of gravel mining.

50. Section 4.3.10 of the Larimer County Code ("LUC") states:

"Accessory uses and structures are intended to allow property owners the full use of their property **while maintaining the integrity and character of the neighborhood**. To accomplish these goals, accessory uses and buildings must be erected and used **only for purposes that are clearly secondary and incidental to the principal use** of the property and **must be located on the same lot with the principal use.**" (emphasis added).

51. Based on information and belief, the proposed concrete batch plant is not located on the same lot as all proposed gravel mining. The concrete batch plant would not maintain the integrity or character of the neighborhood.

52. Section 4.3.7. E of the LUC states that accessory gravel mining uses are limited to "[o]n-site processing of **mined materials**..." (emphasis added). The proposed concrete batch plant would process **unmined offsite materials**, including but not limited to cement, fly ash, and concrete additives.

53. The Code defines the accessory uses allowed on "rural occupation" lots, which is defined as lots "outside a Growth Management Area Overlay zoning district" and zoned "O-Open." Code § 4.3.10.P. The term "accessory rural occupation" includes "[a] use conducted as a customary, incidental, and accessory to a single family dwelling or an agricultural use." *Id.* The proposed concrete batch plant is not customary, incidental, and accessory to a single family dwelling or agricultural use.

54. The Larimer County Code prohibits "general industrial uses", including concrete batch plants, as "accessory rural occupation" uses on lots zoned Open. Code § 4.3.10.P.4. The term "general industrial uses" is defined in the Code to include "concrete batch plants." Code § 0.1.1.

The Noise Ordinance

55. As part of the permitting process, LRM submitted a Noise Evaluation

Report. In its Noise Evaluation Report, LRM sought approval to emit noise from the Proposed Site resulting from the following so-called “construction activities”:

- Overburden/topsoil removal from the active mining footprint (estimated to be 10-acres at any one time) and stockpiling
- Placement of berms on the west, southern and eastern portions of the Site to relieve potential noise and visual impacts
- Preparation and planting of berms and surrounding areas with dryland pasture grasses and trees to mitigate potential visual, noise, and dust issues
- Access road construction
- Concrete batch plant construction including site grading and building of structures.

56. With regard to this construction noise, LRM’s Noise Evaluation Study also states, “[o]verburden removal and stockpiling will take place periodically throughout the mine life as new areas are opened for mining.”

57. Larimer County has a Noise Ordinance No. 97-03. The Ordinance contains a residential noise limit ranging from 50db-55db. The Ordinance also includes a louder noise limit for “construction activities” of 75 db from 7pm-7am and 80 db from 7am-7pm. The Noise Ordinance defines the term “construction activities” as being limited to, “any and all activity incidental to the erection, demolition, assembling, alteration, installation or equipping of **buildings, structures, roads or appurtenances thereof**, including land clearing, grading, excavating, and filling” (emphasis added).

58. The Board’s issuance of the F&R allows LRM to exceed residential noise limits from overburden and stockpiling activities that are not incidental to the erection, demolition, assembling, alteration, installation or equipping of buildings, structures, roads or appurtenances thereof.

State master plan requirements for extraction of commercial mineral deposits.

59. Colorado law requires counties to: “develop a master plan for the extraction of such [commercial mineral] deposits.” C.R.S. §34-1-304.

60. Under State law the commercial mineral deposit master plan

“shall consist of text and maps. In developing the master plan, the planning commission shall consider, among others, the following factors: (a) Any system adopted by the Colorado geological survey grading commercial mineral deposits according to such factors as magnitude of the deposit and time of availability for and feasibility of extraction of a deposit; (b) The potential for effective multiple sequential use which would result in the optimum benefit to the landowner, neighboring residents, and the community as a whole; (c) The development or preservation of land to enhance development of physically attractive surroundings compatible with the surrounding area; (d) The quality of life of the residents in and around areas which contain commercial mineral deposits; (e) Other master plans of the county, city and county, city, or town; (f) Maximization of extraction of commercial mineral deposits; (g) The ability to reclaim an area pursuant to the provisions of article 32 of this title; and, (h) The ability to reclaim an area owned by any county, city and county, city, town, or other governmental authority or proposed, pursuant to an adopted plan, to be used for public purposes by such a governmental authority consistent with such proposed use.”

