COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado	
Previous Appellate History: COLORADO COURT OF APPEALS Case No. 2017CA000463 Hon. Judge Terry, Hon. Judge Casebolt, Hon. Judge Carparelli	
DISTRICT COURT, WELD COUNTY, COLORADO Case No. 2015CV30776 Hon. Judge 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.	▲ COURT USE ONLY ▲ Case No. 2018CA1103
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APPELLANTS' RESPONSE TO MOTION TO DISMISS AS MOOT

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response complies with all requirements of C.A.R. 27 and C.A.R. 32, including all formatting requirements set forth therein.

I hereby acknowledge that this Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 27 and C.A.R. 32.

By: */s/ Mark E. Lacis*
Mark E. Lacis, #37421

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, respectfully submit the following Response in Opposition to Defendant-Appellee the Board of County Commissioners of Weld County's ("BOCC") Motion to Dismiss Appeal as Moot (the "Second Motion to Dismiss") and Defendant-Appellee Martin Marietta Materials Inc.'s ("Martin Marietta") Joinder thereto (the "Joinder"), stating as follows:

INTRODUCTION

This Court previously reversed the Weld County District Court's judgment, which had initially affirmed the BOCC's approval of Martin Marietta's application for a use by special review ("USR") permit. That USR permit would have allowed Martin Marietta to construct and operate a heavy-industrial concrete and asphalt facility in an area zoned for agricultural and residential uses.

In the prior appeal (2017CA463), this Court directed the District Court to enter judgment in favor of the Appellant Neighbors and instructed that the BOCC's decision be "overturned." Because this Court determined that the BOCC had unlawfully approved the USR, this Court did not reach four other potentially

dispositive issues presented by the Appellant Neighbors in the prior appeal.

Following remand, the District Court entered an order that did not order the denial of the USR, but instead simply "reversed" the approval of the USR and remanded the USR application back to the BOCC for further administrative proceedings. This second final judgment of the District Court was then timely appealed to this Court as the instant appeal. At the outset of this appeal in June 2018, Martin Marietta unsuccessfully moved to dismiss the appeal on procedural grounds. Now the BOCC has presented this Court with a second procedural motion to dismiss this appeal because Martin Marietta purportedly has conveyed its interest in the real property at issue to its wholly-owned subsidiary. Martin Marietta has further indicated that it intends to abandon its USR application. At the same time, Martin Marietta's wholly-owned subsidiary and successor-in-interest has filed a separate lawsuit in federal court in an effort to collaterally attack the decision of this Court.

Despite this purported conveyance—which is not in the record on appeal—the BOCC's argument (which is grounded in federal railroad law) fails because the federal railroad laws cited do not extend to the construction or operation of a concrete or asphalt plant, which remains governed by local land use law. As such, there is no federal preemption that warrants dismissal of this appeal.

Furthermore, Martin Marietta's asserted intent to abandon its USR application—which is also not in the record on appeal—is not grounds for dismissal, because the industrial improvements constructed pursuant to the unlawful USR remain onsite and Martin Marietta's wholly-owned subsidiary intends to operate the same in violation of the Weld County Code ("WCC"), notwithstanding this Court's prior Order to the contrary.

Lastly, a case or controversy exists as to the status of the USR application because the WCC provides for a five-year moratorium on similar land use proposals following the denial of a USR application. If Martin Marietta is permitted to simply abandon its USR application without a final adjudication from this Court, there would arguably be nothing to stop its subsidiary and successor in interest, Rock & Rail, from immediately reapplying for the same or similar USR. Likewise, the remedies available to the Appellant Neighbors for prevailing in this case—namely, the request for a mandatory injunction to force (1) the removal of all unlawful industrial improvements and (2) the remediation of the property to a use consistent with its agricultural zoning—are not mooted simply because Martin Marietta intends to abandon its USR application. Those improvements have been built and remain onsite and were only built because of the USR permit that this Court previously found to be unlawful. Martin Marietta (or any successor), should

therefore not be allowed to benefit from unlawful improvements that were only allowed to be constructed because of an illegal USR permit, which was subsequently reversed by this Court. This appeal continues to present a case and controversy that is ripe for review, and the Second Motion to Dismiss must be denied.

FACTUAL BACKGROUND

1. On November 22, 2017, this Court ruled in favor of the Appellant Neighbors on a Rule 106(a)(4) appeal challenging the approval by the BOCC of an application for a Use by Special Review permit filed Martin Marietta. (Exhibit A, Opinion dated November 22, 2017.)

