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VIA EMAIL

Boulder County Board of County
Commissioners
2045 13th Street
Boulder, Colorado
commissioners@bouldercounty.org

***Re: Save Our Saint Vrain Valley, Inc.'s Opposition to Cemex, Inc.'s Dowe Flats
Special Use Application (Planning Docket No. SU-22-0003)***

Dear Commissioners:

This law firm represents Save Our Saint Vrain Valley, Inc. ("SOSVV"). SOSVV is a grassroots non-profit that was formed to conserve and preserve the natural environment in the St. Vrain Valley east of Lyons and in the surrounding areas of unincorporated Boulder County.¹

The purpose of this letter is to respectfully request that the Board of County Commissioners (the "BOCC") deny the special use application submitted by Cemex Inc. ("Cemex") for 15 new years of open pit mining at the Dowe Flats site at Docket No. SU-22-0003 (the "Application"). In doing so, **SOSVV asks the BOCC to accept the unanimous recommendation of the Boulder County Planning Commission**, which agreed with SOSVV and overwhelming public opposition to the Application and recommended denial of the Application by a vote of 6 to 0.

Section 4-601 of the Boulder County Land Use Code (the "L.U.C.") provides that the BOCC may not approve a special use unless the applicant has provided sufficient evidence to

¹ Among its many high profile conservation victories in Boulder County, SOSVV successfully reversed the initial decision of the Director of Planning & Community through a published opinion of the Colorado Court of Appeals regarding the lapse of Martin Marietta Materials, Inc.'s special use permit for mining just to the east of the Cemex cement plant. *See Save Our Saint Vrain, Inc. v. Boulder Cnty. Bd. of Adjustment*, 2021 COA 44. Consistent with that decision, the Director has now confirmed that Martin Marietta's permit has lapsed. This new decision is now pending a further administrative appeal before the Board of Adjustment at Docket No. AP-22-0003.

satisfy 13 mandatory criteria for approval. That is, if a land use applicant fails to provide sufficient evidence to satisfy even one of these requirements, the application must be denied.

Notwithstanding the Planning Commission's unanimous recommendation that the BOCC deny the Application, staff for the Department of Community and Planning ("Staff") continues to recommend that the County approve the Application. In doing so, Staff continues to misinterpret and misapply the L.U.C. in at least four critical ways.

First, Staff looks past the approval criteria and the particular circumstances at the Dowe Flats site and instead finds that the considerable impact of a new permit approving another 15 years of mining at Dowe Flats could be "mitigated" by the offsite concessions that that Boulder County Parks and Open Space ("BCPOS") obtained from Cemex as part of the "deal" that it apparently brokered with Cemex behind closed doors.² Nothing in the L.U.C. suggests that the approval criteria can be satisfied by an applicant's cash considerations and other promises related to offsite land uses.

Second, even if the County could rely upon Cemex's offsite "commitments" to approve the Application, Staff erroneously assumes that if the Application is denied, Cemex will continue to operate its offsite cement plant such that Staff places significant weight on Cemex's conditional offer to terminate that industrial use after 15 years in exchange for a new special use permit. Without a formal administrative review, Staff has incorrectly assumed that the cement plant is a legal nonconforming use and that it will not lose that status if the Application is denied and Cemex is forced to supply the cement plant with imported raw materials. Moreover, Cemex has not made any showing that it can continue to economically operate the cement plant if it is not supplied by Dowe Flats such that it is wholly speculative for Staff to assume that the cement plant will continue to operate indefinitely. (Staff Memo, p. 5 ("Staff does not have sufficient information to determine whether it is economically viable for the cement plant to continue to operate without access to

² Along with many other key stakeholders, neither SOSVV nor the Town of Lyons was invited to participate in BCPOS's negotiations with Cemex or to otherwise comment on the "deal" before it was finalized. Moreover, it appears that Boulder County's failure to consult with Lyons on this "deal" may have violated various intergovernmental agreements between the two governments within this planning area.

