DISTRICT COURT, WELD COUNTY, COLORADO 915 10th Street, Greeley, CO 80631 P.O. Box 2038 Greeley, CO 80632 Phone Number: (970) 475-2400	
PLAINTIFFS: 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:** 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, Steve 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 Number: 2015CV30776 Division 4
Attorneys for Martin Marietta Materials, Inc. Wayne F. Forman, Colo. Atty. Reg. No. 14082 Mark J. Mathews, Colo. Atty. Reg. No. 23749 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 MARTIN MARIETTA MATERIALS, INC.'S RESPONSE OPPOSING PLAINTIFFS' MOTION FOR AMENDED FINAL JUDGMENT

Defendant Martin Marietta Materials, Inc. ("Martin Marietta"), by and through its counsel, respectfully submits this response opposing the Plaintiffs' May 2, 2018 Motion for an Amended Final Judgment ("Motion").

SUMMARY OF POSITION

In this case brought exclusively under C.R.C.P. 106(a)(4), Plaintiffs seek an order requiring Martin Marietta to remove tens of millions of dollars of improvements that were lawfully constructed pursuant to permits and approvals issued by Weld County and other agencies. Most of these permits, including all the permits for construction, were never challenged by Plaintiffs. Under the limited scope of review of C.R.C.P. 106(a)(4), the Court lacks jurisdiction to grant the requested injunctive relief. Indeed, no Colorado court has granted the relief that Plaintiffs seek in the context of a Rule 106(a)(4) proceeding, and Plaintiffs do not and cannot cite to any authority suggesting otherwise.

Additionally, the relief Plaintiffs seek is premature. Plaintiffs seek to tear down Martin Marietta's facility *before* the Weld County Board of County Commissioners (the "Board") has even issued its final decision on Martin Marietta's pending use by special review ("USR") application. Under controlling Colorado precedent, once a court finds that an administrative body has abused its discretion, the matter must be remanded so that the administrative body may exercise its discretion in resolving the defect. Accordingly, this matter should be remanded to the Board so that it can address the issue identified by the Court of Appeals.

BACKGROUND

On August 12, 2015, the Board held a public hearing to consider Martin Marietta's USR application for a permit to amend an existing USR permit held by Gerrard Investments, LLC, to include as allowed uses a concrete plant, asphalt plant, rail loop and aggregate conveyor system

(the "USR Facilities"). At that hearing, Martin Marietta presented a report by its expert noise consultant, AECOM, which used modelling to predict the noise generated by the USR Facilities once they were in operation. Upon receiving that testimony and after the close of evidence, the Board imposed Development Standard 24 ("DS-24"), which requires that the USR Facilities meet the Weld County Code residential noise standards at the property boundary of adjacent properties once the USR Facilities are constructed and operational. Martin Marietta agreed to this standard because it believed (and still believes) that the USR Facilities, once fully operational and with all noise mitigation measures in place, would satisfy the County's residential noise standards as required by DS-24.

Plaintiffs mistakenly allege that the Court of Appeals determined that the evidence demonstrated that the proposed use would be incompatible with the surrounding residential uses. (Mot. ¶6). In fact, the Court of Appeals opinion found only that there was insufficient evidence in the record based on AECOM's modeled noise study to permit it to conclude that the USR Facilities, once fully operational, would meet the County's residential noise standard. (Case No. 17CA0463, Opinion at ¶¶ 16-18). Specifically, the Court of Appeals held that the evidence was inadequate to show that the USR Facilities would comply with DS-24 under normal operating conditions and measured at the residential property lines: "There is currently insufficient support in the record for us to conclude that the proposed use, when running under normal operations, would comply with development standard twenty-four." (Opinion, ¶ 18).

Because all of the USR Facilities have been constructed with the exception of the asphalt plant, Martin Marietta is able to determine the actual noise level of the USR Facilities at adjacent residential property boundaries, and no longer has to rely entirely upon the predictive modelling by

AECOM. Based on noise data resulting from the USR Facilities' actual operations (and including modeling noise data from the still-to-be-built asphalt plant), and actual on-the-ground noise mitigation improvements, Martin Marietta can confirm that its USR Facilities satisfy Weld County's noise standards, as required by DS-24. Martin Marietta intends to seek permission from the Board to present additional evidence as required and contemplated by the Court of Appeals decision to demonstrate this point. As discussed below, under well-established Colorado law, the Board has the discretion to continue the process and allow Martin Marietta to present additional noise evidence based on actual operations to confirm its ability to comply with DS-24.