2. That USR permit would have allowed 133-acres of land zoned within Weld County's A (Agricultural) Zone District and designated as Prime farmland to be developed into a heavy, industrial use at a site that was otherwise exclusively zoned for agriculture and single-family homes. (*Id.* ¶ 2.)

3. This Court explained: "[The Appellant Neighbors] contend that the administrative record lacks competent evidence supporting the board's decision to grant defendant corporations a use by special review to carry out the proposed use in an agricultural zone. **We agree and reverse** the district court's judgment affirming the board's resolution." (*Id.* ¶ 6 (emphasis added).)

4. Following the issuance of a Mandate, on May 1, 2018, the District Court entered Judgment for the Appellant Neighbors. (Exhibit B, Order Entering Judgment in Favor of the Plaintiffs, at 1.)

5. Both Martin Marietta and the Appellant Neighbors filed motions seeking to modify the judgment. Martin Marietta filed a motion asking that the USR approval merely be "set aside" so that it could ask the BOCC to re-open the administrative record and re-approve the USR once Martin Marietta supplemented the record and corrected what it contested, were mere evidentiary shortcomings. (Exhibit C, Defendant Martin Marietta Materials, Inc.'s Motion to Amend and for Stay of Judgment.)

6. The Appellant Neighbors, on the other hand, asked the District Court to modify its final order to provide the Appellant Neighbors with full and final relief by: (1) ordering the denial of the USR; and (2) entering a mandatory injunction ordering the removal of Martin Marietta's now-unlawful industrial improvements in light of the subsequent development that Martin Marietta had knowingly accepted the risk of proceeding with constructing its industrial improvements while this matter was on appeal. (Exhibit D, Plaintiffs' Motion for Amended Final Judgment Pursuant to C.R.C.P. 59(A)(4).) The Appellant Neighbors presented undisputed evidence that Martin Marietta knowingly accepted

the risk of constructing these industrial improvements and accepted that if the USR were overturned, it would have to remove the improvements at its own expense. (Exhibit E, Letter Dated Dec. 21, 2015 from Counsel for Martin Marietta to Weld County.)

7. On June 4, 2018, the District Court entered an Order Granting Martin Marietta's Motion to Amend Judgment, stating it "is improper for the court to direct the Board to deny the special use permit . . . I therefore erred in directing the Board to deny the special use permit, rather than remanding the case for the Board to decide how to address the deficiency identified by the Court of Appeals." (Exhibit F, Order Granting Martin Marietta Materials, Inc.'s Motion to Amend Judgment, at 1-2.) At the same time, the District Court denied the Appellant Neighbors' request that Martin Marietta be compelled to remove the unlawful industrial improvements that had been constructed while the matter was on appeal. (Exhibit G, Order Denying Plaintiffs' Motion for Amended Judgment.)

8. Following the District Court's order, the Appellant Neighbors commenced this Appeal on June 15, 2018.

9. Martin Marietta filed a Motion to Dismiss Appeal (the "First Motion to Dismiss") on June 22, 2018.

10. Following briefing on the First Motion to Dismiss, the Appellant

Neighbors filed their Opening Brief on September 13, 2018.

11. On October 12, 2018, the BOCC filed a Motion to Dismiss Appeal as Moot on October 12, 2018 (the "Second Motion to Dismiss"). That same day, Martin Marietta filed a Joinder in the Second Motion to Dismiss (the "Joinder").

12. In the Second Motion to Dismiss, the BOCC argues that this appeal has been mooted because—unbeknownst to the Appellant Neighbors–Martin Marietta allegedly conveyed its interest in the property affected by the USR application. (*See* Second Motion to Dismiss at pp. 1-2.)

13. Consequently, the BOCC and Martin Marietta now claim that the USR at issue has been "abandoned." (Second Motion to Dismiss at p. 5; Joinder at p. 1 ("MMM is no longer seeking a USR for the facility").) This representation is outside of the record on appeal.

14. Martin Marietta allegedly conveyed its interest in the subject property to an entity called Rock & Rail, LLC ("Rock & Rail")—an entity which is wholly-owned and controlled by Martin Marietta. (Exhibit 1 to Second Motion to Dismiss.) Although this purported transaction allegedly occurred on August 20, 2018, it was not revealed to the Appellant Neighbors or this Court until nearly a month after the Appellant Neighbors filed their Opening Brief in this appeal on September 13, 2018.