It is also unclear how Boulder County can impartially weigh the Application given that BCPOS is a co-applicant with Cemex and worked behind the scenes to put the Application together. Given the BOCC's oversight of BCPOS, before voting on the Application, each of the BOCC's Commissioners must: (1) disclose any and all actual, apparent, or potential conflicts of interest related to the Application; and (2) disclose any and all information that they have considered regarding the Application that is not currently in the administrative record, including but not limited to any discussions between any of the Commissioners and any representatives for the County and/or Cemex regarding the "deal" between BCPOS and Cemex.

materials from Dowe Flats as part of this application.”.) Staff’s reliance on unfounded speculation to support the approval of the Application is unreasonable and inconsistent with the L.U.C.

Third, Staff incorrectly views the Application as merely an “extension” of the existing mining operation at Dowe Flats. (*See* Staff Memo, p. 9 (“[F]uture impacts can be interpreted as a continuation of existing, previously approved, conditions and impacts.”).) This reasoning ignores the fact that under the current permit, all mining at Dowe Flats is set to terminate later this month and the site will be fully reclaimed within three years. Accordingly, the impact of the proposed special use under the Application—a new approval for another 15 years of mining—must be measured against the status quo where all mining stops at the end of this month. Because Staff used the wrong framework in reviewing the Application, the Application is woefully inadequate. Among other things, it does not include a thorough analysis of the current day conditions at the site and does not include any expert analysis of the increased impact of another 15 years of mining as compared to the status quo where the site is fully remediated within three years. For this reason alone, the Application should be denied as incomplete.

Finally, because the application is incomplete, Cemex has not provided any evidence sufficient to find that the Application can satisfy each of the thirteen approval requirements set forth in L.U.C. §4-601. Because the Application does not include any information sufficient to measure the impact of 15 years of mining against the status quo where the site is fully reclaimed within three years, there is no way for the BOCC to approve the proposed special use consistent with L.U.C. §4-601.

Each of these issues is addressed in turn below.

1. Cemex’s Cash Considerations and Offsite Promises Cannot Satisfy the Approval Criteria as a Matter of Law.

In recommending approval of the Application, the bulk of Staff’s analysis centers on the collateral agreements that BCPOS secured from Cemex in exchange for the County’s support for the Application. (*See generally* Staff Memo, pp. 12-22.) But all of these concessions (summarized on page 7 of the Staff Memo) relate to things that Cemex is offering to do outside of the area where it is requesting a special use permit to engage in another 15 years of open pit mining. Accordingly, none of these considerations are sufficient to satisfy the thirteen required elements of approval under L.U.C. §4-601—all of which direct the BOCC to look narrowly at the proposed special use and consider whether it can peacefully coexist with surrounding uses.

Broadly speaking, the concessions that BCPOS negotiated from Cemex fit into one of two categories. First, Cemex is offering to make several different cash considerations and land donations to Boulder County worth millions upon millions of dollars. Second, Cemex is committing to close its neighboring cement plant operation at the Lyons Quarry site after 15 years if the Application is approved. None of these conditional satisfy any of the mandatory approval criteria set forth in L.U.C. § 4-601.

With respect to the cash considerations and land donations that Cemex is offering as a sweetener for its Application, there are any number of reasons why the L.U.C. does not provide a mechanism by which a land use applicant can simply purchase the right to engage in a special use at an otherwise inappropriate site. Aside from creating an inequitable system where monied interests can simply purchase land use rights that are not available to others, such a scheme would violate the basic principles of the L.U.C. which above all else are intended to protect the health, safety, and welfare of the people of Boulder County. The L.U.C. does not allow for an applicant to pay-for-play to engage in a proposed special use and each proposed special use must stand or fall on its own merits given the intensity of the proposed use and the sensitivity of the site and surrounding land uses. Here, Staff has ignored the plain meaning of L.U.C. § 4-601 to find that Cemex's money can mitigate the onsite impacts of another 15 years of mining. Because this reasoning is inconsistent with the L.U.C., it must be rejected.

