

BEFORE THE CITY COUNCIL OF COMMERCE CITY
STATE OF COLORADO

RE: REQUEST FOR CONDITIONAL USE PERMIT BY LAMBLAND, INC. DBA A-1 ORGANICS, INC., CUP-121-19 FOR 9109 MONACO STREET (I-2), AS MODIFIED

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BRIEF IN SUPPORT OF REQUEST FOR CONDITIONAL USE PERMIT, AS MODIFIED, AND REQUEST FOR SUPPLEMENTATION OF RECORD

Lambland, Inc. d/b/a A-1 Organics, Inc., (“A1 Organics”) by and through its undersigned counsel, respectfully requests approval of its Conditional Use Permit (“CUP”) application for the Monaco Greenwaste Organic Recycling Facility at 9109 Monaco Street (“Monaco Greenwaste Facility” or the “Facility”), as modified on March 21, 2019, after hearing by the Commerce City Council on April 1, 2019. A1 Organics also seeks supplementation of the record to include: (i) photographs submitted by Adams County residents Perry Johnson and a single 2017 photograph by Doug Wolf, which were reviewed and considered by the Planning Commission at its February

¹ Drexler Law, LLC is Of Counsel to Ireland Stapleton Pryor & Pascoe, PC, which is defense counsel of record for the litigation A1 Organics is currently defending against the principal opponent of the CUP request, Mr. Perry Johnson, a resident of Adams County (not Commerce City). Drexler Law, LLC was recently retained to assist A1 Organics with the matter involving the recommendation for denial of the CUP made on February 5, 2019 by the Planning Commission given that its vote was in stark contrast to the clear recommendation for approval with conditions by the Development Review Team and Planning Department.

5, 2019 hearing, and (ii) written findings of fact by the Planning Commission, as required by Code Section 21-3125.

As grounds therefor, A1 Organics states as follows:

I. AFTER A THOROUGH AND DETAILED ASSESSMENT, THE DRT/PLANNING DEPARTMENT CONCLUDED THAT A1 ORGANICS' CUP APPLICATION FOR ITS MONACO GREENWASTE FACILITY MET KEY APPROVAL CRITERIA

1. After a thorough and detailed review and assessment, including numerous conferences between Commerce City and A1 Organics and its consulting firm, Norris Design, the Commerce City Development Review Team and its Planning Department determined that the specified criteria under the Land Development Code Section 21-3230 applicable to A1's Organics' CUP request were satisfied. Thus, it recommended Approval thereof to the Planning Commission with enumerated Conditions A-L. This recommendation and a detailed discussion of the applicable regulatory criteria deemed satisfied, as well the numerous factual bases therefor, are set forth in the Amended Staff Report, attached as **Exhibit A**.

II. A1 ORGANICS IS A RESPONSIBLE CORPORATE CITIZEN AND ITS CONTINUED OPERATION AT THE MONACO GREENWASTE FACILITY IS IMPORTANT TO THE ADVANCEMENT OF COMMERCE CITY'S COMPREHENSIVE PLAN

2. For over 40 years, A1 Organics' primary business has been Organic Recycling within the State of Colorado. Its mission is to excel in creating beneficial use options for organic wastes. A1 Organics focuses on commercial composting of organic wastes, and toward this end, it owns and operates one of the largest commercial composting operations in the United States. The company manufactures high quality soil amendment products, i.e., compost, mulches, potting soils, topsoil products, etc., which are marketed and sold primarily along the Front Range.

3. Annually, A1 Organics receives organic materials from businesses and residents throughout Colorado, including at its Commerce City location. The Facility operates as a receiving

and recycling site for greenwaste. Greenwaste recycling involves any organic waste that can be composed or processed (recycled) into surface mulches and/or other beneficial use products. At the Facility, the greenwaste is comprised of tree and limb material, grass clippings, leaves, clean dimensional wood, sod, topsoil, and garden wastes. After minor processing and limited on-site grinding operations, organic materials targeted for composting are promptly shipped from the Facility to an A1 Organics' off-site composting operation. At its Facility, A1 Organics offers Commerce City business and residents a drop off recycling program and also makes soil amendment products available at discounts. No composting is performed at the subject property. The Facility is maintained in a clean and orderly condition and is operated in accordance with or exceeding best industry practices. *See* photographs of Facility, attached as **Exhibit B**; *see also* Affidavit of Robert Yost, attached as **Exhibit C**; Affidavit of Matt Cotton (expert witness), attached as **Exhibit D**.