15. The exhibits attached to the BOCC's Second Motion to Dismiss purportedly establish the following:

- Rock & Rail "joined the [Martin Marietta] family of companies" in December 2015 (Ex. 1 to Second Motion to Dismiss at p. 1);
- Martin Marietta and Rock & Rail entered into an Assignment and Assumption of Lease on August 20, 2018 (Ex. 1 to Second Motion to Dismiss at pp. 5-8);
- Rock & Rail filed and received an exemption from the Surface Transportation Board (without notice to the Appellant Neighbors) on September 5, 2018 (Ex. 1 to Second Motion to Dismiss at pp. 9-11);
- Martin Marietta and Rock & Rail (through their shared counsel) notified the BOCC by letter dated September 25, 2018 that Rock & Rail would commence operations at the subject property notwithstanding this Court's previous Orders (Ex. 1 to Second Motion to Dismiss at pp. 1 ("As matters now stand, Rock & Rail's predecessor [Martin Marietta] has been seeking a County permit for the Hwy. 34 facility for more than three years. No end to that process, or the litigation spawned by it, is in sight. Rock & Rail has therefore elected to exercise its right to commence operations at the Hwy. 34

Facility.").)

ARGUMENT

I. The Appeal is Not Moot because Federal Preemption Does Not Extend to the Operations of the Concrete or Asphalt Plant.

In the Second Motion to Dismiss, the BOCC argues that this appeal is "moot due to subsequent events." (Second Motion to Dismiss, at p. 1.) As support for this proposition, the BOCC offers a letter dated September 25, 2018 from counsel for Martin Marietta (the "Letter"). (Ex. 1 to Second Motion to Dismiss.)

The BOCC accepts without question several assertions and legal conclusions contained in the Letter, namely: (1) that Martin Marietta's interest in the property at issue has been acquired by a successor, Rock & Rail, LLC ("Rock & Rail"); (2) that "Rock & Rail does not need a USR to operate the Facility" because it is "a Class III rail carrier licensed by the federal Surface Transportation Board ("STB")"; and (3) that "Rock & Rail's operations at the Facility are governed by federal law preempting local land use jurisdiction." (Second Motion to Dismiss, at pp. 1-2.) The BOCC further represents that "neither [Martin Marietta] nor Rock & Rail intend to further pursue the approval of the USR application" (Second Motion to Dismiss, at p. 3), and states that Martin Marietta "has abandoned that application." (*Id.* at p. 5.) In its Joinder to the Second Motion to Dismiss, Martin Marietta represents that it "is no longer seeking a USR for the facility," because of

Rock & Rail's "acquisition" of the property at issue. (Joinder, at p. 1.) Martin Marietta maintains that Rock & Rail's "operations are governed by federal law and are beyond the scope of issues raised in this proceeding." (*Id.* at p. 2.)

The purported "acquisition" between Martin Marietta and Rock & Rail, however, appears to be nothing more than a sham transaction designed to frustrate this appeal and undermine the authority of this Court. As set forth in the exhibits to the Second Motion to Dismiss, Rock & Rail "joined the [Martin Marietta] family of companies" in December 2015. (Ex. 1 to Second Motion to Dismiss at p. 1.) Nevertheless, Martin Marietta and Rock & Rail waited until August 20, 2018, to enter into the Assignment and Assumption of Lease. (Ex. 1 to Second Motion to Dismiss at pp. 5-8.) As consideration for that transaction, Rock & Rail purportedly paid Martin Marietta $10.00 to acquire a facility that Martin Marietta claims cost $70 million to design and construct. (*Id.* at 1.)

When Martin Marietta and Rock & Rail (through the same counsel) notified the BOCC by letter dated September 25, 2018, that Rock & Rail would commence operations at the subject property notwithstanding this Court's previous Orders, counsel for Martin Marietta was remarkably candid: "As matters now stand, Rock & Rail's predecessor [Martin Marietta] has been seeking a County permit for the Hwy. 34 facility for more than three years. No end to that process, or the litigation

spawned by it, is in sight. Rock & Rail has therefore elected to exercise its right to commence operations at the Hwy. 34 Facility." (Ex. 1 to Second Motion to Dismiss at pp. 1.) Apparently, Martin Marietta has decided that it has waited long enough to operate the facility that it built pursuant to an unlawful USR and has unilaterally decided to take matters into its own hands, without regard for any decision from this Court.