As for the cement plant,³ the bulk of Staff's analysis rests upon the theory that the unspecified impact of another 15 years of mining at Dowe Flats is worth trading for Cemex's promise to decommission its cement plant at the end of that 15 years. But again, nothing in L.U.C. § 4-601 provides that the approval criteria can be satisfied by such convoluted horse trading.⁴ Just as a land use applicant should not be permitted to buy their way into entitlements that are not available to normal citizens of Boulder County, **the County should not allow Cemex to hold the cement plant hostage to secure another 15 years of mining at Dowe Flats.**

If the BOCC blesses Cemex's scheme here, it will incentivize every other polluter in the County to refrain from voluntarily improving their operations so that they can instead trade their

³ The Lyons Quarry cement plant is a coal-fired operation that was built in 1967 using what is now obviously outdated 1960's technology. The cement plant is the single largest source of greenhouse gas pollution in Boulder County. It emits approximately 350,000 tons of carbon dioxide per year and accounts for approximately 5 percent of all GHG emissions in Boulder County.

⁴ The significant weight that Staff places on the benefits of Cemex's conditional promise to decommission the cement plant is especially frustrating given Staff's steadfast refusal to consider the negative impacts of the continued operation of the cement plant for the intervening 15 years based on a reliable supply of raw materials if the Application is approved. (Staff Memo, p. 17 ("While the operations of the cement plant are not the subject of this review, the applicant has committed to the closure of the plant at the end of the requested 15-year extension for Dowe Flats.")) Despite overwhelming public opposition to the cement plant, Staff has been at pains to evaluate the Application separately from the ongoing cement plant operations. But the County cannot have it both ways. If the County believes that the Application should be approved because of the promises that Cemex has made with regard to the cement plant, then the County's consideration of the Application must necessarily grapple with all of the negative impacts from the continued operation of the cement plant in the interim. To date, all of these significant impacts have been ignored.

dirtiest land uses in exchange for new land use approvals for unrelated projects in other locations. This is both bad policy and contrary to L.U.C. § 4-601, which instructs the County to review each special use application on its own merits.

2. Unfounded Speculation Regarding the Cemex Concrete Plant If the Application Is Denied Cannot Factor Into the BOCC's Decision.

Even if Cemex's promise to decommission the cement plant could serve as the lynchpin for approving the Application (which under L.U.C. § 4-601, it cannot), Staff has still gone too far in assuming that the cement plant can only be closed by approving the Application. If the Application is denied and mining at Dowe Flats ceases, there is simply no way to predict how this could impact Cemex's continued operation of the cement plant.

Cemex has claimed that it will continue to operate the cement plant by importing raw materials from beyond Dowe Flats. But Cemex has never made any showing that the cement plant could be economically operated in this manner. After operating the cement plant for more than 50 years using raw materials that were mined on adjacent parcels, it is not reasonable to assume that Cemex can indefinitely continue operations at the cement plant without a local source of materials. If Cemex cannot economically operate the cement plant without a neighboring mining operation, then the County's denial of the Application would result in the immediate decommission of the cement plant. While only Cemex knows the economic reality, it is not reasonable for the County to simply assume that the cement plant will continue to operate indefinitely if the Application is denied.

Even more importantly, if Cemex were to change its cement plant operation to rely exclusively on imported materials, this use would necessarily be an "alteration" of the historic use such that it would lose its purported status as a legal nonconforming use.⁵ L.U.C. § 4-1003.C.1.d provides that "[t]he right to continue a nonconforming use terminates immediately when" there is any "alteration of the nonconforming use which has the effect or threatened effect of creating a hazard or nuisance on or off the property, of adversely affecting the character of the neighborhood, or of intensifying the use of the land or its need for services."

⁵ SOSVV disagrees with Staff's determination in the first instance that the cement plant as it exists today is a legal nonconforming use. Building and land use records from the County and mining records from the state Division of Reclamation, Mining and Safety confirm that the cement plant has undergone significant alterations since the plant was first constructed in 1967 and after it became a nonconforming use in 1994. Accordingly, the County should not rely upon the truncated nonconforming use analysis included in the Staff Memo and should instead launch a full administrative review to determine the continued legality of Cemex's operation of the cement plant without a special use permit. If after this review, the County determines that the cement plant is no longer a legal nonconforming use, then the County can immediately stop any further operations at the cement plant irrespective of what happens with the Application.