4. A1 Organics has been recognized regionally and nationally for its commercial operations. These industry honors include:

- The United States Composting Councils, USCC Composter of the Year Award
- The Colorado Association for Recycling – Life Time Achievement Award
- Colorado Businesses to Watch Recipient
- The Colorado Environmental Leadership Partner – Gold Level Partner Designation
- Coors Gold Level Supplier Award

A1 Organics also enjoys broad support within the industry nationwide and within the State of Colorado. *See* Cotton Affidavit (**Ex. D**) and letters in support of A1 Organics' operations attached hereto as **Exhibit E** related to a grant application made pertaining to its Rattler Ridge facility. Perhaps even more significantly, A1 Organics enjoys broad support among the citizens of Commerce City. *See* petition signatures in support of A1 Organics from scores of Commerce City residents, attached hereto as **Exhibit F**. Notably, the Facility's purpose and activity align with

Commerce City's Comprehensive Plan. Indeed, as explicitly recognized by the DRT/Planning Department in considering A1 Organics' CUP request:

[T]he site meets a number of goals and objectives within the city's comprehensive plan, specifically in Chapter 15 regarding environmental conservation and stewardship, and conformance with the comprehensive plan designation of industrial / distribution. The site is currently conforming to all LDC regulations (aside from pile heights) and the currently approved development plan for the site.

(Ex. A, Amended Staff Report, p. 13). Commerce City's Comprehensive Plan expressly contemplates the City's engagement with private companies to reduce waste. EC 5.2 of the plan, titled "Partnerships with Private Companies to Reduce Waste", provides that the City endeavor to "[s]upport partnerships with private companies to promote waste reduction, recycling, re-use, composting, and the overall goal of reducing solid waste disposal." (Comprehensive Plan, Ch. 15, attached as **Exhibit G**, p. 199). A1 Organics falls squarely within this mandate. Moreover, the plan identifies environmental and conservation stewardship indicators that expressly target per capita waste reduction and expressly identify *per capita compost material* as an indicator of progress toward Chapter 15's goals. (*Id.* at Ch. 15, Table 15.3, p. 203). This is the exact benefit – a per capita increase in compost material – that the Monaco Greenwaste Facility affords. More generally the plan articulates a desire to "[c]urb need for landfill expansion or relocation" (*id.* at p. 194); "support programs for city and community facilities (in key locations) that focus on source reduction, recycling, composting, and construction materials waste diversion for reuse and exchange of materials" (*id.* at p. 198, Goal EC-5.1); and "reduce the need for new landfills (waste reduction)" (*id.* at p. 194). Through its Facility, A1 Organics is helping to ensure that the City meets those goals.

5. Moreover, the use being made of the property is consistent with the stated goal of the Commerce City Comprehensive Plan to "ensure[] efficient use of land for economic and

community benefit” (*id.* at 19), and is a far better and more productive use than that use to which the property was put prior to the move of the Facility onto the property. *See* photographs of the property prior to its development for use by A1 Organics, attached as **Exhibit H**. In this regard, the prior use of the property was limited to RV storage or no use at all. The site was developed, at considerable expense, specifically for use by A1 Organics’ Monaco Greenwaste Facility and reflects a significantly more beneficial use. *See* Affidavit of Ryan McBreen, attached as **Exhibit I**. As noted in the Amended Staff Report, the site’s characteristics are self-limiting. The site sits on a former landfill, which “presents a technical challenge in terms of constructing any form of major structure due to poor soil quality, which puts a significant limit on the types of uses and business that can operate” there. (**Ex. A** at p. 5; *id.* at p. 12, noting “significant limitations” on the type of uses of the site).

6. Further, A1 Organics is an established and valuable contributing member of the Commerce City business community. The Monaco Greenwaste Facility employs six individuals at the Facility, and its operation there supports many other local businesses, including Commerce City landscape contractors, trucking companies, tree maintenance companies, and landscape supply retail outlets. A1 Organics also supports the City through offering it lower cost landscape supplies for its parks and public works, as well as through payment of significant sales taxes (approximately \$23,000). *See* Yost Affidavit (**Ex. C**).

7. A1 Organics also supplies City retailers, such as home improvement stores, landscape supply facilities, and garden centers, soil amendments, landscape materials, and garden supplies. A1 Organics also provides support directly to the City and its residents by offering occasional free Yardwaste Drop Days and discounts and savings on its products. With a convenient and low-cost option for recycling in lieu of expensive and wasteful landfill disposal, A1 Organics

provides Commerce City and its residents better options to keep property free from limb, log, leaf, and grass piles and further provides a storm remediation contingency site for tree and limb debris. *See* Yost Affidavit (**Ex. C**).