C.R.S. §34-1-304.

61. The County did not have a compliant commercial mineral deposit master plan at the time it issued the F&R. More specifically, to date the County has failed to adopt a master plan for extraction of commercial mineral resources that:

- a. maps its “commercial mineral deposits” as defined in C.R.S. 34-1-302(1);
- b. grades its commercial mineral deposits;
- c. analyzes the potential for effective multiple sequential use which would result in the optimum benefit to the landowner, neighboring residents, and the community as a whole;
- d. analyzes the development or preservation of land to enhance development of physically attractive surroundings compatible with the surrounding area;
- e. plans to ensure the quality of life of the residents in and around areas which contain commercial mineral deposits; and,
- f. analyzes the ability to reclaim an area for public purposes.

The Due Process and Conflict of Interest Violations

62. Loveland Ready-Mix Concrete, Inc. is a Colorado corporation owned and operated by the Fancher family. Based on information and belief, Brad Fancher and Stephanie Fancher are officers, directors, owners, and/or employees of the corporation. Both Brad Fancher and Stephanie Fancher testified before the Board on behalf of LRM and in support of the Application.

63. Commissioner Donnelly was last elected to the Board in 2016. During the 2016 campaign cycle, the Fancher family made significant financial contributions to the Donnelly County Commissioner campaign. More specifically, the Fancher family collectively made \$2,700 in financial contributions to the Donnelly campaign in 2016 that are detailed below:

Steve Fancher	\$1,500
Brad Fancher	\$1,000
Stephanie Fancher	\$ 200

Based on information and belief, employees of Loveland Ready-Mix, and/or individuals related to the Fancher family also contributed to Commissioner Donnelly's campaign in 2016.

64. Article XXIX(1)(c) of the Colorado Constitution requires that local governments "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated."

65. The Code requires that a Commissioner, in his or her "sole discretion", recuse himself or herself from any quasi-judicial decision if he or she "believe[s] they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision." Code § 2-67(10). The Code also states that Commissioners must avoid any conflict of interest and that all official actions "must represent unconflicted

loyalty to the interest of the citizens of the entire county.” Code § 2-71.

66. Neither Commissioner Donnelly nor LRM disclosed the campaign contributions while the application was pending before the Commissioners. Commissioner Donnelly also failed to recuse himself from participating in a quasi-judicial ruling on the Application despite receiving the campaign contributions from the Fancher family during the most recent 2016 campaign.

67. The Board voted 2-1 to approve the Application. Commissioner Donnelly cast the decisive vote on the Application.

FIRST CLAIM FOR RELIEF
(Request for Declaratory Relief)

68. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

69. A C.R.C.P. 106 claim for appellate relief may properly be accompanied by a request for declaratory relief pursuant to C.R.C.P. 57 when a matter raises issues regarding the constitutionality or legality of a statute and/or government action. *See Native Amer. Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004), *cert. denied* (Colo. Aug. 16, 2004), *cert denied* (Colo. Aug. 16, 2004).

70. In setting forth the requirements that must be demonstrated to receive a USR permit, the Code fails to define the critical phrases “harmony”, “substantial adverse impact”, and “maintaining the integrity and character of the neighborhood.” The Code includes a generic definition of “compatible” that fails to provide any guidance as to whether and when uses may be found to be compatible with one another.

71. The Code does not provide for a predictable, repeatable, and objective quasi-judicial test or framework by which the Board should determine whether a USR

application should be approved or denied.

72. Consequently, the USR process under the Code is facially unconstitutionally vague and provides the Board with unfettered discretion to approve or deny a USR application.

73. The absence of well-defined and more particularized criteria permits the Board to engage in unlawful spot zoning by changing the nature of an applicant's property to the sole economic benefit of the applicant and the obvious detriment of surrounding land users.