ARGUMENT

I. Plaintiffs' Motion is Beyond the Court's Jurisdiction.

Under C.R.C.P. 106(a)(4), courts are authorized to determine only whether a local government has "exceeded its jurisdiction or abused its discretion." *Accord* C.R.S. § 13-51.5-101, -103. Apart from making this narrow determination under C.R.C.P. 106(a)(4), courts do not have the jurisdiction to direct the local government to take any particular action in response to its ruling. It is solely up to the local government to decide how to proceed on remand.

In *Wolf Creek Ski Corp. v. Bd. of Cty. Comm'rs*, 170 P.3d 821, 831 (Colo. App. 2007), for example, the trial court reversed the board of county commissioners' approval of a planned unit development because the applicant had failed to demonstrate adequate access. The trial court also directed the board to hold further hearings once the developer obtained year-round access. *Id.* at 831-32. The Court of Appeals reversed the trial court's order directing the commissioners to hold additional hearings because that instruction exceeded the court's jurisdiction: "Once a court finds that an administrative body has abused its discretion, how to address that deficiency on remand is within the discretion of the administrative body." *Accord Carney v. Civil Serv. Comm'n*, 30 P.3d

861, 866-67 (Colo. App. 2001) (though affirming trial court's invalidation of a portion of a civil service examination, reversing the trial court's direction to the administrative body as to how to address the decision on remand).

The United States Supreme Court has adopted similar constraints on the judiciary's ability to direct how agencies respond to reversals of their decisions. *See United States v. Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (*per curiam*) (invalidating district court order that precluded agency from reopening evidence on remand as an "improper limitation on the Commission's duty to reconsider the entire case."); *Federal Power Comm'n v. Idaho Power Co*., 344 U.S. 17, 20 (1952) (reversing Court of Appeals' striking a provision of the commission order because ". . . the guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare. At that point, the matter once more goes to the [agency] for reconsideration."). [1]

As these and other decisions demonstrate, it is proper for the trial court to reverse the Board's issuance of the USR Permit and to remand to the Board for further action. But the Board alone has the discretion to decide what further action it will take in response to the remand, including whether to hold further proceedings on Martin Marietta's pending USR application on the noise issue addressed by the Court of Appeals. *Accord Chonoski v. State, Dep't. of Revenue,*

[1] The cases cited by Plaintiffs as authorizing equitable remedies are inapposite, as none of them involved an action brought under C.R.C.P. 106(a)(4). *See Snyder v. Sullivan*, 70 P.2d 510, 511 (Colo. 1985) (action against seller for breach of sales agreement and fraud); *People In Interest of C.G.*, 2015 COA 106 (dependency and neglect proceeding); *Hunter v. Mansell*, 240 P.3d 469, 481 (Colo. App. 2010) (trespass action); *Bd. of Cty. Comm'rs v. Cty. Roader Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000) (C.R.C.P. 106(a)(2) action to compel board to refer to the electorate an initiative proposal pertaining to a countywide sales tax).

Motor Vehicles Div., 699 P.2d 416, 417 (Colo. App. 1985) (court refuses to enjoin agency hearing based on separation of powers).

Ignoring the Court's limited jurisdiction under C.R.C.P. 106(a)(4), Plaintiffs assert they are entitled to a mandatory injunction, a permanent injunction, and an order of mandamus, all to force the removal of the USR Facilities. These requested remedies extend far beyond the court's limited jurisdiction in a Rule 106(a)(4) action. Indeed, Plaintiffs' First Amended Complaint for Relief Pursuant to C.R.C.P. 106(a)(4) makes no mention of any request for injunctive relief or mandamus. Instead, Plaintiffs appropriately limited their requested relief to reversal of the Board's issuance of the USR Permit: "Pursuant to C.R.C.P. 106(a)(4), the Plaintiffs are entitled to a review of the Weld County Commissioner's approval of the Application and adoption of the Resolution and are further entitled to an order reversing that decision." (First Am. Compl., ¶ 84).[2]