8. As has been the case since the Monaco Greenwaste Facility first moved onto the site in 2016, approximately three years ago, its operations require, and industry best practices mandate, storage pile heights well in excess 8 feet. This is consistent with the requirements of A1 Organics' other similar operations and facilities in Keenesburg, Eaton, and Englewood. *See* Yost Affidavit (**Ex. C**). Simply put, A1 Organics will not be able to continue its operations at the Facility (or at any other property) in Commerce City without the ability to maintain pile heights up to 25 feet, at a height expressly contemplated via Conditional Use Permit under the newly enacted land use regulation Section 21-5254. *See* Ordinance 2194, modifying Land Use Code Section 21-5254, attached as **Exhibit J**. A1 Organics maintains "living piles" which vary in size depending on movement of product off-site and production of new materials for operations. These piles vary in size, from 15-25 feet. Twenty-five (25) foot pile sizes are typical for these operations and many similar facilities typically operate with much larger piles. *See* Cotton Affidavit (**Ex. D**)

9. If A1 Organics is unable to continue its operations at the Facility as maintained for the past three years, it will be forced to relocate, abandoning the property and the highest beneficial use thereof.² This will also eliminate the recycling services A1 Organics makes available to Commerce City and its residents and will remove from its boundaries a long-time and stable locally-owned business and employer that is a nationally-recognized leader in the commercial

² Further, the prior owner of the property was assured of Commerce City's use of the Monaco Elevation Standard (*see* discussion at Section III, *infra*, at p. 7) when it developed the property and that A1 Organics' existing use was compliant. A1 Organics anticipates that the current property owner may request a PUD or otherwise pursue relief in the event that A1 Organics' CUP request is not successful. During the pendency of any PUD or other request, A1 Organics requests that Commerce City continue to adhere to its policy of permitting continued existing use by A1 Organics pending final determination of the matter.

composting industry. Perhaps most significantly, it will jeopardize Commerce City's ability to adhere to or advance its Comprehensive Plan. For all of the foregoing reasons, A1 Organics respectfully requests that the City Council approve its CUP application as modified on March 22, 2019.

III. A1 ORGANICS' CURRENT OPERATIONS, AS EXPRESSLY AUTHORIZED, ARE LAWFUL

10. A1 Organics believes that the Planning Commission understood, incorrectly, at the February 5, 2019 hearing that the Monaco Greenwaste Facility was operating unlawfully and thus disregarded the DRT/Planning Department's recommendation for CUP approval. A1 Organics has at all times operated its Facility lawfully, and according to express authorization by Commerce City, both since commencing operations at the Facility and throughout the pendency of the City's review process.

11. To provide some historical context, when A1 Organics initially was considering possible sites for its grinding and storage facility in Commerce City in 2014, it had numerous meetings and conversations with individuals from the Commerce City Administration, including its Planning and Public Works Departments, regarding A1 Organics' operations and needs. Before A1 Organics entered into a lease with the owner of the Monaco Street property and relocated its Facility there, the City assured A1 Organics that its large storage piles would not pose an issue. *See Yost Affidavit (Ex. C)*. Norris Design, the consultant hired by the then-property owner to assist with the development of the site, shared a similar understanding at the time. These conversations involved Commerce City Planner Jared Draper and other Commerce City employees, including Patrick Buckley in the Public Works Department. *See Yost Affidavit (Ex. C)*.

12. In the materials initially presented to Commerce City, as A1 Organics was looking to relocate in September 2014, it provided specific information about its storage pile height requirements. *See* Letter dated September 2, 2014 to Jared Draper from A1 Organics, attached hereto as **Exhibit K**. On November 14, 2014, Mr. Draper expressly authorized A1 Organics via voicemail message to move its “storage operations” (involving its disclosed pile heights) onto the property. *See* Yost Affidavit (**Ex. C**).

13. Mr. Draper (and other Commerce City personnel) explained that the 8-foot pile height restriction in the regulations related to measurements from the elevation of Monaco Street (“Monaco Elevation Standard”), not measurements from the “bottom of the pile.” At the time, Commerce City personnel explained that it used the Monaco Elevation Standard given that the 8-foot height restriction principally concerned visual impacts and sightlines from Monaco Street (and other nearby streets). A1 Organics specifically confirmed this in a discussion with Commerce City on September 11, 2015. *See* Yost Affidavit (**Ex. C**). This was significant given the substantial depression in elevation from Monaco Street to the subject property which would permit A1 Organics to operate its Facility and store its piles of materials on the site. The elevation disparity between the grade at Monaco Street and the site of the Facility is approximately 35 feet. (**Ex. A**, Amended Staff Report, p. 5). *See* cross section of elevation of Monaco Greenwaste Facility Site to Monaco Street, attached as **Exhibit L**.

14. In fact, the principal reason that the City suggested the Monaco Street site to A1 Organics as the preferred location for the Facility, compared to the other property then being considered in Commerce City, was that the elevation of the other property was at street level, and thus the piles would be visible from street level. Given that, Commerce City recommended that

A1 Organics relocate its Facility, including its 25-foot storage piles, onto the Monaco Street property, inducing A1 Organics to do so. *See* Yost Affidavit (**Ex. C**).

