COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver CO 80203	
Appeal from Weld County District Court The Honorable Todd L. Taylor Case No. 2015CV30776 Opinion by Judge Terry Judge Casebolt and Judge Carparelli concur	
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; 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	**▲ COURT USE ONLY ▲** Court of Appeals Case Number: 2017CA0463
Attorneys for Defendant-Appellee Martin Marietta Materials, Inc.: Wayne F. Forman, # 14082 Mark J. Mathews, # 23749 Julia E. Rhine, #45630 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.223.1100 E-mail: wforman@bhfs.com; mmathews@bhfs.com	

DEFENDANT-APPELLEE MARTIN MARIETTA MATERIALS INC.'S PETITION FOR REHEARING

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with all requirements of C.A.R. 40, C.A.R. 28, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 40(b)(2).

☑ Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains **1,769** words.

The Petition for Rehearing complies with the contents requirements set forth in C.A.R. 40(a)(2).

☑ The Petition must state with particularity each point of law or fact the petitioner believes the court has overlooked or misapprehended and must include an argument in support of the petition.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 40, C.A.R. 28 and C.A.R. 32.

s/ Mark J. Mathews

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Pursuant to C.A.R. 40, Defendant-Appellee Martin Marietta Materials, Inc., respectfully petitions the Court for a rehearing of its November 22, 2017 Opinion ("Opinion"). In support of this petition, Martin Marietta states as follows:

I. SUMMARY OF POSITION

In the Opinion, the Court found that approval of Martin Marietta's USR permit application by the Weld County Board of County Commissioners (the "Board") for a proposed asphalt and concrete production and transloading facility (the "Proposed Use") required Martin Marietta to present evidence that the Proposed Use would meet the residential noise standard at the property line of adjacent residential lots. Because the Court determined that there was not competent evidence that the Proposed Use would meet the residential noise standard at the adjoining property boundaries, the Court reversed the trial court's decision affirming the Board's Resolution approving the USR. Opinion at 7-8.

Unfortunately, the Opinion is based on an indefensible reading of the Weld County Code and of the Board's Resolution approving the USR. First, it failed to recognize that, under the plain language of the Weld County Code, industrial uses such as the Proposed Use are required to meet the industrial, not residential, noise standard at the boundaries of adjacent properties. This was confirmed by the fact that the Weld County Staff and Planning Commission had originally proposed a

condition of approval, Development Standard ("DS") 24, that would require the Proposed Use to meet the County's industrial noise standards.

Second, the Opinion erroneously required Martin Marietta to have presented evidence of compliance with DS 24, which the Board modified to ensure compliance with the County's residential noise standard at the neighboring property boundaries at the very end of the final public hearing, after public testimony had closed. The Opinion ignored the fact that the Board imposed this modified DS 24 on the Proposed Use once it became fully operational, under the Board's authority to require enhanced mitigation to ensure compatibility, not as a USR approval standard requiring evidence of future compliance. This should be clear from the fact that Martin Marietta did not know, and could not have known, it even had to satisfy this standard until the very end of the approval process.

For these reasons, the fact there is not record evidence of strict compliance with modified DS 24 is not a legitimate basis on which to reverse the unanimous decision of the Board approving the USR permit for the Proposed Use. The Opinion undermines the County's USR approval process, and imposes a burden of proof on Martin Marietta that is contrary to the Weld County Code and fundamental fairness. Martin Marietta respectfully requests that the Court reconsider the Opinion.

II. ARGUMENT

A. The Weld County Code Required Evidence of Compliance with the Industrial, Not Residential, Noise Standard.

The Opinion found that W.C.C. § 23-2-230.B., which sets forth the County's USR approval criteria, required evidence of compliance with the residential noise standards imposed by DS 24, as ultimately adopted by the Board. Opinion at 8. But this interpretation conflicts with the plain language of W.C.C. § 23-2-230.B, which states that USR approval requires that an applicant meet the noise standard set forth at W.C.C. § 23-2-250. This provision, in turn, requires that industrial uses must meet industrial noise standards. Specifically, W.C.C. § 23-2-250 states that USR approval requires that a proposed use "shall comply" with the noise standards in the State statute beginning at C.R.S. § 25-12-101, and this statute requires industrial uses, such as the Proposed Use, to comply with the industrial noise standards of 80 db(A) during 7:00 a.m. to 7:00 p.m. and 75 dB(A) during the evening hours. C.R.S. §§ 25-12-102(4)(A) and 25-12-103(1).

