

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

Attorney for the Board of County Commissioners of Weld County, Colorado (including all of the individual Commissioners in their official capacities)

Bruce T. Barker, No. 13690

Weld County Attorney

Frank N. Haug, No. 41427

Assistant County Attorney

1150 'O' Street, P.O. Box 758, Greeley, CO 80632

Phone Number: (970) 336-7235,

Fax Number: (970) 352-0242

E-mail: bbarker@co.weld.co.us; fhaug@co.weld.co.us

▲ COURT USE ONLY ▲

Case Number: 2015CV30776

Division 4

**RESPONSE TO MOTION FOR AMENDED FINAL JUDGMENT PURSUANT TO
C.R.C.P. 59(A)(4)**

COMES NOW the Board of Weld County Commissioners, by and through its attorney, the Assistant of Bruce T. Barker, Weld County Attorney, below-named, and responds to Plaintiffs Motion for Amended Final Judgement Pursuant to C.R.C.P. 59(a)(4), as follows:

STATEMENT OF FACTS

1. On September 15, 2015, and again in an amended resolution on October 5, 2016, the Weld County Board of County Commissioners (“BOCC”) approved USR15-0027 by unanimous vote.
2. The decision of the Board of County Commissioners was appealed to the Trial Court pursuant to C.R.C.P. 106(a)(4). However, the Plaintiffs did not avail themselves of the option to request a stay pursuant to C.R.C.P. 106(a)(4)(V) and C.R.C.P. 65. Notably, C.R.C.P. 65(c) would have required the posting of a bond by the Plaintiffs.
3. The decision of the Board of County Commissioners was upheld by the Trial Court on January 27, 2017.
4. Plaintiffs appealed the Trial Court’s Order affirming the BOCC’s decision. On November 22, 2017, the Colorado Court of Appeals reversed the Trial Court’s Order and remanded the case with instructions for “entry of judgment in favor of Plaintiffs.”
5. On April 30, 2018, the Court of Appeals issued the Mandate to the Trial Court.
6. On May 1, 2018, the Trial Court issued its Order in favor of Plaintiff’s, stating “the court orders the Board of County Commissioners for Weld County to reverse its approval of the special use permit, USR 15-0027, by denying that permit instead.”
7. Both the Plaintiffs and Martin Marietta Materials, Inc. (“MMM”) have submitted requests to amend the order pursuant to C.R.C.P. 59(a)(4). Plaintiffs seek an order from the Court to issue a permanent mandatory injunction to immediately remove all industrial improvements and “return the property to its original state.” Plaintiffs also seek what amounts to a mandamus action for the Court to order “the BOCC to enforce its land use regulations.”

INTRODUCTION

8. The Plaintiffs in this case seek the dismantling and removal of all industrial improvements associated with the invalidated USR15-00027. However, there is nothing in the Court’s record in this case showing they requested a stay upon filing their C.R.C.P. 106(a)(4) action. During the pendency of this case, Defendant MMM was in possession of an approved land use permit issued by the governmental agency. No action was taken by the Plaintiffs to prevent the construction that took place. The BOCC exercised its discretion and approved the permit. Following the approval

of the permit, and absent a stay on appeal, MMM was within its right to construct its facility, and the County was obligated to perform its ministerial duty to issue the appropriate building permits. Thus, the equities weigh in favor of prohibiting the Plaintiffs from undoing millions of dollars of effort and investment while additional options are explored as to potential allowable uses of the property.

9. The Court of Appeals ordered that the 106(a)(4) petition of Plaintiffs be granted. This order effectively states that, based on the evidence in the record, the BOCC abused its discretion in granting USR15-00027. The net effect of this decision is to invalidate the granting of USR15-00027. However, invalidation and denial are two separate remedies. The Court can invalidate a decision of a local body through 106(a)(4). However, 106(a)(4) does not allow the Court to command that the local body take additional action or be prevented from taking additional action. To order an action, the Plaintiffs must prove the need for a mandamus order through a separate court action. To prevent additional action, the Plaintiffs must prove the need for an injunction through a separate court action.

10. Mandamus relief is inappropriate because the decision on how to deal with land use is discretionary and not ministerial. Injunction is inappropriate because plaintiffs never sought a stay, and have not posted a bond. Both an injunction and a mandamus action require meeting the procedural requirements of each action. Here, Plaintiffs are instead simply attempting to insert an injunctive and mandamus action into a motion for an amended order under C.R.C.P. 59.

ANALYSIS

11. The decision of the BOCC is reviewed by the Trial Court pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure. The purpose is to allow review of a governmental body's discretionary decision making. Accordingly, the review is limited to a determination as to whether the governmental body exceeded its jurisdiction or abused its discretion. *See C.R.C.P 106(a)(4)* and *C.R.S. 13-51.5-101* et seq. Here, the review is simply whether the granting of USR15-00027 was an abuse of discretion.