15. Based on these assurances from Commerce City, A1 Organics signed a long-term lease in late 2015, and made substantial financial investments in excess of \$300,000 to move its operations to the Monaco Street site and commenced operating there. *See* Yost Affidavit (**Ex. C**). Thereafter, A1 Organics continued operating for more than two years without receiving notice from the City of any objection to the existing pile heights. Throughout this time, A1 Organics was subject to numerous annual and periodic inspections of its operations and Facility by multiple state and local agencies, including the Adams County Fire Department, Tri-County Health Department, CDPHE's Air Pollution Control Division ("CDPHE APCD"), and CDPHE Hazardous Materials and Waste Management Division ("CDPHE HMWMD"). A1 Organics has been found in compliance related to its pile heights, dust migration, and air pollution by all reviewing agencies. *See* Yost Affidavit (**Ex. C**).

16. During this more than two-year period, A1 Organics was also subject to repeated inspections by Commerce City itself. At no time was A1 Organics cited by the City for any violation related to pile heights, dust migration, or any other related issue, nor was there any notice given that Commerce City intended to modify its pile height measuring standard away from the Monaco Elevation Standard. In fact, on January 19, 2018, Commerce City Inspector John Palmer inspected the Facility, took photographs of the site, including the storage piles, and advised that the piles met regulatory requirements. *See* Email dated January 19, 2018 from Kevan Northrup, A1 Organics Facility Manager, confirming details of inspection, attached as **Exhibit M**.

17. All of that changed in mid-2018, after the City hired a new inspector. Without providing A1 notice or opportunity to be heard, the City discarded the Monaco Elevation Standard,

and elected instead to begin employing a “bottom of the pile” measuring standard. This new measurement regime completely contradicted all of the City’s prior representations and conduct.

18. Although A1 Organics would have been within its rights to formally challenge such an arbitrary change in standard and any related enforcement action, it instead elected to work cooperatively with the City to resolve the issue. In this regard, the City suggested that a PUD process be used to modify the zoning to avoid the issue related to the change from Monaco Elevation Standard and the imposition of an otherwise unworkable 8-foot pile height restriction. A1 Organics immediately followed the recommendation of the City and submitted a comprehensive PUD request on September 13, 2018. The PUD process was ongoing when the City proposed to amend its regulations to permit pile heights up to 25 feet via a Conditional Use Permit, under Code Section 21-5254. After the regulation was amended in December 2018, the City suggested that A1 Organics pursue a Conditional Use Permit instead of its pending PUD request. A1 Organics again immediately followed this recommendation, and on January 11, 2019, submitted a formal CUP request, replacing the pending PUD.

19. From the time it first received notice of the objection to its pile heights in mid-2018, and throughout the PUD process as recommended by the City, and more recently the CUP process as recommended by the City, A1 Organics received repeated assurances that it was Commerce City’s policy to permit continuing as-is use of property while use requests were pending and that A1 Organics was thus within its rights to continue its existing use. A1 Organics was repeatedly assured in this regard by the Deputy City Manager Roger Tinklenberg. *See Yost Affidavit (Ex. C).*

20. During the Planning Commission meeting on February 5, 2019, the Commission clearly seemed to misunderstand this issue and thus incorrectly concluded that A1 Organics was

operating in flagrant violation of City regulations. This misunderstanding seemed influential in the Planning Commission's decision to recommend denial of A1 Organics' CUP request despite the clear recommendation for approval by the City's DRT/Planning Department. Where a factual basis for a decision is flawed, as here, the decision itself is necessarily flawed.

21. Despite the misunderstanding of the Planning Commission, at all times A1 Organics has been lawfully operating the Facility with its consistent pile heights pursuant to Commerce City policies and express authorization, and in continuing compliance with the Monaco Elevation Standard. Given its lawful operations, A1 Organics respectfully requests that the City Council approve its CUP application, as modified.

IV. THE ORAL MODIFICATION OF THE CUP APPLICATION MADE AT THE FEBRUARY 5, 2019 PLANNING COMMISSION MEETING HAS SINCE BEEN WITHDRAWN BY A1 ORGANICS AND THUS, THE CUP APPLICATION IS NOW COMPLIANT IN ALL RESPECTS WITH THE RECOMMENDATION FOR APPROVAL BY THE DRT/PLANNING COMMISSION

The enumerated conditions set forth in the Amended Staff Report recommending Approval of the CUP application for the Facility included the following Conditions A and C, as relevant here:

- (A) This conditional use permit *shall expire 18 months after the date of approval*. The applicant shall be required to renew the conditional use permit prior to the expiration date in order to continue utilizing the site.
- (C) All mulch piles shall be *a minimum of 100' from adjacent residential properties* at any given time, measured from the property line.

At the Planning Commission meeting on February 5, 2019, prior to review by the Commission, A1 Organics orally amended its pending CUP application to:

- (i) request a 36-month use permit instead of the 18-month use stated as enumerated Condition A of the DRT/Planning Department recommendation for approval; and

- (ii) request that mulch piles be permitted up to 75 feet from adjacent residential properties instead of the 100 feet stated as enumerated Condition C of the DRT/Planning Department recommendation for approval.

