

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203

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:

Mark E. Lacin, Reg. # 37421
James R. Silvestro, Reg. # 43982
IRELAND STAPLETON PRYOR & PASCOE, PC
717 Seventeenth Street, Suite 2800
Denver, Colorado 80202
Phone: 303-628-2700; Fax: 303-623-2062
e-mail: mlacin@irelandstapleton.com
jsilvestro@irelandstapleton.com

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Case No. 2017CA463

(Appeal from Weld County
District Court Case No.
2015CV30776)

**APPELLANTS' COMBINED RESPONSE IN OPPOSITION TO
APPELLEES' PETITIONS FOR REHEARING**

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INTRODUCTION

This Court correctly held that the Weld County Board of County Commissioners (“BOCC”) abused its discretion in approving Martin Marietta Materials, Inc.’s (“MMM”) Use by Special Review (“USR”) application because there was no competent evidence to support the BOCC’s conclusion that the proposed heavy industrial use will meet the applicable residential noise standard. Specifically, the Court properly held that the BOCC abused its discretion by: (1) determining that the proposed industrial use would be compatible with the surrounding residential uses; and (2) finding that MMM “has met” the applicable noise standard.

The Appellees concede that there is no competent evidence that the proposed use will meet the applicable noise standard. Nevertheless, the Appellees ignore the issue of compatibility and instead rehash several arguments and present at least one new one to argue that this Court should reverse itself.

MMM’s Petition focuses on whether and when MMM was required to demonstrate compliance with the applicable noise standard. MMM emphasizes the discretion afforded to the BOCC in setting the terms of approval, while simultaneously claiming that the residential noise standard adopted by the BOCC could not supplant the baseline industrial noise standard. MMM then argues that it

was unfair for the BOCC to add such a condition of approval “late in the hearing” despite the fact that the condition was offered voluntarily by MMM’s own attorney.

For its part, the BOCC claims that a finding that MMM *would* comply with the residential noise standard was supported by an “assurance” that MMM would comply with all operational standards. This argument flatly ignores the competent evidence standard and does not support rehearing.

ARGUMENT

I. The Court Correctly Concluded that the BOCC’s Compatibility Finding Was Unsupported by the Only Evidence Regarding the Applicable Noise Standard.

This Court reversed the BOCC’s approval in the first instance because there was no competent evidence to support the finding that “noise has been mitigated to be at the residential standard of 55/50 dB(A).” (Order, at 6.) In the absence of competent evidence, the Court correctly concluded that there was no basis for the BOCC to find that MMM had met its burden to demonstrate compatibility with the existing surrounding residential uses.

In their Petitions for Rehearing, the Appellees refuse to address this issue. Instead, they argue that the BOCC should be afforded latitude to determine what “enhanced mitigation” could be imposed to ensure compatibility. (*See* MMM Petition, at p. 3.) However, while the Weld County Code provides the BOCC with

discretion to tailor conditions of approval, there is nothing in the Code that allows the BOCC to set a standard for compatibility and then ignore it.

The quoted portion of the BOCC hearing set forth in MMM's Petition¹ confirms that the BOCC believed MMM's proposed use would only be compatible with existing surrounding land uses if it could meet the residential noise standard at all surrounding residential property lines. Compatibility was found *because* of this heightened noise standard. But the only competent evidence showed that the standard could not be met. Accordingly, there is no competent evidence to support a finding of compatibility as required under Section 23-2-230.B(3) of the Weld County Code.

This Court correctly reversed the arbitrary and capricious approval of the BOCC, and nothing in either Petition for Rehearing provides grounds for the Appellees' claim that this Court "misapprehended" the relevant law and facts regarding compatibility. C.A.R. 40(a)(2).

¹ MMM characterizes this exchange between members of the BOCC as "changing the noise standard [from industrial to residential] to ensure the Proposed Use would be compatible with surrounding uses." (MMM Petition, at p. 6.)

II. The Court Correctly Held that the Weld County Code Required MMM to Demonstrate Compliance with the Applicable Noise Standard Adopted by the BOCC.

