DISTRICT COURT, WELD COUNTY, COLORADO 915 19th Street Greeley, Colorado 80631 **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, 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:** Mark E. Lacis, #37421 James R. Silvestro, #43982 IRELAND STAPLETON PRYOR & PASCOE, PC 717 Seventeenth Street, Suite 2800 Denver, CO 80202 Phone: 303-628-2700; Fax: 303-623-2062 E-mail: mlacis@irelandstapleton.com E-mail: jsilvestro@irelandstapleton.com	▲ COURT USE ONLY ▲ Case No. 2015CV30776 Division: 4

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S MOTION TO AMEND AND FOR STAY OF JUDGMENT

Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino (collectively, "Plaintiffs"), through undersigned counsel IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit this Response in Opposition to Defendant Martin Marietta Materials, Inc.'s ("Martin Marietta") Motion to Amend and for Stay of Judgment ("Motion") and state as follows:

INTRODUCTION

Martin Marietta knowingly assumed the risk of constructing a heavy industrial use on land zoned for agriculture, notwithstanding the fact that the approval of its application for a use by special review permit was being challenged on appeal. Now that the appeal has been conclusively resolved against it, Martin Marietta challenges the Court's jurisdiction and suggests the Court has no power to enforce its own orders. Martin Marietta is wrong and should not be rewarded for its gamesmanship or efforts to avoid the consequences of this Court's judgment.

ARGUMENT

I. The Weld County Code Does Not Allow the BOCC to "Invalidate" a USR Application; Instead, the BOCC May Only "Approve" or "Deny" the Application.

In the Court's May 1, 2018 Order Entering Judgment in Favor of the Plaintiffs, this Court ruled as follows: "This case has been remanded by the Colorado Court of Appeals with instructions to reverse this court's previous judgment in favor of the defendants. Accordingly, the prior judgment is hereby vacated, the court enters judgment in favor of the plaintiffs, and 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**." (Order Entering Judgment in Favor of the Plaintiffs, dated May 1, 2018 (emphasis added).)

Without any legal authority for its request, Martin Marietta now asks this Court to amend the judgment to direct the BOCC to "invalidate" instead of "denying" the application for a USR permit. (Motion, pp. 2-3.) Martin Marietta's motivations are clear. The Weld County Code ("WCC") provides that if a USR application is denied, the applicant cannot submit a similar land use application for five years. *See* 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 for any portion of the property contained in the original application unless the Board of County Commissioners has determined that, based upon a showing by the applicant, there has been a substantial change in the facts and circumstances regarding the application subsequent to the original decision of denial by the Board of County Commissioners or that there is newly discovered evidence which would have been likely to affect the outcome of the original decision that the applicant could not have discovered with diligent effort prior to the original decision of denial."). Here, however, there has been no substantial change in the facts or circumstances subsequent to any original denial, nor any newly discovered evidence that the applicant could not have discovered previously. Thus, Martin Marietta *concedes* that if its application for a USR permit is denied, it *must* wait five years before it can submit another application for a USR permit related to the proposed site. (Motion, at p. 6.)

Fatal to Martin Marietta's request, however, is the fact that the Weld County Code does not provide the BOCC with the ability to "invalidate" an application for a USR permit. Instead,

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* 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).

This makes sense. Review of an application for a USR permit occurs within the confines of the quasi-judicial process, where the BOCC is required to sit in the same capacity as a judge in court—as an impartial tribunal. *See Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988) (explaining that the hallmarks of quasi-judicial action are well-settled as involving "a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question."); *Vernard v. Dep't of Corrections*, 72 P.3d 446, 449 (Colo. App. 2003) (the decision maker is sitting in the role of a judge in a quasi-judicial proceeding, and judges may only make decisions based upon the evidence that is presented at trial). Moreover, before an application for a USR permit may be properly considered by the BOCC, the Weld County Code provides that it must be "complete." *See* WCC § 23-2-200 (USR application "shall be completed as set forth in Section 23-2-260" and a "complete application and application fees shall be submitted to the Department of Planning Services.). The BOCC may then approve an application for a USR permit "**only** if it finds that the applicant has met the standards or conditions of this Subsection B and Sections 23-2-240 and 23-2-250 of this Division." WCC § 23-2-230(B) (emphasis added). The Weld County Code further provides that the applicant "has the burden of proof to show that the standards and conditions … are met." *Id.*

Thus, only where an application is complete, and where the applicant has successfully met its burden of proof in demonstrating the standards and conditions outlined by the Weld County Code are met, may the BOCC approve an application for a USR permit. *Id.* In all other cases, the BOCC—as a quasi-judicial body—must deny the application. WCC § 23-2-210(B)(1). This was the binary choice before the BOCC on Martin Marietta's USR application.