22. Given that the two oral amendments made at the Planning Commission hearing may have, in part, caused the Commission to disregard the clear recommendation for Approval made by the DRT/Planning Department to the Planning Commission, A1 Organics thereafter modified its CUP application, as set forth in writing from Norris Design to the Commerce City Planner Domenic Martinelli, dated March 22, 2019, attached hereto as **Exhibit N**, as follows:

- (i) To request only an 18-month use permit in accordance with enumerated Condition A of the DRT/Planning Department's recommendation for approval.
- (ii) To request that pile setbacks be restricted to 100 feet from adjacent properties in accordance with enumerated Condition C of the DRT/Planning Department's recommendation for approval.

23. A1 Organics also clarified, via the Norris Design March 22, 2019 letter, that it was committed to compliance with ALL conditions enumerated by the DRT/Planning Department in the Amended Staff Report, A-L, as amended on March 22, 2019, as follows:

- A. This conditional use permit shall expire 18 months after the date of approval. The applicant shall be required to renew the conditional use permit prior to the expiration date in order to continue utilizing the site.
- B. The conditional use permit is granted only for the storage of dyed mulch chips, inbound recyclable wood product, *soil*, mulching material stackers, and raw wood chips at a height of no greater than 25'. All other outdoor storage on the property must comply with all outdoor storage requirements that apply to a property zoned I-2, as currently adopted or amended by the city. Any deviations from this condition will require an amendment to this application.
- C. All mulch piles shall be a minimum of 100' from adjacent residential properties at any given time, measured from the property line.
- D. A minimum setback of 500' for grinding and screening operations shall apply from adjacent residential properties, measured from the property line.
- E. Grinding operations will not occur on the site when wind speeds exceed 15 miles per hour for a duration of at least 10 minutes. (**Note that the normal standard for**

similar facility shutdown protocol due to winds in Colorado is 30 MPH); see Yost Affidavit (Ex. C)).

- F. The applicant shall construct and maintain a minimum of an 8' high net on the east property boundary to prevent any woodchips from blowing onto neighboring properties.
- G. The applicant shall construct and maintain a 25' demarcation pole on the subject property, in order to assist with ongoing enforcement of the 25' high pile restriction.
- H. Primary drive aisles of the outdoor storage area shall be paved with recycled asphalt and maintained by the applicant, as indicated in the approved development plan for case D-255-14- 15-16-19.
- I. Water trucks shall be kept and utilized on site during business hours for the spraying of mulch piles and drive aisles.
- J. The property shall act in accordance with the Dust Control and Mitigation plan, included as exhibit A.
- K. Due to the nature of the operations, the applicant will maintain the premises to be free of garbage, trash, and excessive woodchip debris at all times.
- L. The applicant shall comply with all federal, state, and local law.

24. Given the above material modifications to the CUP application made since the February 5, 2019 Planning Commission meeting, and A1 Organics' full commitment to comply with ALL Conditions enumerated in the Amended Staff Report, A1 Organics respectfully requests that the City Council approve its CUP application, as modified.

V. THE PLANNING COMMISSION HEARD ONLY LIMITED OBJECTIONS BY NON-RESIDENTS AND WAS SWAYED BY UNRELIABLE EVIDENCE OF THE IMPACT OF THE FACILITY ON THE JOHNSON PROPERTY

25. The Planning Commission also appeared to disregard the DRT/Planning Department's recommendation for approval as the result of a handful of complaints made at the Planning Commission meeting, principally from single adjacent neighbors, Perry and Arla Johnson, who are residents of Adams County, not Commerce City. As an initial matter, and although Mr. Johnson did not disclose this fact to the Planning Commission, he is a party to ongoing litigation against A1 Organics in Adams County. In an apparent attempt to gain a possible financial and/or litigation advantage, Mr. Johnson provided false and misleading information to the Planning Commission in the course of the meeting. Had the Planning Commission been aware

of Mr. Johnson's failure to disclose such a significant fact related to the ongoing litigation (and Mr. Johnson's inherent bias), it may have assessed the false and misleading information provided by Mr. Johnson with the careful scrutiny it deserved.

A. Mr. Johnson's False and Exaggerated Claims

26. According to the February 5, 2019 meeting minutes, Perry Johnson:

“[S]tated concerns regarding saw-dust contamination in the water and the air, dust impact on the streets and causing accidents, and concerns about containment. Mr. Johnson provided 23 pictures...Mr. Johnson stated these [photographs] are from his property with dates ranging in 2018 and 2019. Pictures were presented to the commission.”

27. Mr. Johnson is a challenging neighbor. He has owned his Monaco residential property in Adams County for over 40 years, and, in that time, the use of the land has transitioned from more rural to more industrial, with many heavy industrial uses commencing operations nearby over recent years, including even a waste water treatment plant. There is no doubt that has been a difficult evolution for Mr. Johnson (and his wife).