Throughout the USR application process up to the very end of the final public hearing, everyone understood that the Code required that the Proposed Use satisfy the industrial noise standard. Indeed, the Weld County Staff and Planning Commission, in recommending operating conditions on the Proposed Use should the Board approve it, included the following: "24. This facility shall adhere to the

maximum permissible noise levels allowed in the Industrial Zone as delineated in Section 14-9-30 of the Weld County Code." AR, p. 110, ¶ 24.[1] Martin Marietta's application and presentation at the hearing was consistent with this requirement. TR 8/12/15, p. 204:12-15 (even without mitigation, noise study shows Proposed Use meets industrial standards).

Martin Marietta demonstrated that the Proposed Use satisfied the industrial noise standard in a noise study prepared by AECOM. AR, p. 305. This study, presented at the final hearing, first reviewed the applicable State and Weld County noise standards and confirmed that, "[f]or the Highway 34 project [the Proposed Use], the property would be considered 'industrial' so the applicable maximum noise levels would be 80 dBA during the day and 75 dBA at night as predicted or measured at any point to the property line adjacent to another developed land use." AR, p. 306, ¶ 202. AECOM then demonstrated through modeling that even under the conservative assumption that all operations at the Proposed Use were being conducted at once, the Proposed Use met the industrial noise levels during the day and night, with or without the extensive mitigation measures imposed by the Board. AR, p. 309.

[1] The Weld County noise standards are identical to the numerical decibel levels of the state's standards, but require that the noise be measured "at or within the boundary of the property from which the noise complaint is made." W.C.C. §§ 14-90-40.B, 14-9-50.A.2.

Through submission of this report, Martin Marietta met its burden of proof under W.C.C. §§ 23-2-230.B. and 23-2-250 to demonstrate that it "has met" the only noise standards with which the Code required Martin Marietta to show compliance. Contrary to the holding of the Opinion, these Code requirements, and not modified DS 24, contained the operative noise standards as of the hearing date with which Martin Marietta was required to demonstrate compliance.[2]

B. The Residential Noise Standard of DS 24 Was Imposed by the Board Late in the Hearing, As An Operational, Not An Approval, Standard.

In finding that Martin Marietta had the burden to present evidence at the hearing that it would comply with modified DS 24, Opinion at 8, the Opinion imposed an impossible burden on Martin Marietta that was contrary to the requirements of the Weld County Code. In response to the request by certain Plaintiffs, TR 8/12/15, p. 58:21-22, the Board imposed a new DS 24 at the end of a

[2] The AECOM report also predicted that the Proposed Use would meet the residential noise standards at the nearby residences, except for small exceedances that were still within the daytime limits, at three receptors during evening hours. AR, p. 309. This prediction, too, was based on the most conservative assumption that all equipment was in operation. *See* TR 8/12/15, p. 37:5-8 (noise study assumes all facilities operating at night "and we know that's not the case."). This analysis provided competent evidence, in addition to the lack of complaints from residents at similar facilities (TR 8/12/15, pp 30:18-31:6; 98:14-20; 106:9-12; 129:13-16; 131:10-15; 145:16-24; 242:1-4; 297:14-23; 299:12-300:10; 302:4-14), that the Proposed Use would be operated in a manner that would be noise compatible with surrounding residential uses.

13½ hour public hearing, during consideration of the terms and conditions of a resolution approving the USR for the Proposed Use. At that point during the hearing, several Commissioners suggested changing the noise standard to ensure the Proposed Use would be compatible with surrounding uses:

> "COMMISSIONER KIRKMEYER: Okay, so how about we just change Industrial zone to Residential zone?"
>
> COMMISSIONER CONWAY: Yeah. That's what the-actually the mitigation-that's what was asked for.
>
> COMMISSIONER KIRKMEYER: Yep. Can we agree to that?
>
> COMMISSIONERS: Yes. (TR 8/12/15, p. 260:17-22).