Plaintiffs initiated this suit seeking a determination that the BOCC's approval of Martin Marietta's USR application was unlawful and therefore void *ab initio*. Plaintiffs did not seek rehearing or reconsideration before the BOCC, and the only possible outcome is to flip the binary determination of the BOCC from approved to denied. *Cf.* WCC § 23-2-290 (providing a mechanism by which *an existing, validly approved* USR permit may be revoked following additional hearings and consideration by the BOCC). Plaintiffs, however, have not sought to cancel, revoke, vacate, or terminate an existing, validly approved USR. Instead, Plaintiffs have successfully challenged the BOCC's unlawful *initial approval of an application* for a USR permit. Consequently, WCC § 23-2-210(B) applies, and the Court of Appeals' order to enter judgment in favor of Plaintiffs can only be accomplished by ordering the denial of Martin Marietta's USR permit application consistent with the binary choice that initially existed before the BOCC. There is no legal basis to allow for the "invalidation" of Martin Marietta's application for a USR permit and a remand for yet additional administrative hearings on the unlawful land use proposal.

Accordingly, because there is no mechanism under the Weld County Code providing for the "invalidation" of a USR or the reconsideration of an otherwise unlawful USR application,

this Court can and should instruct the BOCC to deny the permit consistent with the finding that the BOCC abused its discretion in its original unlawful approval.

II. This Court Has the Power to Craft an Appropriate Remedy and Enforce its Orders.

The Court of Appeals ruled that the BOCC abused its discretion and that Martin Marietta's USR application should have been denied. This Court has both the inherent authority and the actual authority pursuant to C.R.C.P. 106 ("Rule 106") to enter and enforce a final judgment consistent with those instructions.

Martin Marietta's request for an amended judgment is grounded in its sweeping and unsupported claim that this Court "has no jurisdiction to direct the lower tribunal to take **any** particular action in response to its ruling." (Motion, at p. 3 (emphasis added).) Martin Marietta's argument would have the effect of neutering the judicial relief afforded under Rule 106 and is therefore completely untenable. But, "[i]t is fundamental that trial courts are vested with certain inherent powers necessary for courts to act efficiently. These inherent powers include all powers reasonably necessary to allow the court to efficiently perform its judicial functions and to make its lawful actions effective." *Laleh v. Johnson*, 2016 COA 4, ¶ 14 (citing *Peña v. Dist. Court*, 681 P.2d 953, 956 (Colo. 1984)).

Martin Marietta cites to *Wolf Creek Ski Corp. v. Bd. Of Cty. Comm'rs*, in support of its argument that the Court lacks jurisdiction to enforce its own orders. 170 P.3d 821 (Colo. App. 2007). In *Wolf Creek*, the Colorado Court of Appeals considered an appeal brought by a developer that challenged a trial court's reversal pursuant to Rule 106(a)(4) of an approval by the Board of County Commissioners of Mineral County of a planned unit development ("PUD"). 170 P.3d at 824. The trial court had voided the Mineral County Board of County

Commissioners' PUD approval because the development lacked sufficient access to the state highway system, which was a statutory requirement. *Id.* The Court of Appeals agreed with the trial court's decision, concluding that the Mineral County Board of County Commissioners "abused its discretion in approving the PUD because the PUD lacked year-around access to the state highway system." *Id.* The Court reasoned that the applicable statute required "at least year-around wheeled vehicular access" and that "the record provides no support for finding that [a one lane forest service road] met this requirement." *Id.* at 829.

The developer also challenged the trial court's decision to "plac[e] requirements on the developer in subsequent proceedings before the board." *Id.* at 831. Specifically, the developer challenged the trial court's instruction to the board on remand, that "the Developer may request that Mineral County give notice of new public hearings for the Planning Commission and the board as required by the zoning and subdivision regulations" once the developer had obtained adequate year-round access from the National Forest, Wolf Creek, and confirmation from CDOT. *Id.* Martin Marietta incorrectly suggests that the Court of Appeals expressly rejected the trial court's ability to give such instructions in the context of a Rule 106(a)(4) appeal. However, the Court of Appeals explained that "the trial court's statements regarding what the developer must do on remand are dicta." *Id.* at 831. The Court then held, "[a]ccordingly, we conclude that those statements do not limit the board's discretion." *Id.* at 831-32.