Despite this cavalier approach, the BOCC and Martin Marietta are both wrong on the law. Federal law does not preempt local land use law with respect to both the concrete plant that Martin Marietta built pursuant to the unlawful USR at issue and the asphalt plant that Rock & Rail has claimed that it still intends to construct at the site. In *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the United States Court of Appeals for the Eleventh Circuit squarely rejected a similarly sweeping preemption argument as the argument advanced by the BOCC and Martin Marietta here.

In *Florida East Coast Railway*, the Court considered a challenge to an aggregate distribution facility, which was to receive deliveries of aggregate (the "primary feedstock for cement") by rail, and operate on property that was located in an area otherwise zoned for residential uses. *Id.* at 1326. When the city attempted to enforce its zoning ordinance, the plaintiff argued federal preemption

by the Interstate Commerce Commission Termination Act (the "ICCTA") precluded the city from enforcing its zoning requirements on the aggregate facility. *Id.* 1327. The Eleventh Circuit rejected the plaintiff's sweeping preemption claims, stating: "It is clear, however, that in no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad. The language of the ICCTA pre-emption provision in no way suggests that local regulation was to be so thoroughly disabled." *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d at 1332. The Surface Transportation Board (which is the federal agency that regulates railroads) has similarly rejected sweepingly broad preemption arguments and efforts to extend the ICCTA to encompass non-rail facilities. *See Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380, 1999 WL 715272, at *7 (1999) ("manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption.")

As conceded by the BOCC in its Second Motion to Dismiss, Martin Marietta applied for a USR permit to construct and operate a "mineral resource development facility, including asphalt and concrete batch plants and transloading." (Second

Motion to Dismiss, at p. 1.) At a minimum, Martin Marietta's (and now Rock & Rail's) plan to construct and operate industrial asphalt and concrete manufacturing plants are plainly outside of the scope of the ICCTA. Accordingly, there is no federal preemption with regard to these existing and proposed industrial improvements, which plainly violate Weld County's land use laws. Accordingly, the Appellant Neighbors' appeal—which asks this Court to fully and finally resolve the outstanding issues that remain as a result of Martin Marietta's nullified USR and interim, unlawful construction of industrial improvements—remains justiciable in this Court and the Second Motion to Dismiss should be denied.

II. Abandoning the USR Application Does Not Moot the Appeal Because the Issue is Capable of Repetition While Evading Review and Involves a Matter of Public Importance.

The BOCC next argues that the appeal is moot because Martin Marietta is purportedly no longer interested in pursuing its USR application. Even if this were sufficient to moot the appeal, it is well-settled that "a court may resolve an otherwise-moot issue on its merits if it is capable of repetition while evading review, involves matters of great public importance, or involves an allegedly recurring constitutional violation." *People In Interest of Vivekanathan*, 2013 COA 143M, ¶ 20, 338 P.3d 1017, 1020, as modified on denial of reh'g (Dec. 5, 2013) (citing *People v. Black*, 915 P.2d 1257, 1259 n.1 (Colo. 1996)).

Here, the issue before the Court is not only capable of repetition—it is currently inflicting harm upon the Appellant Neighbors in light of Martin Marietta's stated intent to commence operating the unlawful industrial improvements through its subsidiary. The only thing that has changed is that Martin Marietta has apparently conveyed its property interest in its $70 million industrial facility for $10.00 to its wholly-owned subsidiary, Rock & Rail. The industrial concrete facility is fully constructed and, according to the BOCC, "Rock & Rail began receiving, handling and distributing interstate shipments of construction aggregate and related material at the Facility the first Week of October, 2018." (Second Motion to Dismiss, at p. 2.) Martin Marietta, through Rock & Rail, has stated that it intends to operate the now-existing industrial concrete manufacturing facility and to further construct and operate an industrial asphalt manufacturing facility without a valid USR. These efforts remain ongoing despite this Court's prior ruling on November 22, 2017 that the BOCC "abused its discretion" in approving Martin Marietta's application to convert the subject property within the A (Agricultural) Zone District to heavy industrial use, which "must be overturned." (Ex. A, Opinion, Nov. 22, 2017, at pp. 8-9.)

Under the circumstances, Martin Marietta's motivations are obvious and brazen. Martin Marietta believes that it can avoid the consequences of an adverse

ruling from this Court by conveying the facility to its wholly-owned subsidiary and arguing federal preemption. At the same time, Martin Marietta posits that if it now withdraws its application for its USR permit, it can foreclose the Appellant Neighbors from obtaining the judicial review that they have sought for more than three years.