Soon after this exchange, Martin Marietta's counsel, the County Attorney, County staff and the Commissioners negotiated the final terms of DS 24. They discussed that the development standard would require the Proposed Use to meet the County's residential noise standards at the property line of the adjacent residential lots and the industrial noise standards at the common boundaries with other land uses, that the point of compliance would be at the property lines of adjacent lots, that Martin Marietta would implement an ongoing noise monitoring program, and that the data generated from that program would be available to the County and the community. TR 8/12/15, pp. 285:6-288:19. Martin Marietta's counsel confirmed that "we're confident we can meet those numbers," referring to

the County's residential noise standard measured at the property boundaries. TR 8/12/15, p. 286:8-12.

DS 24 reflected an exercise of the Board's discretion to impose additional mitigation requirements on the Proposed Use to ensure compatibility, as explicitly authorized by W.C.C. § 23-2-230.C. The Proposed Use, once fully operational, is bound to meet those standards, or be subject to enforcement, curtailment of operations or revocation of the USR permit. But DS 24 is not, as the Opinion mistakenly determined, a standard Martin Marietta had to satisfy for USR approval. Accordingly, the fact that there is not record evidence of strict compliance with DS 24 is not a legitimate basis on which to reverse the unanimous decision of the Board approving the USR permit for the Proposed Use. Rather, DS 24 reflects a legitimate exercise of the Board's discretion under its Code to impose additional mitigation on the Proposed Use to ensure compatibility with surrounding uses. Nothing in that exercise of discretion warranted reversal by the Court.[3]

[3] The Opinion is also at odds with other Court of Appeals precedent that recognized the propriety of a county board's imposition of operational conditions to ensure compliance with use by special review criteria. *See Sheep Mtn. Alliance v. Bd. of Cnty. Comm'rs,* 271 P.3d 597, 606-07 (Colo. App. 2011).

III. CONCLUSION

The Opinion misconstrued the requirements of W.C.C. §§ 23-2-230.B. and -230.C. Those provisions did not, as the Opinion found, require Martin Marietta to present evidence of strict compliance with modified DS 24 which, given the course of the proceeding, would have been virtually impossible. They did require Martin Marietta to present evidence of compliance with the applicable industrial noise standards, which it did during the final public hearing. The Board had before it competent evidence that the Proposed Use would be noise compatible with surrounding residential land uses, but imposed modified DS 24, as an operational standard to ensure it. This reflects a legally permissible exercise of discretion under C.R.C.P. 106(a)(4). The Court should withdraw the Opinion and issue a new decision affirming the Board's decision with regard to the noise issue, and resolve the balance of Appellants' challenges to the issuance of the USR permit for the Proposed Use.

Dated: December 6, 2017

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Mark J. Mathews
Mark J. Mathews, # 23749
Wayne F. Forman, # 14082
Julia E. Rhine, # 45630

Attorneys for Defendant-Appellee
Martin Marietta Materials, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2017, a true and correct copy of **DEFENDANT-APPELLEE MARTIN MARIETTA MATERIALS INC.'S PETITION FOR REHEARING** was filed via the Colorado Courts e-filing system which will provide notification and availability of such filing to the following individuals:

Mark E. Lacis, Esq.
James R. Silvestro, Esq.
mlacis@irelandstapleton.com
jsilvestro@irelandstapleton.com
Attorneys for Plaintiffs/Appellants

Patrick Groom, Esq.
pgroom @wobjlaw.com
Attorney for Defendant/Appellee
Gerrard Investments LLC,
A Colorado Limited Liability Company

Christopher Michael Kamper
ckamper@csmkf.com
Attorney for Defendant/Appellees
Weld LV LI LLC, A Nevada Limited Liability Company
and Weld LV LLC, A Nevada Limited Liability Company

Bruce T. Barker
bbarker@co.weld.co.us
Attorney for Defendant/Appellee Weld County

Avi S. Rocklin
Avi@rocklinlaw.com
Attorneys for Amicus Curiae Party

s/ *Shirley M. Newman*
Shirley M. Newman, Paralegal

16182546.6