In reaching its ultimate decision, however, the Court of Appeals affirmed the trial court and—importantly—provided further explicit instructions to the board: "[t]he order is affirmed, and the case is remanded to the trial court **with directions to remand to the board for further proceedings consistent with this opinion**." *Id.* at 832 (emphasis added). Thus, contrary to

Martin Marietta's suggestion, *Wolf Creek* does not stand for the proposition that a trial court "has no jurisdiction to direct the lower tribunal to take any particular action in response to its ruling." (Motion, at p. 3.) In fact, *Wolf Creek* expressly held to the contrary when the board was directed on remand to hold "further proceedings consistent with this opinion." 170 P.3d at 832.

Martin Marietta's reliance on *Carney v. Civil Service Comm'n*, 30 P.3d 861 (Colo. App. 2001) is similarly unavailing. In *Carney*, the plaintiffs were police sergeants who sought judicial review of a lieutenant promotional examination administered by the Civil Service Commission. 30 P.3d at 863. The plaintiffs asserted that one of five components of the examination—the personnel record evaluation ("PRE")—was not administered objectively and was arbitrary and capricious. *Id.* The trial court agreed and "ordered that the Commission neutralize that component of the exam scores by giving each candidate the same score . . ." *Id.* In addition, the trial court directed the Civil Service Commission to create a "new eligibility register." *Id.* at 866.

The Colorado Court of Appeals agreed with the trial court's determination that the PRE was arbitrary and capricious and with the decision to give the plaintiffs equal scores to neutralize the effect of an arbitrary and capricious exam. *Id.* at 866. The trial court, however, did not just provide a remedy for the plaintiffs—it directed the Civil Service Commission to create a new eligibility test. It was on this issue where the trial court exceeded its authority. The Court of Appeals explained that "[w]hile the [trial] court could determine that the test was invalid, it could not direct the Commission to create a new eligibility list . . . establishing a new list was in excess of the trial court's jurisdiction." *Id.* at 866-867.

Notably, the Court of Appeals did not reverse the trial court's decision directing part of the remedy—that the Commission neutralize the effect of the arbitrary and capricious PRE exam

component by giving equal scores to the plaintiffs. *Id.* at 867. Instead, it was only the direction to create a wholly new eligibility list, which was found to be beyond the scope of the court's jurisdiction. *Id.* Accordingly, *Carney* actually supports the proposition that this Court may enter orders in furtherance of the Court of Appeals' decision to effectuate justice.

Martin Marietta next points to two cases from the Supreme Court of the United States that are wholly inapplicable. In *United States v. Saskatchewan Minerals*, 385 U.S. 94, 95 (1966), the Court found "under the circumstances present here" the appellate court improperly set aside an order of the Interstate Commerce Commission dismissing a complaint filed by the appellee and which directed the Commission to grant relief to the appellee while precluding "the Commission from reopening the proceedings for the receipt of additional evidence relevant to the question whether the rates challenged by the appellee are in fact unreasonably preferential in violation of" the Interstate Commerce Act. *Id.* at 94-95. Similarly, in *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952), the Court reversed an appellate court for removing a condition imposed by the Federal Power Commission related to the construction of a hydroelectric project by a privately owned public utility and the transmission lines utilized to transfer electricity generated by said project. *Id.* at 20. The Court concluded that while the reviewing court had the power to "affirm, modify, or set aside" the decision of the Commission, by removing conditions imposed by the Commission the appellate court exercised "an essentially administrative function" which was solely within the province of the Commission under Section 10(a) of the Federal Power Act. *Id.* Here, cases interpreting federal statutes, with federal agencies created to implement such statutes, are not applicable to Colorado courts reviewing improper county government decisions as provided by C.R.C.P. 106(a)(4).

Martin Marietta next relies on *Chonoski v. State, Dept. of Revenue, Motor Vehicles Div.*, 699 P.2d 416 (Colo. App. 1985), for the proposition that this Court may not direct the BOCC to take any action. *Chonoski* is inapposite. In *Chonoski*, the plaintiff sought to enjoin the Department of Revenue "from conducting further proceedings concerning revocation of his driver's license." 699 P.2d at 417. The Department of Revenue had previously commenced a driver's license revocation hearing, but dismissed the case without prejudice because a police officer had not properly sworn to an affidavit as to the grounds for his belief that the plaintiff had been driving under the influence and had refused to submit to a blood alcohol determination test. *Id.* The plaintiff asserted that such a second hearing was not permitted by statute and would violate his due process rights. *Id.*

The Department of Revenue moved to dismiss the plaintiff's complaint for injunctive relief, which the trial court granted. *Id.* On appeal, the Court of Appeals affirmed the trial court's dismissal, concluding that "trial courts lack jurisdiction to enjoin administrative agencies from performing their statutory functions" and noted that such "**premature** judicial interference . . . violates the principle of separation of powers." *Id.* (emphasis added).