12. When reviewing the action of a quasi-judicial governmental agency, the trial court "has no factfinding authority." *Rangeview v. City of Aurora*, 381 P.3d 445 Colo.App (2016). Instead, the Trial Court is tasked with making a single determination: whether there is an abuse of discretion or exceedance of 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. *Wolf Creek Ski Corp. v. Board of County Com'rs of Mineral County*, 170 P.3d 821 (Colo.App 2007); citing *Carney v. Civil Serv. Comm'n*, 30 P.3d 861, 866-67 (Colo.App.2001). Therefore, the Trial Court should invalidate USR15-0027, and remand it for further action consistent with the BOCC's discretion.

13. The Plaintiffs had the option to obtain the relief now requested, that the land be left as it was, at the outset of the case. An applicant seeking judicial review under 106(a)(4) can request a stay pursuant to Rule 65. This stay would require the posting of a bond pursuant to C.R.C.P. 65(c).

When issuing an injunction, the trial court is bound to set bond in at least some amount. *Kaiser v. Market Square Discount Liquors, Inc.*, 992 P.2d 636, (Colo.App 1999). Generally, strict compliance with the security provisions of C.R.C.P. 65 is required for the enforcement of an injunction. *Id.*

14. However, Plaintiffs posted no bond and requested no stay. Now, having prevailed on appeal, Plaintiffs seek to achieve a retroactive injunction to return to the status quo at the beginning of the case. However, in the case cited by Plaintiffs, *Snyder v. Sullivan*, 705 P.2d 510, 514 (Colo. 1985), the Colorado Supreme Court cites to the idea that “An injunction is primarily a preventive and protective remedy, affording relief against future rather than past acts.” Citing *Board of County Commissioners of Pitkin County v. Pfeifer*, 546 P.2d 946, 949 (Colo 1976). The purpose of an injunction is to preserve the status quo or protect a party's rights pending the final determination of a cause. *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo.App 2007).

15. Plaintiffs, with full knowledge of the construction, allowed not only the onsite improvements to be built, but millions of dollars of road improvements to also be built near the site. They made no legal challenge to the construction. It is also unclear whether the road improvements are to be removed pursuant to this order. Now, rather than a preventive measure, Plaintiffs seek to obtain an affirmative requirement from the Court commanding both a governmental agency and private company to take certain actions. MMM may choose to proceed with the use of its property in any number of other ways, including seeking other uses, modifying its plans, or sale of its assets. These decisions are within the discretion of MMM and not properly curtailed pursuant to the Court's Order under 106(a)(4). In the case of the BOCC, what Plaintiffs seek is an order of mandamus.

16. Mandamus is an extraordinary remedy, “used to compel performance by public officials of a plain legal duty devolving upon them by virtue of their office or which the law enjoins as a duty resulting from the office.” *Sherman v. City of Colorado Springs Planning Commission*, 763 P.2d 292 (Colo. 1988); citing *Potter v. Anderson*, 392 P.2d 650 (1964). A three-part test has been established to determine whether mandamus is appropriate. To grant mandamus relief, the Court must find: (1) The plaintiff must have a clear right to the relief sought; (2) the defendant must have a clear duty to perform the act requested; and (3) there must be no other available remedy. *Id.*

17. The text of rule 106(a)(4) clearly highlights that the “discretion,” or decision making authority, rests with the governmental body, and therefore is not simply a ministerial act. The Courts have distinguished between ministerial acts of a government body, and discretionary acts. See *Winters v. City of Commerce City*, 648 P.2d 175 (Colo.App 1982). Application of the Weld County Zoning Code is discretionary. Therefore, the mandamus action sought by the Plaintiffs is improper.

18. Mandamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment. It does not lie where performance of a trust is sought which is discretionary or involves the exercise of judgment. *Board of County Com'rs of County of Archuleta v. County Road Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000). An

action compelling an officer to act will lie only when that officer fails to perform an official duty. *Sheeley v. Board of County Commissioners*, 325 P.2d 275 (1958). Conversely, then, where there is no duty to act, an action in the nature of mandamus pursuant to C.R.C.P. 106(a)(2) cannot be sustained. *People ex rel. Garrison v. Lamm*, 622 P.2d 87 (Colo.App 1980).

19. Here, the Plaintiffs ask the Court to force the BOCC to exercise its discretion in a certain way. Section 23-10-10 of the Weld County Code states “The COUNTY, through its Department of Planning Services or other departments so authorized, **may enforce** this Chapter [zoning violations] through methods included in this Chapter or through other methods adopted by the Board of County Commissioners” (emphasis added). There is no obligation on the County to prosecute every person everywhere in the County who may be violating some element of their approved land use. Similarly, there is no provision in the Weld County Code that requires buildings to be torn down simply because a proposed use may result in a violation of zoning regulations.