28. In an apparent effort to fight this change in use by nearby properties, and in a repeated and aggressive manner, Mr. Johnson has campaigned against A1 Organics since at least 2017, complaining to various state and local agencies, including but not limited to CDPHE APCD, CDPHE HMWMD, Tri-County Health, and even to the local police. By way of a fantastical theory, he has even suggested that A1 Organics is *intentionally* trying to poison (and kill) him and cause substantial damage to his property. All of Mr. Johnson's numerous and unfounded complaints about A1 Organics to the various agencies related to dust and mulch product migration (and otherwise) have been found to lack merit.

29. Frankly, it is somewhat surprising that Mr. Johnson would express significant concern about the condition of his property, considering his lack of maintenance or care thereof.

See photographs of Mr. Johnson's property attached as **Exhibit O**. In fact, Mr. Johnson's property itself appears to have at least one debris pile – apparently comprising various car parts, branches, garbage, etc., as shown the photographs – that may exceed 8 feet.

B. Substantial History of Compliance as Evidenced by Numerous Inspections by Various Agencies

30. Nevertheless, due to Mr. Johnson's abuse of the system, A1 Organics has been subjected to numerous periodic inspections by various agencies throughout its tenancy, including by CDPHE HMWMD, CDPHE APCD, and Tri-County Health, in addition to its annual inspections. The complaints made to various agencies have been meritless. During one of the inspections, in July 2018, CDPHE Inspector Thomas Lovell received a complaint that A1 Organics was operating a grinder that morning that was "creating a dust storm and blowing dust all over the neighboring homes in the area." When Mr. Lovell visited the site, he confirmed that there had been no grinding operations that occurred that day (or in any of the recent prior days), and advised that the complaint did not surprise him because the division receives multiple false claim calls. (Norris Design January 11, 2019 submission, para. 5, Compliance with Section 21-5120 Performance Standards, p. 8, attached as **Exhibit AA**). Also, in March 2018, in response to another complaint by Mr. Johnson about mulch product on his property, Ms. Lisa Oliveto, inspector for Tri-County Health, conducted another inspection, also finding that A1 Organics was compliant. In response to Ms. Oliveto's offer to inspect his property for the mulch product about which he had complained, Mr. Johnson advised that "the property was clean today." See Oliveto email dated March 27, 2018, attached as **Exhibit P**. Ms. Oliveto offered to inspect Mr. Johnson's property at any time he claimed that mulch product blew onto his property from the Facility, but upon information and belief, Ms. Oliveto has never been permitted onto Mr. Johnson's property to inspect for this purpose.

31. As recently as November and December 2018, CDPHE APCD, CDPHE HMWMD, and Tri-County Health each found (again) that A1 Organics had committed no violations and was in compliance with all applicable regulatory standards related to air pollution and dust migration. *See* Inspection Summary and CDPHE HMWMD Letter from Mr. Wolf Kray dated November 26, 2018 finding no violations, attached as **Exhibit Q**; CDPHE APCD email from Mr. Ben Cappa dated December 27, 2018 finding no violations (after complaint by Mr. Johnson), attached as **Exhibit R**. Mr. Cappa even explicitly acknowledges that “complaints can be the result of other types of neighbor disputes.”

C. Extraordinary Wind Event in April 2018

32. A1 Organics has readily acknowledged that there was a single extraordinary wind event in late April 2018, involving wind gusts of approximately 80 miles per hour that tore roofs from structures in Commerce City. A1 Organics acknowledges this significant wind event caused mulch product to be blown onto Mr. Johnson’s property. *See* photographs of Johnson property taken by A1 Organics after wind event, attached as **Exhibit S**. However, immediately after notice of the issue, A1 Organics undertook efforts and made numerous offers to clean up the dust and mulch product which had migrated onto Mr. Johnson’s property as a result of the windstorm. *See* Notes from A1 Organics’ site manager Kevan Northrup dated April 25, 2018 concerning the wind event and the numerous offers made by A1 Organics to clean up the mulch product, attached as **Exhibit T**. Mr. Johnson repeatedly refused A1 Organics’ offer to clean up the site to his satisfaction, and including any required pond clean up. *See* Yost Affidavit (**Ex. C**).

33. A1 Organics believes that the photographs presented by Mr. Johnson to the Planning Commission³ are multiple photographs taken of the same mulch product that A1 Organics acknowledges dust and mulch product migration onto Mr. Johnson's property during that extraordinary windstorm in April 2018 and that it has repeatedly offered to clean up. The contention about the repeat nature of the photographs is also consistent with Mr. Johnson's representations that he took the photographs in 2018-19, after the April 2018 wind event (given that there has been no intervening clean up).