Here, unlike in *Chonoski*, there is nothing premature about this Court's enforcement of the Court of Appeals' Order and the instructions given to the BOCC to carry out the Court's judgment. Martin Marietta's USR application was fully heard before the BOCC. A timely appeal was taken to this Court pursuant to Rule 106(a)(4). After this Court ruled, a timely appeal was taken to the Colorado Court of Appeals. When the Court of Appeals ruled against Martin Marietta on November 22, 2017, Martin Marietta timely filed a Petition for Rehearing. The Court of Appeals entertained briefing on the rehearing request, and ultimately denied the

petition. Martin Marietta then waived its right to file a Petition for a Writ of Certiorari to the Colorado Supreme Court. Consequently, a Mandate issued returning jurisdiction to this Court, which provided instructions to this Court to enter judgment in the favor of Plaintiffs and reverse the decision of the BOCC.

As a practical matter, a mere "invalidation" of the USR permit which returns the USR application to the BOCC for further administrative proceedings would strip this Court of any meaningful authority to review the BOCC's unlawful approval. Martin Marietta and the BOCC have now been working together on this appeal for more than two and a half years. This alliance was formalized through a joint defense agreement that permitted the parties and their respective counsel to work together in opposition to the Plaintiffs. If, as Martin Marietta requests, this matter is now remanded for further proceedings before the BOCC, it is inconceivable that Plaintiffs will receive a fair and impartial process regarding any "reconsideration" of the unlawful USR permit.

The Weld County Code provided the BOCC with a binary choice in August 2015. When Martin Marietta presented the BOCC with an unlawful USR application and then the BOCC in turn abused its discretion in approving the unlawful USR application, the Defendants dug in and battled against Plaintiffs for more than two and a half years. There is no mechanism by which the USR application can now be returned to the BOCC for further quasi-judicial proceedings, and any order to do the same would make a mockery of both the quasi-judicial land use process and this Court's inherent authority to provide aggrieved parties with the relief they seek.

III. Both this Court and Martin Marietta Previously Confirmed that Plaintiffs Could Obtain a Denial of the USR Application through the Rule 106 Process.

Plaintiffs initially brought this suit as both an appeal pursuant to Rule 106 and a suit for declaratory judgment. Martin Marietta filed a partial motion to dismiss Plaintiffs' claim for declaratory judgment and argued that Plaintiffs' sole avenue for relief in this case was pursuant to Rule. 106. Specifically, Martin Marietta argued that "the Court is clearly authorized under Rule 106(a)(4) to determine if the Board misapplied the law or violated whatever constitutional rights Plaintiffs are asserting. . . . Such relief, if granted, **would fully remedy** Plaintiffs' claims that the Board misapplied the Weld County Code." (Martin Marietta Materials, Inc.'s Reply in Support of its Motion to Dismiss Second Claim for Relief, at p. 6, dated November 24, 2015 (internal citations omitted) (emphasis added).)

This Court agreed with Martin Marietta and ruled that the Rule 106 process was the Plaintiffs' sole avenue for judicial relief. (*See* Order on Martin Marietta Materials, Inc.'s Motion to Dismiss Second Claim for Relief at p. 5, dated January 15, 2016 ("Thus, C.R.C.P. 106(a)(4) is the plaintiffs' exclusive remedy for challenging the zoning determination and their declarative relief claim should be dismissed.").) In that Order, this Court noted that "Martin Marietta, joined by the other defendants, moves to dismiss this claim on the grounds that Rule 106 is the **exclusive** means by which the plaintiffs can challenge the approval of the land-use application." (*Id.* at p. 1 (emphasis added); *see also* Martin Marietta Materials, Inc.'s Reply in Support of its Motion to Dismiss Second Claim for Relief, at p. 10, dated November 24, 2015 (arguing that "Plaintiffs' **exclusive** means to pursue **reversal** of the Board's decision is their claim under C.R.C.P. 106(a)(4).") (emphasis added).)

When this Court—at the express urging of Martin Marietta—removed declaratory judgment under C.R.C.P. 57 as a potential avenue for relief, it did so by confirming that Plaintiffs could obtain all of the relief they were seeking through the appellate review procedure guaranteed by Rule 106. If that process is to have any legitimacy whatsoever, it must empower this Court to take action to provide Plaintiffs with all of the relief that they requested.