Throughout its history, the cement plant has operated in conjunction with the adjacent open pit mining operations at the Lyons Quarry and Dowe Flats. In this way, the cement plant has always functioned as a manufacturing facility collocated with a mine to process locally extracted materials. If the Application is denied, Cemex will only be able to continue operating the cement plant if it can find a way to economically import all of the raw materials that are needed to manufacture cement. Given the location of the site, this would require a significant increase in truck and/or train traffic coming to the site. Such a change in the nature of the operation (and potentially the type of raw materials used to supply the plant) would fundamentally alter the use and pose a new and potentially increased threat to the health and safety of surrounding land users.⁶ Accordingly, if the Application is denied, then the historic nonconforming operation of the cement plant would necessarily need to be altered in a manner that would automatically terminate any legal nonconforming status under L.U.C. § 4-1003.C.1.d.

Of course, it is impossible to know exactly what the future might hold for the cement plant if the Application is denied. But that uncertainty is precisely why it is unreasonable for Staff to recommend approval of the Application based upon unfounded speculation as to how the fate of the Application may or may not dictate what happens with the cement plant. Consistent with the L.U.C., the Application must be considered on its own merits. An approval that is based on speculation about the potential impact of the discontinuation of Dowe Flats mining on the continued operation of the cement plant would be both arbitrary and capricious.

3. The Application Is Missing Critical Information Regarding the Impact of New Mining in Light of Present-Day Conditions At and Around the Site and Should Therefore Be Denied as Incomplete.

In the Staff Memo, Staff incorrectly assumes that the Application is merely a request to continue the existing mining operation at the Dowe Flats site. When Docket No. SU-93-14 was approved for the Dowe Flats site in 1994, the BOCC expressly limited the duration of that special use to 25 years and required that the site would be fully reclaimed within three years after that 25-year mining campaign. Accordingly, if the Application is denied, all mining at Dowe Flats will stop at the end of this month and the site will be fully reclaimed in 2025, if not sooner. Because the status quo provides that the site will be fully reclaimed by 2025, any new approval for 15 years of mining must be judged against that base case and cannot be viewed as simply a “continuation” of the existing special use.

Staff ignores this context and simply assumes that because mining has been occurring at the site, mining can continue for another 15 years without any need to newly assess the impact of

⁶ For its part, the state Division of Mining, Reclamation and Safety has confirmed that if the cement plant were no longer to be supplied by locally mined materials, that would constitute an alteration in the change of the cement plant operation which would require Cemex to amend its state permit for the cement plant. (See Aug. 29, 2022 Letter from DRMS to Boulder County (attached to Staff Memo at pp. G1 to G3.)

this additional mining. (*See, e.g.*, Staff Memo, p. 17 (“Many of the impacts addressed in the criterion have already occurred; these impacts include alterations to the natural landscape and topography, the effects on Rabbit Mountain Natural Area, and the disturbance of the plant and animal habitats.”). As a result, Staff’s analysis is devoid of any actual consideration of the additional social and environmental impacts that will result if the Application is approved and the Dowe Flats site is not fully reclaimed within the next three years. (*See also* Staff Memo, p. 19 (claiming that another 15 years of mining will not result in significant visual impacts because “the area of site disturbance will not be increasing; instead, the excavation will be going deeper into the current pit”).)

Because Staff has incorrectly applied this thinking to the Application at all times since the Application was first submitted in May 2022, the Application does not include any in-depth analysis of the impact of another 15 years of mining at the Dowe Flats site as compared to the status quo where the site will be fully reclaimed within three years. The only information that Cemex provided in support of the Application is a one-page discussion of the “Long- and Short-Term Ecological Impacts” of 15 more years of mining at Dowe Flats, which is itself based on generic information pulled from the state wildlife database for the surrounding area and not any site-specific information. (Staff Report, p. A43.) But even this analysis acknowledges that additional mining will delay the habitat restoration that was set to begin immediately upon the expiration of the existing special use permit at Dowe Flats. (*Id.*)

The absence of any in-depth site-specific studies and analysis is contrary to the L.U.C., which expressly provides that an application for a special review must include a “Development Report” which analyzes “[t]he long and short term effect on Environmental Resources . . . through field surveys and/or expert opinions or other competent information. The applicant shall address any material adverse impacts of the development on any identified Environmental Resources, including plans for the mitigation of these impacts. Wildlife impact reports shall be required in accordance with Article 7-1700.” L.U.C. § 3-203.F.