In so doing, Martin Marietta seeks to enjoy all of the benefits of the now reversed USR while simultaneously preventing this Court from ensuring that its earlier decision is carried out. The now-existing industrial concrete manufacturing facility at the subject property was only built because Martin Marietta received a USR permit from the BOCC. That USR permit has since been reversed by this Court. But instead of honoring this Court's prior decision, Martin Marietta believes that it can benefit by conveying its interest in the property to its wholly-owned subsidiary, so that it can argue federal preemption and abandon the USR which allowed it to construct these industrial improvements in the first place.

While Martin Marietta's shell game continues to play out, the Appellant Neighbors are forced to live in the shadows of an unlawfully constructed, industrial blight on their agricultural and residential neighborhood. Despite Martin Marietta's tactics, nothing has changed for the Appellant Neighbors. In fact, the neighborhood has suffered additional adverse impacts because, Martin Marietta—

through the guise of its wholly-owned subsidiary—is willfully disobeying this Court's prior Order and operating at the site. (Second Motion to Dismiss, at p. 2.) Accordingly, Martin Marietta's willful and flagrant tactics are not only capable of repetition, they are actually repeating, while frustrating review. Such issues involve matters of significant public importance. Accordingly, the Court should deny the Second Motion to Dismiss and resolve the case on the merits.

III. A Case or Controversy Exists Because of the 5-year Moratorium on Development at the Property.

Under the WCC, once an application for a USR permit has been submitted, the quasi-judicial process commences and the BOCC can either approve or deny the application. (See Exhibit H, WCC § 23-2-210(B)(1) ("The authority for making the decision to approve or deny the request for a Special Review Permit rests with the Board of County Commissioners.") (emphasis added).) Under the WCC, if a land use application is denied, there is a mandatory five-year moratorium before any new land use application may be submitted, which Martin Marietta acknowledged in its Motion to Amend Judgment. (Ex. C, at p. 6; Ex. H, WCC § 2-3-10(A) ("neither an applicant nor his or her successors in interest in property for which a land use application was denied within the preceding five (5) years may submit a land use application or request a rehearing on a previously submitted application . . .").) By its express terms, this moratorium applies not

only to the applicant, but to any "successors in interest" in the property at issue. *Id.*

Here, assuming Rock & Rail's "acquisition" of Martin Marietta's interest in the property was proper, Rock & Rail would take the property as a "successor in interest" under WCC § 2-3-10(A). As a result, Rock & Rail should be subject to the five-year moratorium on submitting a new land use application at the site. Furthermore, its existing USR has already been declared unlawful by this Court. A case or controversy exists as to when the five-year moratorium begins, which should preclude Martin Marietta or any "successor in interest" (including Rock & Rail) from submitting a new land use application or making any use of the subject property during the five-year moratorium period.

IV. A Case or Controversy Exists as to the Appellant Neighbors' Request for Mandatory Injunctive Relief.

C.R.C.P. 65(f) provides that an injunction may be "made mandatory" whenever "merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled . . . ." Here, Rock & Rail is not an innocent, bona fide purchaser for value. It is a wholly-owned subsidiary of Martin Marietta, that is represented by the same counsel, and which apparently paid $10.00 for a $70 million concrete and asphalt facility.

Martin Marietta constructed the industrial improvements while knowingly accepting the risk that the improvements would need to be removed if the USR

was later found to be unlawful. This Court has confirmed that the USR was unlawfully approved and that therefore the construction of the industrial improvements violated local zoning law. Martin Marietta should not be permitted to avoid this fate by simply conducting a paper transaction with its wholly-owned subsidiary, Rock & Rail. The industrial improvements were constructed pursuant to an unlawful USR and they continue to exist at the subject property in violation of the WCC. The Appellant Neighbors can and should be afforded to full and final relief by this Court, including an order mandating that the property be brought in line with the existing zoning laws.

This Court should proceed to the merits of this appeal and determine whether Martin Marietta should be required to honor the prior decision of this Court or whether it can frustrate that decision by purportedly conveying the property at issue to a wholly-owned subsidiary solely for the purposes of avoiding the consequences of this Court's prior decision.

CONCLUSION

WHEREFORE, the Appellant Neighbors respectfully request that the Court deny the BOCC's Second Motion to Dismiss.

Dated: October 19, 2018

Respectfully submitted,

IRELAND STAPLETON PRYOR & PASCOE, PC

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CERTIFICATE OF SERVICE

I certify that on October 19, 2018, a true and correct copy of this **APPELLANTS' RESPONSE TO MOTION TO DISMISS AS MOOT** was served via the Colorado Courts e-filing system on the following individuals:

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