D. Substantial Dust Control and Mitigation Efforts

34. Significantly also, since the extraordinary wind event in April 2018, A1 Organics has voluntarily undertaken numerous dust and mulch product mitigation efforts, including among other things, (i) relocating its grinding operation to the southwest portion of its site (away from Mr. Johnson's property); (ii) conducting routine watering during operations, (iii) performing periodic and seasonal grinding operations as operationally required; (iv) applying magnesium chloride to and watering of roadways, grinding operations, and storage piles; (v) conducting continuous wind monitoring via wind monitoring equipment (which equipment shows wind principally blowing from the south, in a direction which does not and would not cause migration from the Facility to Mr. Johnson's property, rather than from the west or northwest, which would; (vi) implementing regular dust migration and weather monitoring (*see* reports dated February 18, 2019, February 25, 2019, March 4, 2019, March 11, 2019, and March 18, 2019, all attached as **Exhibit U**; and (vii) adopting and implementing a Dust Control and Mitigation Plan, attached as **Exhibit V**, all of which are above and beyond nationwide best practices for this type of facility.

³ Significantly, Mr. Johnson's photographs do not appear to be included in the record in this matter. *See* request below for supplementation of the record to include Mr. Johnson's photographs in time sufficient to permit review, inspection and rebuttal thereof by A1 Organics.

See Yost Affidavit (**Ex. C**); *see also* Cotton Affidavit (**Ex. D**). Significantly, since implementing these measures, discernable dust and mulch product have not migrated from A1 Organics' site, including not even during unusually strong wind events such as the "bomb cyclone" on March 13, 2019, when winds were blowing in an unusual direction, west and northwest, from the Facility towards Mr. Johnson's property. *See* photographs taken of the site on March 13, 2019 after that weather event, attached as **Exhibit W**, involving the most intense cyclone ever recorded in the State of Colorado. As is clear from these photographs, there is no dust or mulch product located atop the snow (or even mixed in with the snow) as a result of that record-breaking high wind event, during which the west and northwest wind directions were far more likely to cause dust and mulch product migration than the prevailing wind direction. Moreover, fewer, shorter piles would be more likely to result in dust and mulch product migration given the much larger exposed surface areas. *See* Cotton Affidavit (**Ex. D**). Further, A1 Organics has expressed a commitment to undertake all mitigation measures required by the DRT/Planning Department as set forth in the Amended Staff Report.

35. Notwithstanding A1 Organics' substantial efforts, there is abundant evidence that no significant dust or mulch product ever migrated onto Mr. Johnson's property apart from the April 2018 weather event. *See* photographs, taken in February and March 2019, attached as **Exhibit X**, which show structures and a vehicle on Mr. Johnson's property, that contradict his claim that significant dust and mulch product have accumulated or are accumulating. Indeed, the Johnsons also benefit from the extensive natural barrier that exists between the Monaco Greenwaste Facility site and their property, comprising stands of mature trees and shrubbery. *See* photographs (**Ex. B**). Further, equipment belonging to third parties located at a similar distance or closer to A1 Organics' operations, including the equipment of the co-tenant of the property, Brown

Brothers Asphalt and Concrete, LLC, shows no accumulation of dust and mulch product. *See Exhibit Y.*

E. Potential Third Party Sources of Any Dust or Debris Migration

36. The dust about which Mr. Johnson has continued to so vociferously complain may be originating from other sources. In this regard, there are many nearby operations, throughout the I-76 industrial corridor, which could be producing dust migrating onto Mr. Johnson's property, including from (i) Albert Frei & Sons, Inc., which operates a business on a neighboring property at 9001 Monaco Street that provides construction aggregates, such as rocks and gravel for projects including but not limited to highways, bridges, roads, stadiums, and building, and involves grinding and dumping; (ii) Werner Enterprises, Inc., which is a trucking company that operates dozens of its semi-trucks on a very large dirt lot near Monaco Street where dozens of semi-trucks are also stored; (iii) Brown Bros., which provides paving, concrete, asphalt repair, and other services and stores and uses asphalt and paving materials that are dumped from trucks and stored onsite; and (iv) a ranch property with a large dirt boarding and stables immediately adjacent to Mr. Johnson's property. *See Exhibit Z*, for nearby operations which could be responsible for the migrating dust; *see also* Reports, (Ex. U).

37. As noted in the Planning Commission Minutes, in addition to Mr. Johnson, concern about the CUP application was made by only four other individuals, *not one of whom is a resident of Commerce City*, and one of whom is Mr. Johnson's wife, Arla Johnson (also a party to the litigation, which she too failed to disclose to the Planning Commission), and another who upon information and belief is Mr. and Mrs. Johnson's daughter and a resident of Brighton, Colorado, many miles away from the property.⁴ In fact, the only evidence presented to the Planning

⁴ Per the February 5, 2019 Planning Commission meeting minutes, in addition to the Johnsons, whose property abuts the site on the east and Mr. Wolf, whose property shares a corner with the subject site and

Commission by anyone other than Mr. Johnson was a single photograph taken November 11, 2017, taken nearly a year and a half before the hearing, and significantly, before A1 Organics developed or implemented its robust dust mitigation efforts or its Dust Control and Mitigation Plan.⁵