The USR Facilities were erected lawfully under validly issued building permits when the USR permit was valid and outstanding. *See Zoning Bd. of Adj. v. DeVilbiss*, 729 P.2d 353, 359 (Colo. 1986) (defendant who completed improvements during pendency of 106(a)(4) challenge "was not guilty of any legally impermissible or culpable conduct in proceeding with the construction . . . [the filing of a 106 action] did not constitute a judicial constraint on the [defendant's] activities"). As mentioned, the sole basis for the Court of Appeals' reversal was that it found there was no competent evidence in the record to support the Board's findings that the proposed use could meet the Weld County residential noise standards. Opinion at ¶ 17. Nothing in

[2] Moreover, mandamus relief can be obtained only through a separately filed claim for relief under C.R.C.P. 106(a)(2), not through a motion. *See* C.R.C.P. 106(a) ("In the following cases relief may be obtained … by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure") (emphasis added). *See also Pima Fin. Serv. v. Selby*, 820 P.2d 1124, 1126 (Colo. App. 1991) (claim for relief cannot be brought by motion).

the Court of Appeals' opinion impairs the continued validity of Martin Marietta's USR application, or prohibits the Board from exercising its discretion on remand to conduct additional proceedings to correct this evidentiary infirmity. Upon remand, the Board will regain jurisdiction to address Martin Marietta's USR application and may exercise its discretion in determining whether noise data generated by Martin Marietta's operations satisfies the requirements of DS-24. An order requiring the dismantling and destruction of the USR Facilities is completely inappropriate under these circumstances.[3]

II. Plaintiffs' Requested Relief is Inequitable.

Now that Martin Marietta has constructed and tested the USR Facilities and can present noise evidence primarily based on operational testing, rather than entirely on predictive modeling, it is possible that Martin Marietta will again obtain approval of a permit for the USR Facilities. Given that there is at least a reasonable prospect that the USR Facilities will again receive approval in the near future, it would be premature at best, and a colossal waste of resources and impacts at worst, to require Martin Marietta to dismantle the USR Facilities when it could, in a relatively short time period, again obtain the Board's approval of the USR application.

Yet Plaintiffs assert they are entitled to a mandatory injunction, a permanent injunction, and an order of mandamus, all to force the removal of the USR Facilities, as additional remedies for prevailing in this Rule 106(a)(4) action. Apart from the fact that Plaintiffs' requested relief is not within the Court's jurisdiction, it is grossly inequitable and such relief has been rejected by Colorado courts applying equitable principles in determining whether to order structures to be removed even when it is acknowledged that they are in violation of a municipal or land use

[3] Indeed, C.R.C.P. 106(a)(4)(V) explicitly allows for the award of possible injunctive relief only to allow a stay of an administrative decision pursuant to C.R.C.P. 65, which the Plaintiffs failed to do here. The rule does not authorize other injunctive or equitable relief.

requirement. For example, in *Hargreaves v. Skrbina*, 662 P.2d 1078, 1079-80 (Colo. 1983), Longmont mistakenly issued a building permit to the defendant allowing it to construct an office building in violation of setback requirements. The adjoining landowner sued to have the building torn down. The trial court rejected that relief, but the Court of Appeals ruled that upon a demonstration that the municipal ordinance had been violated, injunctive relief should be granted. The Colorado Supreme Court reversed, holding that private parties, like municipalities, must make an equitable showing that they are entitled to such drastic relief:

> We have long recognized that equitable considerations must be taken into account when a municipality enforces its own zoning ordinances … If a city's enforcement of its own ordinances is tempered by equitable considerations, then it is certainly appropriate that a private citizen be required to demonstrate the equity of his position before obtaining relief under a municipal ordinance… Accordingly, we hold that in the present case it was proper for the trial court to apply the doctrine of relative hardships.

Id. at 1080. The Supreme Court further held that it would be inequitable to require the removal of the office building.

Similarly, in *DeVilbiss*, 729 P.2d at 359-360, where the plaintiff failed to seek any injunctive relief preventing defendant from building its coal-loading facility at great expense, the court dismissed that plaintiff's appeal as moot, holding as follows:

> We are satisfied that the granting of permanent injunctive relief sought by DeVilbiss would be highly inappropriate and fundamentally inequitable under the facts present here . . . In short, to require the removal of the coal-loading facility, which was built at a cost of $7.7 million pursuant to the governmental variance and permit processes, would be grossly disproportionate to any arguable legal error in the variance and permit procedures that led to the construction of the facility.

