

COLORADO COURT OF APPEALS  
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Denver, Colorado  
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CASE NUMBER: 2017CA463

DISTRICT COURT, WELD COUNTY, COLORADO  
Case No. 2015CV30776  
Hon. Judge Todd Taylor

Plaintiffs/Appellants:

**MOTHERLOVE HERBAL COMPANY**, a Colorado Certified B Corporation, **INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC.**, a Colorado Nonprofit Corporation, **ROCKIN S RANCH LLC**, a Colorado Limited Liability Company, **JOHN CUMMINGS**, an Individual, **DAVID KISKER**, an Individual, **GARY OPLINGER**, an Individual, **WOLFGANG DIRKS**, an Individual, and **JAMES PIRAINO**, an Individual,

v.

Defendants/Appellees:

**THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO** (including all of the individual Commissioners in their official capacities: Chair Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steven Moreno, and Julie Cozad), **MARTIN MARIETTA MATERIALS, INC.**, a North Carolina corporation, **GERRARD INVESTMENTS, LLC**, a Colorado limited liability company, **WELD LV, LLC**, a Nevada limited liability company, and **WELD LV II, LLC**, a Nevada limited liability company.

**Attorneys for Plaintiffs/Appellants:**

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▲ COURT USE ONLY ▲

Case No. \_\_\_\_\_

**NOTICE OF APPEAL**

Appellants Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino (collectively, the “Appellant Neighbors”), through their attorneys, IRELAND STAPLETON PRYOR & PASCOE, PC, pursuant to C.A.R. 3, submit the following Notice of Appeal:

**I. TRIAL COURT INFORMATION**

COURT: District Court

COUNTY: Weld County

JUDGE’S NAME: Hon. Judge Todd Taylor

**PARTIES INITIATING THE APPEAL:** Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino

TRIAL COURT CASE NUMBER: 2015CV30776

**II. NATURE OF THE CASE AND DISPOSITION IN THE TRIAL COURT**

A. Nature of the Controversy:

This is an appeal taken by right from an action brought in the District Court pursuant to C.R.C.P. 106(a)(4) challenging Appellee The Weld County Board of County Commissioners’ (the “BOCC”) September 2015 approval of a use by special review application filed by Appellees Martin Marietta Materials, Inc. and

Gerard Investments, LLC (collectively, “MMM”). The BOCC approved MMM’s request to convert 133-acres of land zoned for agricultural use in rural, unincorporated Weld County into an industrial asphalt and concrete production facility including, among numerous other components: (1) a 100-foot tall asphalt plant; (2) a 110 foot tall concrete plant; (3) a ready-mix concrete plant; (4) a transloading facility that will include a new 6,400-foot rail spur that will encircle the proposed site; (5) a materials processing plant; and (6) dozens of new buildings and materials storage facilities (the “Proposed Use”). The BOCC approved MMM’s application over the recommendations of the Weld County Planning Commission and Weld County Planning Department staff both of which concluded that the proposed use was incompatible with surrounding uses and detrimental to public health, safety, and welfare.

The Appellant Neighbors timely challenged the BOCC’s approval of MMM’s Proposed Use in the District Court for Weld County pursuant to C.R.C.P. 106. The Appellant Neighbors are surrounding homeowners, farmers, and small businesses who will be severely affected by the negative impacts of the Proposed Use. Although the District Court initially ordered that the matter be remanded before the BOCC for a more complete statement of findings, the District Court ultimately affirmed the District Court’s Amended Resolution approving the

Proposed Use. The District Court also refused the Appellant Neighbors' request to supplement the record with communications that occurred between the BOCC and MMM during the remand.

The Appellant Neighbors now appeal the District Court's affirmation of the BOCC's Amended Resolution as an unlawful instance of *de facto* spot zoning which is unsupported by competent evidence sufficient to satisfy the criteria for approval set forth in the Weld County Code. The Appellant Neighbors further challenge the District Court's refusal to supplement the record with the *ex parte* communications that occurred between the BOCC and MMM while this action was remanded before the BOCC.

B. Judgment or Order Being Appealed:

The Appellant Neighbors appeal the District Court's January 27, 2017 "Order on the Plaintiffs' Appeal of the Weld County Board of County Commissioners' Decision to Approve Special Use Permit," which was the final order entered in the District Court.

Now that a final order has been entered, the Appellants Neighbors also appeal the District Court's interim "Order on Plaintiffs' Motion for Order to Supplement the Certified Record" dated October 28, 2016.