VI. A1 ORGANICS' CUP APPLICATION MEETS ALL THE CRITERIA OF SECTIONS 21-3230, 21-5254 AND 21-5120 AND THEREFORE SHOULD BE APPROVED BY THE CITY COUNCIL

38. A1 Organics' request meets all criteria for CUP approval under Section 21-3230 for an 18-month permit for outdoor storage pile heights up to 25 feet under Section 21-5254 and related to eliminating potential discernable dust migration under Section 21-5120, as set forth in detail in both the Norris Design January 11, 2019 submission (**Ex. AA**) and in the Amended Staff Report (**Ex. A**). Given this, and particularly, as set forth herein: (i) the DRT/Planning Department clear recommendation for Approval of the CUP after a thorough and detailed assessment of the CUP request as set forth in the Amended Staff Report; (ii) A1 Organics' history of compliance and clean operation, as recognized by CDPHE HMWMD, CDPHE APCD, Tri-County Health, and even Commerce City as recently as January 2018 with respect to its pile heights and dust and pollution control; (iii) A1 Organics' substantial voluntary mitigation efforts; (iv) A1's willingness to commit to further mitigation efforts as demonstrated in its Dust Control and Mitigation Plan and its modified CUP, wherein it has committed to comply with all Conditions of the CUP grant as recommended by the DRT/Planning Department; (v) A1 Organics' willingness to engage in clean

is adjacent to the Johnsons' parcel, Patty Long of 14755 Piccadilly Road, Brighton, Colorado, stated concerns about mulch pile height and water truck operations, and Keith Sabin off 8193 Counter Drive, Henderson, Colorado, stated concerns about compliance, containment of the mulch piles, air contamination, and he requested a copy of the Dust Mitigation Plan.

⁵ Although presented to the Planning Commission, Mr. Wolf's photograph also does not appear to be included in the record. *See* request below for supplementation of the record to include Mr. Wolf's photograph in time sufficient to permit review, inspection and rebuttal thereof by A1 Organics.

up and maintenance efforts, as demonstrated by the exemplary condition of the Facility as well as its repeated offers to clean up Mr. Johnson's property; (vi) the effectiveness of mitigation efforts undertaken by A1 Organics and the related lack of reliable evidence of any ongoing dust or mulch product migration from the Facility; and (vii) the failure by Mr. Johnson or the City to establish that A1 Organics is the source of any dust migration, A1 Organics respectfully requests that the City Council approve its CUP application, as modified.

VII. REQUEST FOR SUPPLEMENTATION OF RECORD

39. As explained above, none of the 23 photos presented by Mr. Johnson to the Planning Commission appear to be included in the record. There was also a single photo from November 17, 2017 submitted by Mr. Wolf that also appears to be omitted from the record. A1 Organics requests that the record be supplemented to include the same in order to permit sufficient time for review, inspection and rebuttal thereof prior to the scheduled hearing on April 1, 2019.

40. A1 Organics further requests that the record be supplemented with written findings of fact by the Planning Commission, as mandated by Code Section 21-3125(3). That section requires: "All non-administrative decisions shall be based on written findings of fact related to the relevant standards or criteria set forth in this land development code." Despite this, the only "findings" made were legal conclusions, i.e.,

Commissioner Jones made a motion: "I move that the Planning Commission enter a finding that the requested Conditional Use Permit for the property located at 9109 Monaco Street contained in case CU-121-19 fails to meet the following criteria of the Land Development Code: 'Inadequate assurances of continued maintenance'" [.] Commissioner Amador seconded the motion.

Commissioner Cammack made a motion to amend the motion: "when the proposed use does result in a substantial undue and adverse effect to adjacent properties and adverse effects have not been mitigated to the maximum extent feasible and that the use does not totally comply with general purposes, goals and objectives of standards of comprehensive plan."

There were no factual findings made.

As set forth above, because there were no findings of fact made by the Planning Commission as related to the applicable regulatory criteria and because the current record of the hearing lacks documents, such as photographs, considered at the hearing by members of the Planning Commission, A1 Organics has been left to surmise the basis for the Planning Commission's recommendation, which is inexplicable based on the record. The required detailed findings by the Planning Commission would permit A1 Organics notice of the basis for its contradictory recommendation and permit A1 Organics an opportunity to respond thereto. This thin record of the February 5, 2019 Planning Commission meeting stands in stark contrast to the DRT/Planning Department's detailed factual findings and exhaustive CUP criteria rationales, as set forth in the Amended Staff Report.

Based on all of the foregoing, A1 Organics respectfully requests that the Commerce City Council grant its Application for CUP for the Monaco Greenwaste Recycling Facility.

Respectfully submitted this 27th day of March, 2019.

DREXLER LAW, LLC

By: /s Regina T. Drexler
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**ATTORNEYS FOR LAMBLAND, INC. d/b/a
A-1 ORGANICS**

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 2019, a true and correct copy of the foregoing was served via email on the following:

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/s Erin M. Verneris

Erin M. Verneris