In a different context that is nonetheless instructive, the Tenth Circuit recently held that "[t]he opportunity for review is not, then, an empty formality: if the record clearly showed [the local government] abused its discretion, [Plaintiff] would be *entitled* to a favorable outcome." *M.A.K. Inv. Grp., LLC v. City of Glendale*, No. 16-1492, 2018 WL 2188900, at *5 (10th Cir. May 14, 2018) (emphasis in original). Here, the Court of Appeals found that the BOCC abused its discretion, accordingly, Plaintiffs are entitled to a favorable outcome, not an empty formality.

This Court has the authority to enter orders to administer justice. Martin Marietta cannot be allowed to assert that Rule 106(a)(4) is Plaintiffs' "exclusive" means for judicial review and assert that a reversal "would fully remedy" the Plaintiffs' claims, and then reverse course by arguing that the Court lacks the power to enforce its judgment. Such a result would remove any meaningful remedy from the Rule 106(a)(4) process.

IV. Even if Martin Marietta Successfully Resolved the Noise Issue, It Cannot Ignore the Remaining Four Issues that the Court of Appeals Elected Not to Reach.

Lastly, it should be noted that even if Martin Marietta were able to "cure" the noise issue, that would not end this dispute. Plaintiffs raised five issues on appeal, namely, (1) that there is no competent evidence that the proposed industrial use is consistent with existing surrounding agricultural and residential uses; (2) that there is no competent evidence Martin Marietta made a

diligent effort to conserve prime farmland when selecting the site; (3) that there is no competent evidence the proposed industrial use can comply with the applicable noise standard; (4) that proposed industrial use is not "directly related to" agriculture and that the approval constitutes *de facto* spot zoning; and (5) that *ex parte* communications between MMM and the BOCC while on remand tainted the proceedings and should have been produced.

The Court of Appeals found for Plaintiffs on the noise issue, and expressly elected not to reach any of the remaining issues. Specifically, the Court of Appeals held "**[b]ecause the board's decision must be overturned**, we decline to address plaintiffs' other contentions that the board improperly considered non-adjacent land uses in its compatibility analysis, that there was not competent evidence demonstrating a diligent effort to conserve prime farmland, and that the board engaged in illegal "spot zoning." We also decline to address plaintiffs' contention that the board and defendant corporations' attorneys engaged in improper ex parte communications." (Opinion, dated November 22, 2017) (emphasis added).

Therefore, even if Martin Marietta were to cure the noise issue, Plaintiffs would have four remaining issues that were never fully adjudicated at the Colorado Court of Appeals. Unlike the noise issue, the remaining four issues cannot be cured by improperly expanding the administrative record years after the BOCC's unlawful approval. For example, Martin Marietta cannot rewrite history to create evidence that the selection of the proposed site considered the presence of Prime farmland. Similarly, the proposed use remains just as unrelated to agriculture today as it did in August 2015. Each of these issues provides independent means to reverse the BOCC's decision approving Martin Marietta's application for a USR permit and would require further appellate review before Martin Marietta's facility may engage in any industrial use.

However, the Court of Appeals did not address these remaining four issues because it intended for its decision on the noise issue to shut down Martin Marietta's proposal down once and for all. Accordingly, there is no method by which this Court can "invalidate" the USR permit and return it to the BOCC for further administrative consideration without ignoring the Court of Appeals' Opinion. Anything short of a denial of Martin Marietta's USR application requires a return of this entire case to the Court of Appeals for a full and final resolution of all outstanding issues.

CONCLUSION

Martin Marietta assumed the risk of proceeding with the construction of an industrial development in an area zoned for residences and agriculture. It knowingly did so despite the fact that the legality of its application for a special use permit was being challenged on appeal. Rather than seeking further redress before the Colorado Supreme Court, Martin Marietta waived its right to further appeal. Now, in the face of its loss before the Court of Appeals, Martin Marietta brazenly claims that this Court has no authority to effectuate and enforce the result dictated by the Court of Appeals. Martin Marietta should not be permitted to undermine the Court of Appeals' judgment and this Court's authority. To hold otherwise would render judicial review under Rule 106 a legal nullity, and would leave appellate courts devoid of power to enforce their orders and administer justice.

WHEREFORE, Plaintiffs respectfully request that this Court deny Martin Marietta's Motion to Amend and for Stay of Judgment.

DATED: May 25, 2018

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CERTIFICATE OF SERVICE

I certify that on May 25, 2018, a true and correct copy of this **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S MOTION TO AMEND AND FOR STAY OF JUDGMENT** was filed and served via the Colorado Courts e-filing system on the following:

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