Here, the Cemex Application does not include a detailed “Development Report” or any of the necessary expert reports or other information that the County would need to understand the current situation at and around the Dowe Flats site and to ultimately weigh the full impact of another 15 years of mining. Among its many deficiencies, the Application does not include: (1) a site-specific wildlife impact report based upon a current field survey at the site (as required by L.U.C. § 7-1700); (2) any assessment of the acute harm that might result from the localized effects of dust and other air pollution;⁷ (3) any assessment of potential water pollution; (4) a noise study; (5) a traffic study; and (6) an archeological assessment or updated cultural resources report for the

⁷ The Staff Memo notes that the exiting mining operations at Dowe Flats have been within state permit limits. However, Staff fails to acknowledge that state pollution limits are focused on limiting the cumulative impact of pollution across the state and do not specifically protect against acute, localized harm.

site. Even if the County’s 1994 approval of mining at the Dowe Flats included some of this information, all of this information has necessarily changed in the intervening three decades.

While Staff is technically correct in at least some sense that continued mining operations at the site will probably have a similar impact as the previous mining at the site, this reasoning ignores the fact that: (1) conditions around the site have necessarily changed in the past three decades such that the impact of mining at Dowe Flats must be reassessed in light of those changing conditions; and (2) the impact of 15 new years of mining must be measured against the status quo where the site is fully reclaimed within three years. For example, while the substantial impact on wildlife in the area of additional mining under the Application will presumably be similar to what it has been in recent years under the 1994 permit, the County has not made any attempt to: (1) understand extent of that significant impact given current conditions in the year 2022 and beyond; and (2) measure that impact against the significant and immediate benefits of allowing the existing permit to expire such that the site will be fully reclaimed within three years.

No one can answer any of these basic questions for any of the impacts that will result if the Application is approved because Cemex has not done the work. Because the Application does not include a detailed Development Report that complies with L.U.C. § 3-203.F, it should be denied as incomplete.

4. Cemex Has Not Presented Any Evidence to Satisfy the Approval Criteria.

Given Cemex’s failure to provide sufficient information regarding the impacts of another 15 years of mining, there is no way for the County to measure the proposed use against the status quo where mining concludes this month and the site is fully reclaimed within three years. Consequently, Cemex has not provided any evidence in support of the Application sufficient to satisfy all of the thirteen required elements of approval for a new special use under L.U.C. § 4-601.

For example, there is no evidence in the record that the Application complies with L.U.C. § 4-601(1), which requires the applicant to demonstrate that a proposed special use will be “compatible with the surrounding area.” The Staff Memo (at pp. 12-13) claims that another 15 years of mining will be compatible because the surrounding area has managed to find a way to live with the last 25 years of mining. But again, without any understanding of the traffic, noise, and pollution that will be generated by the proposed mining in the context of the present-day conditions, there is simply no way to determine whether the proposed use will be compatible with the surrounding neighborhood.

The absence of any information or analysis regarding the potential interaction of the proposed use with the existing surrounding uses likewise precludes any finding that the Application can satisfy at least nine other mandatory approval requirements:

- L.U.C. § 4-601(4)—prohibiting “over-intensive” land uses;

- L.U.C § 4-601(5)—no material adverse impact on community capital improvements;
- L.U.C. § 4-601(6)—will not require additional community facilities and services;
- L.U.C. § 4-601(7)—will not result in significant negative traffic impacts or traffic hazards;
- L.U.C. § 4-601(8)—will not cause significant air, odor, water, or noise pollution;
- L.U.C. § 4-601(9)—will be adequately buffered or screened to mitigate any undue visual impacts;
- L.U.C. § 4-601(10)—will not be detrimental to the health, safety, or welfare of the present or future inhabitants of Boulder County;⁸
- L.U.C. § 4-601(11)—will establish an appropriate balance between current and future economic, environmental, and societal needs; and
- L.U.C. § 4-601(12)—will not result in unreasonable risk of harm to people or property.