Rather than address the compatibility issue at the heart of the Order, MMM focuses on the significance of the BOCC's adoption of a heightened operational noise standard before the approval of the USR application. MMM argues that the evidence demonstrated compliance with the *industrial* noise standard and then asserts that the adoption of the residential noise standard should merely pertain to future compliance with the heightened standard once the project is operational.

As the Court noted in its Order, however, MMM's argument is plainly contradicted by the Weld County Code. Specifically, Section 23-2-230.B requires an applicant to show that it "has met" (rather than "will meet") the applicable noise standard (as required under Section 23-2-250(A)) before the BOCC may lawfully approve a USR application. It is important to note, however, that Section 23-2-250(A) does not explicitly set forth the applicable noise standard. Instead, the Weld County Code incorporates the noise standards enumerated by state law, but does not provide guidance as to the applicable noise standard for any given USR. Within this framework, the BOCC appropriately exercised its discretion in adopting the residential noise standard as a condition of approving the USR application.

MMM cites inapplicable case law in support of its argument that the BOCC's adoption of the heightened residential noise standard should only apply once the proposed use was operational. But this argument is belied by the BOCC's statements regarding the residential noise standard and its impact on compatibility, and the fact that the residential noise standard was the *only* applicable noise standard in place at the time that the BOCC approved the USR applications.

Here, the only way that MMM could demonstrate that it "had met" the residential noise standard imposed by the BOCC was through competent evidence of the same. All parties agree, however, that the only evidence in the record confirms that MMM's proposed use will violate² the standard imposed by the BOCC. Consequently, the BOCC abused its discretion in approving MMM's USR Application, and there is no basis to amend the Court's Order.

III. MMM Voluntarily Accepted the Heightened Noise Standard and this Court's Application of that Standard Did Not Violate "Fundamental Fairness."

MMM argues for the first time, and in the alternative, that it would be unfair to fault MMM for failing to comply with a noise standard that was added as a

²MMM admits that it failed to demonstrate "strict compliance" with the applicable noise standard, but fails to explain the difference between compliance and "strict compliance." In reality, neither the Weld County Code nor C.R.C.P. 106 draws such a distinction.

condition of approval at the BOCC hearing. MMM argues that the timing of this condition placed an “impossible burden” on MMM. But this argument fails to acknowledge that any supplemental evidence that MMM could have provided showing compliance with the residential noise standard would have necessarily conflicted with the uncontroverted evidence previously submitted by MMM.

Beyond this basic failing, MMM’s fairness argument is fatally undermined by the fact that MMM was a willing participant in the BOCC’s adoption of the residential noise standard. Specifically, at the BOCC hearing, counsel for MMM offered:

[S]o we have an alternative proposal that we think would protect [neighbors] equally well that I would like to ask the Board to consider. And that is that the noise limit of residential as you’d specified – the 55 and 50 – apply as measured at the Residential property line for all the adjacent lots which are residential. . . . If we’re talking about the Residential lots, which are principally the ones we are confident we can meet that standard with the mitigation, then it would be 55/50 as measured at the Residential property line.

(R. Tr. 285:14-16.) Contrary to its present claims, MMM was not blindsided by the residential noise standard. In fact, MMM voluntarily proposed and consented to the heightened standard, which was intended to combat the BOCC’s compatibility concerns and permit the USR application to move forward. MMM was given a full

and fair opportunity to provide competent evidence that it could comply with this standard.

Finally, this Court should disregard MMM's fairness argument out of hand because it was never previously raised before this Court. *Kelly v. Cent. Bank & Trust Co.*, 794 P.2d 1037, 1044–45 (Colo. App. 1989) (explaining that a court must decline to address any issue raised for the first time in a petition for rehearing); *see also People v. Gallegos*, 260 P.3d 15, 29 (Colo. App. 2010).

There is no factual or legal basis for the Court to revise its Order based on the timing of the BOCC's adoption of the residential noise standard. MMM and the BOCC jointly agreed that the residential noise standard was necessary to demonstrate compatibility with surrounding uses, and MMM's failure to meet its burden fully justifies this Court's reversal of the underlying approval.