The Court of Appeals has jurisdiction over this appeal pursuant to C.A.R. 1(a)(1) and Section 13-4-102(1), C.R.S.

C. Whether the Judgment or Order Resolved All Issues Pending Before the District Court:

The District Court's January 27, 2017 order resolved all of the issues pending before the District Court.

D. Whether the Judgment is Final for the Purposes of Appeal:

The District Court's January 27, 2017 order was a final order for the purposes of appeal.

E. The Date the Judgment or Order Was Entered and the Date of Mailing to Counsel:

The District Court's final order was entered on January 27, 2017, and served on counsel via the Colorado Courts e-filing system the same day.

F. Whether There Were Any Extensions Granted to File Any Motion(s) for Post-Trial Relief:

Not applicable.

G. The Date Any Motion for Post-Trial Relief Was Filed:

Not applicable.

H. The Date Any Motion for Post-Trial Relief Was Denied or Deemed Denied under C.R.C.P. 59(j):

Not applicable.

I. Whether There Were Any Extensions Granted to File Any Notice of Appeal:

No extension was requested.

III. **ADVISORY LISTING OF ISSUES TO BE APPEALED**

1. Whether the Board of County Commissioners Engaged in Unlawful *De Facto* Spot Zoning When It Approved a Use By Special Review Application that Will Convert a Site Zoned for Agricultural Uses Into a Heavy Industrial Site?

2. Whether the Board of County Commissioners Erred in Approving a Use By Special Review Application that Was Not Supported By Competent Evidence that the Proposed Use is Consistent with Existing Surrounding Uses, as Required By the County Code?

3. Whether the Board of County Commissioners Erred in Approving a Use By Special Review Application that Was Not Supported By Competent Evidence that the Applicant Made Diligent Efforts to Preserve Prime Farm Land, as Required By the County Code?

4. Whether the Board of County Commissioners Erred in Approving a Use By Special Review Application Where the Uncontested Evidence Demonstrated that the Proposed Use Will Violate the Applicable Noise Standard?

5. Whether the District Court Erred in Refusing to Order the Record to Be Supplemented With All *Ex Parte* Communications Between the Board of County Commissioners and the Applicants While the Order Approving a Special Use Application Was On Remand Before the Board of County Commissioners?

**IV. WHETHER A TRANSCRIPT OF EVIDENCE IS NECESSARY TO RESOLVE THE ISSUES ON APPEAL**

No transcript will be necessary to resolve the issues raised on appeal. With respect to the first, second, third, and fourth issues on appeal, this Court will review the lawfulness of the BOCC's approval on the basis of the record before the BOCC, which was previously certified and subsequently supplemented for use by the District Court. With respect to the final issue on appeal, this Court will review the District Court's October 28, 2016 Order on Plaintiffs' Motion for Order to Supplement the Certified Record on the basis of that order and the related briefing and materials submitted by the Parties before the District Court.

All such materials will be certified as part of the appellate record before this Court.

**V. PREARGUMENT CONFERENCE**

The Appellant Neighbors do not request a pre-argument conference.

**VI. ATTORNEY INFORMATION**

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## VII. APPENDIX TO THIS NOTICE OF APPEAL

Attached as an appendix are copies of:

- (a) Resolution of the Board of County Commissioners for Weld County “Approving an Amendment to a Site Specific Development Plan and Use By Special Review Permit, USR15-0027” signed September 15, 2015;
- (b) The District Court’s August 9, 2016 “Order of Remand”;
- (c) Amended Resolution of the Board of County Commissioners for Weld County “Approving an Amendment to a Site Specific Development Plan and Use By Special Review Permit, USR15-0027” signed October 5, 2016;
- (d) The District Court’s October 28, 2016 “Order on Plaintiffs’ Motion for Order to Supplement the Certified Record”; and

- (e) The District Court’s January 27, 2017 “Order on the Plaintiffs Appeal of the Weld County Board of County Commissioners Decision to Approve Special Use Permit.”

DATED: March 15, 2017

IRELAND STAPLETON PRYOR &  
PASCOE, PC

*This document is e-filed per C.R.C.P. 121, section  
1-26.*

*/s/ Mark Lacis*

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APPELLANTS

## CERTIFICATE OF SERVICE

I certify that on March 15, 2017, a true and correct copy of this NOTICE OF APPEAL was served via email on the following individuals:

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*SIGNED ORIGINAL ON FILE AT THE OFFICE OF  
IRELAND STAPLETON PRYOR & PASCOE, PC*

*/s/ Dawn A. Brazier*

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Dawn A. Brazier