Here, Plaintiffs attempt to paint Martin Marietta's conduct as reckless and argue that Martin Marietta should have waited for the Court of Appeals to rule before initiating construction of the USR Facilities. In reality, Martin Marietta's conduct was appropriate under the circumstances.

Martin Marietta did not begin to construct any of the USR Facilities until after the trial court affirmed the Board's Amended Resolution approving the USR permit. Although Martin Marietta knew the trial court order might be appealed, Martin Marietta had in hand valid permits issued for each structure being constructed, none of which had been challenged by the Plaintiffs. And it had the benefit of having a trial court opinion that it regarded as legally correct and therefore likely to be upheld on appeal.

Under Plaintiffs' theory, the Board's decision and the trial court's judgment should effectively be stayed without Plaintiffs having sought such relief. The inevitable result of this argument is that no business or landowner could move forward with any approved project during the year and a half or longer it takes to resolve a Court of Appeals challenge. But that is not the law, as made clear by the Colorado Supreme Court in *DeVilbiss*, in which it held that there is nothing improper or unlawful about a landowner exercising its rights under a land use permit during the pendency of an appeal. 729 P.2d 359-60.[4]

Indeed, in constructing the USR Facilities and associated improvements, Martin Marietta obtained the issuance of over 30 building, grading access and drainage permits from Weld County, an access permit from the Colorado Department of Transportation ("CDOT"), approvals from CDOT to construct turn lanes and install new lights and railroad safety crossing devices within State Highway 34 and County Road 13, and air emissions and stormwater permits from the Colorado Department of Public Health and Environment, among others, all while the USR permit

[4] Contrary to the Plaintiffs' assertions, Martin Marietta has not operated the USR Facilities in violation of the Court of Appeals opinion. It has not operated the USR Facilities at all since the Court of Appeals opinion and operated them before that opinion issued only for several hours for the limited purpose of monitoring noise levels.

was lawful and in effect. Martin Marietta expended millions of dollars on public improvements that benefit transportation in the region. In addition, Martin Marietta incorporated additional sound mitigation measures into the project, including extending and increasing the height of sound-mitigation berms, relocating and thereby improving the effectiveness of sound walls, constructing an underground bridge to muffle traffic noise, among others, all to further ensure compliance with DS-24.

These are but examples of the massive, multi-year effort Martin Marietta undertook to construct and obtain approval for the USR Facilities. Throughout this period, Martin Marietta met regularly with its neighbors to discuss the design and construction of the USR Facilities. Martin Marietta accepted and implemented many of the requested design features including creating a barn-like architectural structure for the Ready-Mix plant. Plaintiffs' Motion is particularly inappropriate given that they participated in a multi-year effort to provide input into the design of the USR Facilities, and in turn, Martin Marietta expended millions of dollars acceding to Plaintiffs' requests. And it is noteworthy that Plaintiffs never sought a stay of the Board's Amended Resolution or of the trial court's order, from either the trial court or the Court of Appeals.

Accordingly, even if there were a legal basis for Plaintiffs' requested remedies, the Court would have to hold a hearing to determine whether, under *Hargreaves* and *DeVilbiss*, it would be equitable to require Martin Marietta to dismantle and remove tens of millions of dollars in improvements built pursuant to validly issued county and state permits. Particularly because the Board may yet approve a USR permit to allow those facilities to operate, Martin Marietta submits that granting Plaintiffs' requested relief would be manifestly inequitable.

CONCLUSION

Plaintiffs' claims for injunctive and mandamus relief to force the removal of the USR Facilities are procedurally wrong as a matter of law and grossly inequitable. The Court should deny the Motion and remand this matter to the Board to allow it to exercise the discretion reserved to it under Colorado law.

Dated: May 22, 2018.

Respectfully submitted,

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s/ Wayne F. Forman
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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2018, I filed a true and correct copy of the foregoing document, titled **DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S RESPONSE OPPOSING PLAINTIFFS' MOTION FOR AMENDED FINAL JUDGMENT**, via Colorado Courts E-Filing which will provide notice of the filing and availability of such document by electronic mail to the following recipients:

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