IV. MMM's Unsupported Promise that It Will Meet the Applicable Noise Standard Is Not Competent Evidence.

The BOCC devotes the first portion of its Petition to arguing about the extent to which the proposed use will violate the applicable noise standard. However, it is undisputed that there is no competent evidence demonstrating compliance with the applicable noise standard, and the scope and degree to which the proposed use will

violate the applicable noise standard is a factual question that is irrelevant and does not merit Rehearing.

The BOCC then argues that the only competent evidence needed to approve MMM's USR application was MMM's "agreement and assurance" that it *would comply* with the applicable noise standard in the future. This argument violates the basic standard set forth in the Weld County Code requiring that a USR applicant demonstrate that it "has met" all criteria—including the applicable noise standard—and the standard under C.R.C.P. 106 that all quasi-judicial government decisions be supported by competent evidence. A wholly unsupported, conclusory claim of an applicant does not meet that standard. *Hellas Constr., Inc. v. Rio Blanco Cnty.*, 192 P.3d 501, 507 (Colo. App. 2008) (holding that a conclusory statement without "factual evidence" to support the conclusion is not competent evidence); *see also Duncan v. McGill*, No. 08-cv-00296-REB-MJW, 2010 WL 582356, at *1 (D. Colo. Feb. 18, 2010) ("conclusory statements and testimony based merely on conjecture" are not competent evidence). This Court cannot adopt the BOCC's reasoning without upending decades of C.R.C.P. 106 jurisprudence and opening the floodgates to any applicant who is willing to claim, without evidentiary support, that their proposal will comply with all applicable laws. With respect to more intensive land uses that are not permitted by right, Colorado's system of quasi-judicial review

requires more than an applicant’s naked “promise and assurance”—competent evidence requires factual support.

The BOCC has not articulated any reasonable basis for this Court to revisit its Order, and the Court should decline to do so.

V. All Other Issues Preserved.

Once this Court concluded that the lack of competent evidence demonstrating compliance with the applicable noise standard required reversal, the Court correctly refrained from addressing the other issues raised by Appellants in this appeal. If, however, this Court reverses a material portion of its Order, it must address all other issues presented by the Appellant Neighbors—compatibility (beyond noise issues) with existing surrounding land uses, diligent efforts to preserve Prime farmland, direct relationship to agriculture, and the District Court’s erroneous finding of privilege with regards to post-remand, *ex parte* communications.

CONCLUSION

The Appellees have failed to present this Court with any issue of fact or law that requires any revision to the Order. The Court should deny both Petitions and grant such other and further relief as it deems just and proper.

Respectfully Submitted: January 23, 2018

IRELAND STAPLETON PRYOR &
PASCOE, PC

/s/ Mark E. Lacis

Mark E. Lacis, Reg. # 37421

James R. Silvestro, Reg. # 43982

717 Seventeenth Street, Suite 2800

Denver, Colorado 80202

Phone: 303-628-2700; Fax: 303-623-2062

E-mail: mlacis@irelandstapleton.com

jsilvestro@irelandstapleton.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I certify that on January 23, 2018, a true and correct copy of this Combined Response in Opposition to Petitions for Rehearing was served via the Colorado Courts e-filing system on the following individuals:

Bruce Barker, Esq.

bbarker@co.weld.co.us

*Attorney for Defendant the Board
of County Commissioners of Weld
County*

Wayne Forman, Esq.

Mark Mathews, Esq.

wforman@bhfs.com

mmathews@bhfs.com

*Attorneys for Defendant Martin
Marietta Materials, Inc.*

Patrick Groom, Esq.

pgroom@wobjlaw.com

*Attorney for Defendant Gerrard
Investments, LLC*

Christopher Kamper

CKamper@csmkf.com

*Attorney for Defendants Weld
LV, LLC and Weld LV II, LLC*

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

/s/ Dawn Brazier

Dawn Brazier