For each of these mandatory elements of approval, the Staff Memo simply assumes that the fact that the site has been mined for the past 25 years means that it can be mined for another 15 years. The Staff Memo repeatedly assumes that because the site has already been “disturbed” by the historic mining operation, there will be no impact from further disturbance. But again, this reasoning ignores the baseline situation where—if the Application is denied—all mining at the site will conclude later this month and the site will be fully reclaimed by 2025, if not sooner. Because the Application does not include any information or analysis as to what the impact of a new special use approval for another 15 years of mining might be, there is simply no way for the County to find that the Application satisfies the special use approval criteria.

Finally, despite all of the unknowns within the Application, one thing that has indisputably changed at Dowe Flats since 1994 is its specially protected status under the Boulder County Comprehensive Plan. Specifically, when the Comprehensive Plan was updated in 2014, portions of the Dowe Flats site where Cemex now proposes additional mining under the Application were designated as part of: (1) the Rabbit Mountain Environmental Conservation Area; (2) the Rabbit

⁸ Cemex has expressly refused to commit to upgrading any of its facilities in response to numerous specific requests from the County Public Health Department. (Staff Memo, p. 8 (nothing that these improvements are needed to “address long standing and ongoing fugitive dust and maintenance issues”).)

Mountain Natural Area; and (3) the Rabbit Mountain High Biodiversity Area (which is designated as an area with “Outstanding Biodiversity Significance” that is “Irreplaceable”).

The Comprehensive Plan expressly provides that the purpose of each of these designations is to sustain and protect native species, ecosystems and the biodiversity of the region. (Boulder County Comprehensive Plan, p. CG-4.) In particular, the Comprehensive Plan provides that the County must preserve areas designated as “Environmental Conservation Areas” “to preserve broader ecological processes and functions” and Natural Areas to “protect unique and distinctive natural features and landscapes in the County.” (Boulder County Comprehensive Plan, p. ER-1.) “Natural Areas” are “physical or biological areas that are unique and important to the natural heritage of the state and/or county.” (*Id.* at ER-3.) “High Biodiversity Areas” are “locales that have a concentration of rare environmental resources. If managed well, they represent the greatest opportunities for preserving specific aspects of Boulder County’s natural heritage.” (*Id.*) All of the Comprehensive Plan’s policies and goals within these areas are focused on environmental conservation above all else and dramatically limit the types of development that can lawfully occur in these areas. (*Id.* at ER-4 to ER-6.) Development is only permitted in these areas when a land use applicant has completed any necessary “studies, inventories, or reports that address the proposal’s potential impacts on environmental resources and include recommendations for mitigation of those impacts.” (*Id.* at ER-5.)

Here, Staff did not require Cemex to engage in any of this additional analysis and instead simply concluded that the existing mining operation had already “disturbed” the site such that Staff could assume that additional mining would not result in additional impacts. (Staff Memo, p. 14 (“The environmental resources of the site have already been impacted due to the mining activities on the site.”).) Yet again, this fails to account for the scenario where all mining immediately stops at the site and the site is fully reclaimed within three years. Even more importantly, this analysis fails to account for the site’s newly protected status following the more recent revisions of the Comprehensive Plan.

Now that Boulder County has designated the Dowe Flats site as part of the Rabbit Mountain Environmental Conservation Area, the Rabbit Mountain Natural Area, and the Rabbit Mountain High Biodiversity Area, no additional development can be approved at the site without first meeting the heightened showing that it will not impact environmental resources, wildlife corridors, and natural landscapes at the site. Because the Application does not even attempt to make this showing, the Application does not comply with the Comprehensive Plan and must be denied in accordance with Section 4-601(3).

Cemex has not presented any evidence to show that its request for a new special use permit for another 15 years of mining can satisfy all of the required approval criteria. As a matter of law, the County cannot ignore these legal requirements. Accordingly, the County does not have any discretion to approve the Application, and the Application must be denied.

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For each of the reasons set forth above, SOSVV respectfully requests that the BOCC accept the **unanimous** recommendation of the Planning Commission and deny the Application.

On behalf of SOSVV, we sincerely appreciate your time and your careful consideration of this important matter. We look forward to addressing these issues and any questions that the Board might have at the hearing that is set in this matter for September 14, 2022.

Finally, please include a copy of this letter as part of the administrative record for the Application.

Respectfully,



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