20. Given the limited resources of the County, the determination as to how to approach violations is within the discretion of the BOCC. Similar to the discretion to determine what roads to maintain at what times, the legislature has delegated authority on enforcement of zoning regulations to the County. *See 30-28-124 et seq.* In a case where private citizens attempted to force the County to maintain the roads within their particular subdivision, the court stated: “The County is entrusted with developing and overseeing county road policies. § 43–2–111. How it allocates funds for that purpose is within its discretion.” *Wibby v. Boulder BOCC*, 409 P.3d 516, 523 (Colo.App 2016). Similarly, the process of enforcing zoning ordinances is within the discretion of the County, and cannot be compelled by specific groups of citizens through the courts. Further, Plaintiffs incorrectly assume that enforcement and removal is the only valid option to move forward.

21. The *Wolf Creek* case clearly indicates that the mechanism used to remedy an infirmity in a quasi-judicial hearing is within the discretion of the governmental body. One remedy may be an exercise of the governmental body’s enforcement power. Another remedy may be additional fact finding to determine the appropriate course of action. A quasi-judicial body is not necessarily precluded from reconsidering and superseding its own final decision. *Citizens for Responsible Growth v. RCI Development Partners, Inc.*, 252 P.3d 1104 (Colo. 2011). In addition, the plain language of rule 106(a)(4)(IX) allows for the Court to remand the issue for additional findings of fact. The Court has previously done so in this matter. There are a variety of ways in which the County and the Company may proceed following the invalidation of USR 15-0027.

22. A court in equity has considerable discretion in fashioning a decree that achieves a fair result under the particular circumstances of the case. *Hunter v. Mansell*, 240 P.3d 469, 477 (Colo.App 2010). The Supreme Court of Colorado has highlighted that equitable considerations must be taken into account when a municipality enforces its own zoning ordinances. *Hargreaves v. Skrbina*, 662 P.2d 1078, 1080 (Colo. 1983). The *Hargreaves* case states that when a municipality enforces its ordinances the government agency must be tempered by equitable

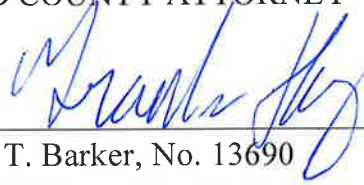
considerations. *Id. Hargreaves* also states that this same equitable reasoning applies to a private citizen before they are afforded relief. *See id.*

23. The County Commissioners voted unanimously on two occasions to approve USR15 00027. The Trial Court upheld that decision. On appeal, the Court of Appeals determined that there was an abuse of discretion due to insufficient evidence relating to a particular noise standard. This determination by the Court of Appeals does not warrant an order requiring the removal of the improvements. The County retains its rights to exercise its authority to remedy the infirmity, as well as the authority to exercise discretion in how to enforce zoning violations. MMM retains the right to determine the manner in which to move forward after its USR15-00027 was invalidated. Further, the Plaintiffs have failed to demonstrate what harm that they will suffer if the improvements are not immediately removed.

CONCLUSION

The Weld County BOCC respectfully requests that the Court deny Plaintiffs' requests for injunctive and mandamus relief.

BRUCE T. BARKER, ESQ.
WELD COUNTY ATTORNEY



Bruce T. Barker, No. 13690

Frank N. Haug, No. 41427

Attorney for Defendant Weld County

1150 'O' Street, P.O. Box 758

Greeley, CO 80632

Phone Number: (970) 336-7235,

Fax Number: (970) 352-0242

E-mail: bbarker@co.weld.co.us

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2018, I filed a true and correct copy of the foregoing document, titled FILING OF CERTIFIED RECORD, via the Integrated Colorado Courts E-filing System (ICCES) which will provide notice of the filing and availability of such document by electronic mail to the following recipients:

<p>Mark E. Lacin James R. Silvestro IRELAND STAPLETON PRYOR & PASCOE, P.C. 717 Seventeenth Street, Suite 2800 Denver, Colorado 80202 Telephone: 303-628-2700 E-mail: mlacin@irelandstapleton.com; jsilvestro@irelandstapleton.com</p> <p><i>Counsel for Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, David Kisker, Gary Oplinger, John Cummings and James Piraino</i></p>	<p>Patrick M. Groom WITWER, OLDENBURG, BARRY & GROOM, LLP 822 7th Street, Suite 760 Greeley, CO 80631 Telephone: 970-352-3161 E-mail: pgroom@wobjlaw.com</p> <p><i>Counsel for Defendant Gerrard Investments, LLC</i></p>
<p>Wayne F. Forman Mark J. Mathews 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</p> <p><i>Counsel for Defendant Martin Marietta Materials, Inc.</i></p>	<p>Christopher M. Kamper. CARVER SCHWARZ MCNAB KAMPER & FORBES LLC 1600 Stout Street, Suite 1700 Denver, CO 80202 Telephone: 303-893-1815 E-mail: ckamper@csmkfcom</p> <p><i>Counsel for Defendants WELD LV, LLC and WELD LV II, LLC</i></p>



Diane Beckman, Paralegal
Weld County Attorney's Office