74. The Code further fails to provide sufficient procedural safeguards to ensure the fairness of quasi-judicial land use decisions. The Code requires that a Commissioner, in his or her "sole discretion", recuse himself or herself from any quasi-judicial decision if he or she "believe[s] they have a conflict of interest or for any other reason believes that they cannot make a fair and impartial decision." Code § 2-67(10). The Code also states that Commissioners must avoid any conflict of interest and that all official actions "must represent unconflicted loyalty to the interest of the citizens of the entire county." Code § 2-71. These Code provisions make recusal entirely voluntary; do nothing to ensure a fair and unbiased quasi-judicial process; and are inconsistent with Article XXIX(1)(c) of the Colorado Constitution.

75. Plaintiffs also bring "as applied" constitutional challenges under C.R.C.P. 57 to the County's application of these vague and unconstitutional Code provisions. The County's application of the conflict of interest, disclosure, and recusal Code provisions to this Application violated Plaintiffs' due process and constitutional rights by allowing Commissioner Donnelly to pass quasi-judicial judgment on the Application after

receiving significant campaign contributions from the Applicant, or those employed by or related to the Applicant, without disclosing the conflict of interest and recusing himself from the proceeding. The timing and amount of the campaign contributions from Defendant LRM to Defendant Commissioner Donnelly created a “serious risk of actual bias” where “a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009). By not recusing Defendant Commissioner Donnelly from the County’s consideration of Defendant LRM’s USR Application, the County Defendants fell below the “constitutional floor” for guaranteeing a fair process before a fair tribunal. *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010).

76. The foregoing infirmities in the Code have impaired the Plaintiffs’ rights to fundamental fairness and due process of law and should be declared facially unlawful and constitutionally unlawful “as applied” pursuant to C.R.C.P. 57.

77. Plaintiffs’ C.R.C.P. Section 106(a)(4) does not provide adequate judicial relief for these constitutional violations. A judgment or decree by the Court, if rendered or entered on these Rule 57 issues, would require the reversal of the F&R and end the uncertainty, insecurity, and controversy with respect to the rights, status, or other legal relations between the parties.

SECOND CLAIM FOR RELIEF

(Review of the Larimer County Commissioners’ F&R approving of LRM’s Use by Special Review Permit, 17-ZONE2113 pursuant to C.R.C.P. 106(a)(4))

78. The Plaintiffs incorporate all of the foregoing allegations as if set forth herein.

79. The Board abused its discretion by approving the proposed gravel mine and concrete batch plant despite the absence of competent evidence in the record that the proposed use would be compatible with the existing surrounding uses, in harmony with the surrounding neighborhood and that the proposed concrete batch plant would maintain the integrity and character of the neighborhood. More specifically,

a. the undisputed evidence demonstrates that the industrial gravel mine and concrete batch plant is objectively incompatible, out of harmony with, and would not maintain the integrity and character of the existing residences and uses surrounding the Proposed Site.

b. The Board further abused its discretion by basing its compatibility determination on LRM's claim that it would cease operation of, and remove, the concrete batch plant upon cessation of gravel mining and would preserve the open nature of the land after reclamation. As approved, the F&R does not include any enforceable obligation for LRM to cease operation of, and remove, the concrete batch plant upon cessation of gravel mining and/or to preserve the open nature of the land after reclamation.

80. The Board's findings of compatibility, harmony, integrity and maintenance of character was arbitrary and capricious.

81. The Board further abused its discretion by approving the gravel mine and concrete batch plant despite the absence of competent evidence within the record that the proposed uses would not have a substantial adverse impact on property in the vicinity of

the Proposed Site. The undisputed evidence in the administrative record confirms that the proposed gravel mine and concrete batch plant will result in numerous adverse impacts, including but not limited to diminishment of use and enjoyment of surrounding properties, air pollution, water pollution, significant heavy truck traffic on rural roads, dust, noise, blight on the existing viewshed, disruption of rural residential quality of life, and risk of harm to buildings and properties from groundwater mounding.

82. The Board's finding of no substantial adverse impact was arbitrary and capricious.

83. The Board further abused its discretion by approving the gravel mine and concrete batch plant despite the absence of competent evidence within the record that the proposed mine and batch plant are consistent with the master plan elements adopted pursuant to Section 34-1-304 C.R.S. regarding commercial mineral deposits.

84. The Board's finding that the proposed mine and batch plant are consistent with the master plan elements adopted pursuant to Section 34-1-304 C.R.S. was arbitrary and capricious.

85. Issuing a Board decision in violation of the State law or the Larimer County Code is a *per se* abuse of discretion. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004).

86. In Board abused its discretion in approving the Application, issuing the F&R, and/or granting the Special Review permit to LRM because:

a. The Code does not allow the proposed concrete batch plant as an accessory use to gravel mining at the Proposed Site;

b. The Larimer County Noise Ordinance does not allow residential noise

standards to be exceeded by activities unrelated “to the erection, demolition, assembling, alteration, installation or equipping of buildings, structures, roads or appurtenances thereof, including land clearing, grading, excavating, and filling”;

c. Larimer County failed to comply with State law in adopting a compliant master plan for excavation of commercial mineral deposits prior to issuing the F&R.

87. A quasi-judicial administrative decision must be based upon findings of fact within the administrative record and failure to make express findings of fact on a core issue may be grounds for remand to the administrative body to make such findings. *Canyon Area Residents*, 172 P.2d at 909-10.

88. The Board’s F&R fails to make express findings of fact on core issues including:

a. whether the proposed concrete batch plant is an allowable accessory use on the Proposed Site and why;

b. whether the Code allows processing of **offsite unmined** materials as an accessory use at gravel mining sites, and why;

c. whether the concrete batch plant is located on the same lot as all gravel mining operations, and why;

d. whether the concrete batch plant is secondary and incidental to the gravel mining operation, and why;

e. whether the concrete batch plant is prohibited as a “general industrial use” on lots zoned Open and only allowing “accessory rural occupation” uses, and why;

f. whether noise from overburden removal and stockpiling activities are incidental to the construction of buildings and/or roads under the Noise Ordinance, and

why;

g. whether Larimer County had a compliant master plan for excavation of commercial mineral deposits at the time it approved the F&R, and why.

89. Pursuant to C.R.C.P. 106(a)(4), the Plaintiffs are entitled to a review of the Board's F&R; an order reversing and vacating the F&R; and/or an order remanding the F&R for additional express findings and reconsideration.

90. The Plaintiffs have suffered and will continue to suffer harm as a result of the actions of the Board.

91. The Plaintiffs have no other plain, speedy, or adequate remedy provided by law.

WHEREFORE, the Plaintiffs respectfully request that this Court:

- (a) Preliminarily enjoin the Defendants pursuant to C.R.C.P. 65(a) from undertaking any land use upon the Proposed Site in furtherance of the F&R;
- (b) Declare the Larimer County Land Use Code facially unlawful and unlawful "as applied" under Rule 57 and reverse the F&R;
- (c) Conduct judicial review of the Board's approval of the F&R under C.R.C.P. 106(a)(4) and hold that the Board abused its discretion in adopting the F&R and reverse the F&R, or alternatively remand the F&R for both reconsideration by the Board and to make necessary and express findings of fact lacking in the F&R;
- (d) Permanently enjoin the Defendants from undertaking any land use upon the Proposed Site that is inconsistent with the underlying Code and zoning designation;
- (e) Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 27th day of March 2019.

/s/ John M. Barth
John M. Barth
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
barthlawoffice@gmail.com
303-774-8868 telephone and fax

ATTORNEY FOR PLAINTIFFS

Plaintiffs Addresses:

No Laporte Gravel Corp
P.O. Box 59
LaPorte, CO 80535

Robert Havis
3217 West County Road 52 East
LaPorte, Colorado 80535

Peter Waack
3116 Gold Charm Drive
Fort Collins, CO 80524

CERTIFICATE OF DELIVERY

I hereby certify that on this 27th day of March 2019, a true and correct copy of the foregoing **Plaintiffs' First Amended Complaint** was sent via Colorado Courts E-filing System and/or by email to the following:

FOR DEFENDANT BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY

Jeannine Haag @ jeanninehaag@larimer.org
William Ressue @ wressue@larimer.org

FOR DEFENDANT LOVELAND READY-MIX

Donald Ostrander @ mail@hrodlaw.com
Joel Spector @ pooljoel@hrodlaw.com

/s/ John M. Barth
John M. Barth